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Achieving Racial and Ethnic Fairness in Drug Courts

Douglas B. Marlowe

In June 2010, the Board of Directors of the National Association of Drug Court Professionals (NADCP) passed a unanimous resolution directing drug courts to examine whether unfair disparities exist in their programs for racial or ethnic minority participants, and if so, to take reasonable corrective measures to eliminate such disparities.¹ The resolution places an affirmative obligation on drug courts to continuously monitor whether minority participants have equal access to the programs, receive substantially equivalent services in the programs, and successfully complete the programs at equivalent rates to non-minorities.² The resolution further directs drug courts to adopt evidence-based assessment tools and clinical interventions that are scientifically proven to be valid and effective for minority participants, and to instruct staff members to attend up-to-date training events on the provision of culturally sensitive and culturally proficient services.³

As a professional membership and training organization, the NADCP has no enforcement authority over drug courts, which are typically governed by the administrative office of the courts, Supreme Court, or attorney disciplinary board in each state or territory. However, the NADCP is widely regarded as a leading national organization on best practices and evidence-based practices in drug courts, and its word carries considerable weight in the field. When the NADCP speaks definitively on an issue such as this, practitioners, policymakers, and funding agencies may come to view the recommendations as indicative of appropriate standards of practice for drug courts.

This article provides a backdrop to the NADCP Board

Resolution and reviews what is currently known, and not yet known, about racial-and-ethnic-minority impacts in drug courts. After briefly describing what drug courts are and why they came to be, research is presented on minority access to drug courts, the services received by minorities in drug courts, and the outcomes produced. Virtually all of the empirical research to date has focused on African-American participants and those of Hispanic and Latino/Latina ethnicity. This is largely due to the fact that these groups have been represented in sufficient numbers in many studies for evaluators to conduct separate analyses on their behalf. Additional efforts are needed to examine drug-court impacts on other racial and ethnic minority groups.

I. DRUG COURTS

The “War on Drugs” of the 1980s emphasized incarceration as a principal response to drug-related crime. It is now evident that this policy had a minimal effect on criminal recidivism,⁴ was prohibitively costly,⁵ and disproportionately harmed racial and ethnic minorities and the poor.⁶ Nearly one out of every 100 adult citizens is now behind bars in the United States,⁷ and the rates are substantially higher for minorities: approximately one out of every 15 African-American adult males and one out of every 36 Hispanic adult males are behind bars.⁸

Drug courts emerged as one alternative to the War on Drugs that emphasizes community-based treatment and rehabilitation in lieu of prosecution or incarceration.⁹ The drug-court judge leads a multidisciplinary team of professionals that commonly includes representatives from the prosecutor’s office,

Footnotes

1. NAT’L ASS’N DRUG CT. PROF., RESOLUTION OF THE BOARD OF DIRECTORS ON THE EQUIVALENT TREATMENT OF RACIAL AND ETHNIC MINORITY PARTICIPANTS IN DRUG COURTS, *available at* <http://www.nadcp.org/sites/default/files/nadcp/NADCP%20Board%20Resolution%20-%20The%20Equivalent%20Treatment%20of%20Racial%20and%20Ethnic%20Minority%20Participants%20in%20Drug%20Courts%2006-01-10.pdf> [hereafter NADCP MINORITY RESOLUTION].
2. *Id.* at 2.
3. *Id.* at 2-3.
4. See generally Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357, 381 (2010) (concluding incarceration had little effect on likelihood of re-arrest for drug offenders); Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 346 (2002) (finding incarcerated drug offenders were more likely to recidivate than those sentenced to probation); Jonathan P. Caulkens & Sara Chandler, *Long-Run Trends in Incarceration in the United States*, 52 CRIME & DELINQ. 619, 630 (2006) (finding incarceration does not dramatically reduce drug use and is not cost-effective).

5. See PEW CTR. ON STATES, HIGH COST, LOW RETURN: DESPITE THE MASSIVE INCREASE IN THE SIZE AND COST OF AMERICA’S CORRECTIONAL SYSTEM, THE NATIONAL RECIDIVISM RATE REMAINS STUBBORNLY HIGH, *available at* http://www.pewstates.org/uploadedimages/PCS_Assets/Graphics/PSPP_infographic.png [hereinafter HIGH COST, LOW RETURN] (finding 1 in 14 state general fund dollars spent on corrections, totaling \$52 billion in 2011).
6. See generally E. L. Jensen et al., *Social Consequences of the War on Drugs: The Legacy of Failed Policy*, 15 CRIM. JUST. POLY REV. 100 (2004) (reviewing harmful impacts of War on Drugs on minorities and minority communities); Martin Y. Iguchi et al., *How Criminal System Racial Disparities May Translate into Health Disparities*, 16 J. HEALTH CARE FOR POOR & UNDERSERVED 48 (2005) (linking disproportionate confinement of minorities for drug offenses to severe health and mental-health impairments).
7. HIGH COST, LOW RETURN, *supra* note 5, at 1 (finding 1 in 104 American adults was behind bars in 2011); PEW CTR. ON STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008) [hereinafter ONE IN 100] (finding 1 in 100 American adults behind bars in 2008).
8. ONE IN 100, *supra* note 7, at 6.
9. See generally NAT’L ASS’N DRUG CT. PROF., DEFINING DRUG COURTS: THE KEY COMPONENTS (1997) (describing the core ingredients of and services delivered in drug courts).

defense bar, treatment agencies, case-management agency, and probation department. The team members meet frequently to review participants' progress and offer recommendations to the judge about suitable consequences to impose. The consequences may include desired rewards such as verbal praise, reduced supervision requirements, or token gifts; punitive sanctions such as verbal reprimands, community service, or brief intervals of jail detention; or adjustments to participants' treatment regimens. The consequences are typically administered during regularly scheduled status hearings in which the judge discusses the matter with the participant in open court. In pre-adjudication drug courts, the ultimate incentive is to have the criminal charge(s) dropped or withdrawn, and in post-adjudication drug courts the ultimate incentive is to avoid incarceration or reduce the length or conditions of probation.¹⁰

Several scientific meta-analyses¹¹ and a large-scale national study¹² have concluded that drug courts significantly reduce crime and return an average of more than \$2 in direct financial benefits to the criminal justice system for every \$1 invested.¹³ The success of adult drug courts has spawned a wide variety of other types of problem-solving courts, including juvenile drug courts, family drug courts, driving-while-impaired (DWI) courts, mental-health courts, and prisoner-reentry courts.¹⁴ Although research has not advanced nearly as much for these

newer programs as it has for adult drug courts, evidence is promising to support the effectiveness of several of the newer models.¹⁵

Almost from their inception, controversy has surrounded the question of what impacts, if any, drug courts might have on preexisting racial or ethnic disparities in the criminal justice system. Researchers and commentators have variably concluded that drug courts reduce disparities,¹⁶ exacerbate disparities,¹⁷ or that insufficient evidence exists to know what effects they may have.¹⁸ This confusion stems from at least two sources. First, many researchers have sorely neglected the issue. Most evaluations have not reported outcomes separately by race or ethnicity; and among those that have, few evaluators performed the type of detailed inquiry and analyses that are required to validly interpret the findings. For example, as will be discussed,¹⁹ when racial or ethnic differences have been detected, evaluators rarely sought to determine whether those

[C]ontroversy has surrounded the question of what impacts, if any, drug courts might have on preexisting racial or ethnic disparities in the criminal justice system.

10. See, e.g., David S. Festinger et al., *Expungement of Arrest Records in Drug Court: Do Clients Know What They're Missing?*, 5 DRUG CT. REV. 1, 5 (2005) (reviewing the legal benefits of successful graduation from drug court).
11. See generally Ojmarh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. CRIM. JUST. 60, 66 (2012) (concluding drug courts reduced crime by an average of 12%); David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459, 479 (2006) (concluding drug courts reduced crime an average of 14-26%); Christopher T. Lowenkamp et al., *Are Drug Courts Effective: A Meta-Analytic Review*, 15 J. COMMUNITY CORRECTIONS 5, 8 (2005) (concluding drug courts reduced crime an average of 7.5%); JEFF LATIMER ET AL., CANADA DEPT. JUSTICE, *A META-ANALYTIC EXAMINATION OF DRUG TREATMENT COURTS: DO THEY REDUCE RECIDIVISM?* 9 (2006) (concluding drug courts reduced crime an average of 14%); Deborah Koetzle-Shaffer, *Looking Inside the Black Box of Drug Courts: A Meta-Analytic Review*, 28 JUST. Q. 493, 508 (2010) (concluding drug courts reduced crime an average of 9%); STEVE AOS ET AL., WASHINGTON ST. INST. PUB. POL'Y, *EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT* at 9, Table 4 (2006) (concluding drug courts reduced crime an average of 8%); U.S. GOV'T ACCOUNTABILITY OFF., *ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS* 19 (2011) (concluding drug courts significantly reduced crime by 6 to 26 percentage points).
12. See generally Michael Rempel et al., *The Impact of Adult Drug Courts on Crime and Incarceration: Findings From a Multi-Site Quasi-Experimental Design*, J. EXPERIMENTAL CRIMINOLOGY, available at DOI: 10.1007/s11292-012-9143-2 (finding probability of re-offending reduced by almost one quarter in national study of 23 adult drug courts).
13. See generally AVINASH S. BHATI ET AL., URBAN INST., *TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO*

- DRUG-INVOLVED OFFENDERS 56 (2008) (finding drug courts returned an average of \$2.21 for every \$1 invested, for net benefit to society of \$624 million in 2006).
14. See generally WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG CT. INST., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* (2011) (defining and tallying the number of various types of problem-solving courts in the U.S. and internationally).
15. See generally Douglas B. Marlowe, *The Verdict on Drug Courts and Other Problem-Solving Courts*, 2 CHAPMAN J. CRIM. JUST. 53 (2011) (reviewing research on various types of problem-solving courts).
16. See Michael Wright, *Reversing the Prison Landscape: The Role of Drug Courts in Reducing Minority Incarceration*, 8 RUTGERS RACE & L. REV. 79, 81 (2006) (stating drug courts have the "potential, not only to reduce minority incarceration, but also to heal minority communities"); MARC MAUER, SENTENCING PROJ., *THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS* 2, 14 (2009) (concluding drug courts, especially those in urban communities, are likely to be disproportionately benefiting African-Americans by diverting them from prison).
17. See NAT'L ASSOC. CRIM. DEFENSE LAWYERS, *AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* 42 (2009) [hereafter NACDL REPORT] (concluding racial prejudice pervades the criminal justice system, and drug courts are no exception); JUST. POL'Y INST., *ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES* 23 (2011) (concluding people of color are more likely to be kicked out of drug courts); Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 479-480 (2009) (concluding drug courts exacerbate racial disparities).
18. See Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT'L BLACK L. J. 27, 44 (2009) (noting "dearth of data" on race and drug courts; rather than answers, researchers have only questions).
19. See *infra* notes 44-50 and accompanying text.

[I]t is imperative for serious-minded and duly trained scientists to carefully examine what is confidently known about minority impacts in drug courts

differences might have been influenced by extraneous factors, such as participants' socioeconomic status (SES) or drug of choice—which may have been coincidentally correlated with race and truly responsible for the differential effects.

Second, some advocacy groups have seized upon the possibility of disparate racial impacts as a wedge issue to wield against drug courts and in favor of their alternative policy proposals, such as drug decriminalization²⁰ or a restorative-justice philosophy.²¹ Putting aside for the moment the correctness of their alternative proposals, some of these advocates have marshaled weak and contradictory “evidence” against drug courts, including unverifiable anecdotes, biased correlations, and mischaracterizations of what researchers have reported in their publications. Given the potential for this hot-button issue to inflame passions on all sides of the conversation, it is imperative for serious-minded and duly trained scientists to carefully examine what is confidently known about minority impacts in drug courts and what matters require further exploration and deliberation.

II. MINORITY ACCESS TO DRUG COURTS

Drug courts have been alternately accused of unfairly excluding minority citizens from participation in the programs²² and over-targeting minorities—thus drawing them deeper into the criminal justice system—a phenomenon known as net-widening.²³ Virtually all of these assertions have been anecdotal²⁴ because representative data are sparse and very difficult to come by.²⁵

A 2008 survey of all state and territorial drug-court coordinators in the U.S. estimated that African-Americans comprised approximately 21% of drug-court participants nationally, and Hispanic and Latino/Latina citizens comprised approximately 10% of drug-court participants (see Table 1).²⁶ There was wide variability around these averages, with some drug courts reporting less than 1% minority participants in their programs and others reporting more than 95% minorities.²⁷

As points of reference, these figures were contrasted against those derived from national studies of arrestees, probationers and parolees, prison inmates, and jail inmates.²⁸ Representation of African-Americans was estimated to be approximately 7 percentage points lower in drug courts than in the arrestee and probation-and-parole populations (21% vs. 28% and 28%), and approximately 20 percentage points lower than in jails and prisons (21% vs. 39% and 44%). Representation of Hispanic and Latino/Latina citizens was estimated to be nearly equivalent to the probation-and-parole population (10% vs. 13%), and approximately 6 to 10 percentage

TABLE 1: MINORITY REPRESENTATION IN DRUG COURTS COMPARED WITH OTHER CRIMINAL JUSTICE PROGRAMS IN 2008

	African-American	% Difference in Drug Courts	Hispanic and Latino or Latina	% Difference in Drug Courts
Drug Courts	21%		10%	
Arrestees	28%	-7%	Not Reported	
Probationers & Parolees	28%	-7%	13%	-3%
Jail Inmates	39%	-18%	16%	-6%
Prison Inmates	44%	-23%	20%	-10%

Source: West Huddleston & Douglas B. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, at 30, Table 6 (Nat'l Drug Ct. Inst., 2011). Adapted with permission.

20. See NACDL REPORT, *supra* note 17, at 20-21 (advocating for the decriminalization of all controlled substances in lieu of supporting drug courts); DRUG POLY ALLIANCE, DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 19 (2011) (advocating for the removal of all criminal penalties for drug use in lieu of providing diversion opportunities within the criminal justice system, as in drug courts); JUST. POLY INST., *supra* note 17, at 26 (advocating for voluntary community-based treatment in lieu of drug courts).

21. See O'Hear, *supra* note 17, at 125-136 (advocating for a restorative justice model in lieu of drug courts).

22. See, e.g., NACDL REPORT, *supra* note 17, at 42-43 (asserting drug courts were developed for middle-class teens and minorities are rarely accepted); JUST. POLY INST., *supra* note 17, at 21 (asserting people of color are more likely to have prior felony convictions making them ineligible for drug court).

23. See, e.g., DRUG POLY ALLIANCE, *supra* note 20, at 8 (asserting drug courts may increase the number of people of color brought into the criminal justice system).

24. See, e.g., NACDL REPORT, *supra* note 17, at 42-43 (quoting one public defender's anecdotal experiences in one Utah drug court as evidence that drug courts discriminate).

25. *Id.* at 42 (acknowledging the extent of the problem cannot be adequately analyzed because relevant data “simply does not exist”); Wolf, *supra* note 18, at 30 (noting “virtually nothing” written about specialized courts has addressed the issues of race and bias).

26. HUDDLESTON & MARLOWE, *supra* note 14, at 28-29. These figures represent best estimates because the data were collected at the state level and the quality of statewide statistics on minority impacts was variable.

27. *Id.* at 28-29, Tables 4, 5.

28. The sources for the comparison data were: FEDERAL BUREAU OF INVESTIGATION, FBI CRIME REPORTING DATA, 2008; BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2007 (NCJ #221945); BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2008 (NCJ #228230); BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 (NCJ #228417).

points lower than in jails and prisons (10% vs. 16% and 20%).

Taken together, these national statistics suggest that drug courts may be under serving racial and ethnic minority citizens, but the magnitude of the problem appears to be far smaller than that asserted by some critics. Based on these findings, a reasonable benchmark for improvement in drug courts would be to increase minority representation by approximately 7 percentage points so as to be equivalent with the arrestee and probationer populations.

A much greater concern relates to the disproportionate confinement of minorities, particularly African-Americans, in jails and prisons.²⁹ As can be seen from the above table, African-Americans were considerably less likely to be on community supervision than in jail or prison (28% vs. 39% or 44%). In contrast, Caucasians were more likely to be on community supervision than in jail or prison (56% vs. 43% or 34%).³⁰

Fortunately, a national study recently found that the number of African-Americans in state prisons for drug-related crimes has declined by nearly 22% since the advent of drug courts and similar treatment-oriented diversion programs.³¹ After ruling out several alternative explanations for this development, such as changing drug-use rates among minorities, the report credited the rapid expansion of drug courts as one likely contributor to the precipitous decline.³² Drug courts offer an evidence-based alternative to incarceration that defense attorneys can propose and judges and prosecutors can take into consideration during the plea bargaining and sentencing processes. If drug courts were to disappear, minority representation in jails and prisons would be expected to rise as opposed to decline,³³ contrary to what some policy advocates have asserted.³⁴

Nevertheless, drug courts cannot and do not accept dispro-

portionate minority representation in their programs, no matter how small the magnitude. Therefore, drug courts have set for themselves an obligation to make all reasonable efforts to bring minority representation in line with the applicable arrestee population in their respective jurisdictions.³⁵ Examples of reasonable steps to be taken include ensuring that all assessment tools used for determining eligibility are equally valid and predictive for minorities as for non-minorities.³⁶ In addition, drug courts should ensure that their eligibility and exclusion criteria are objective and race-neutral both in intent and effect. If an eligibility requirement has the unintended consequence of differentially restricting access for minorities, then extra assurances should be required that it is a necessary prerequisite for the program to achieve effective outcomes and protect public safety.³⁷ Where less restrictive adjustments can be made to a drug court's eligibility criteria to increase minority representation without jeopardizing safety or efficacy, it should be incumbent upon the program to implement such adjustments.

[D]rug courts should ensure that their eligibility and exclusion criteria are objective and race-neutral both in intent and effect.

III. MINORITY OUTCOMES IN DRUG COURTS

Numerous studies have reported that a considerably smaller percentage of minority participants graduated successfully from drug courts as compared to non-Hispanic Caucasians.³⁸ In several of the studies, the magnitudes of the differences were quite large—as high as 25 to 40 percentage points.³⁹ This problem may be particularly pronounced among African-

29. See *supra* notes 6-8 and accompanying text.

30. HUDDLESTON & MARLOWE, *supra* note 14, at 30, Table 6.

31. See generally MAUER, *supra* note 16.

32. *Id.* at 14 (concluding “it is likely that at least in some jurisdictions there are people charged with a drug offense who are diverted from a prison term due to drug court programming”).

33. Cf. Wolf, *supra* note 18, at 46-47 (noting studies show minorities express more support than Caucasians for alternatives to incarceration, such as problem-solving courts).

34. See *supra* note 23 and *infra* notes 69-72 and accompanying text.

35. See NADCP MINORITY RESOLUTION, *supra* note 1, at 2.

36. *Id.*

37. Although an unintended discriminatory impact may not always be constitutionally objectionable, *Washington v. Davis*, 426 U.S. 229, 239-242 (1976), it is inconsistent with best practices for drug courts.

38. See, e.g., Mary P. Brewster, *An Evaluation of the Chester County (PA) Drug Court Program*, J. DRUG ISSUES 177, 194 (2001) (finding African-American participants were less likely to graduate from a drug court than Caucasians); Roger E. Hartley & Randy C. Phillips, *Who Graduates from Drug Courts?: Correlates of Client Success*, 26 AM. J. CRIM. JUST. 107, 113 (2001) (finding minorities significantly less likely to graduate from drug court than non-minorities); KATHARINA L. WIEST ET AL., NPC RESEARCH, VANDERBURGH COUNTY DAY REPORTING DRUG COURT EVALUATION: FINAL REPORT 32 (2007), available at http://www.npcresearch.com/Files/Vanderburgh_Adult_Eval_Final.pdf (finding Caucasians

graduated from drug court 1.74 times more often than non-Caucasians); M. Schiff & C. Terry, *Predicting Graduation From Broward County's Dedicated Drug Treatment Court*, 19 JUST. SYS. J. 291 (1997) (finding minorities significantly less likely to graduate from drug court than non-minorities); Dale K. Sechrest & David Shicor, *Determinants of Graduation from a Day Treatment Drug Court in California: A Preliminary Study*, 31 J. DRUG ISSUES 129, 139 (2001) (finding African-American and Hispanic participants less likely to graduate from drug court than Caucasians); Christine A. Saum & Matthew L. Hiller, *Should Violent Offenders Be Excluded from Drug Court Participation?*, 33 CRIM. J. REV. 291, 300 (2008) (finding Caucasian participants in drug court less likely to recidivate than non-Caucasians); SHELLI B. ROSSMAN ET AL., NAT'L INST. JUST., *THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS* 75 (2011), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf> (finding in a national study of 23 adult drug courts that African-Americans were less likely to show reductions in recidivism than Caucasians); David M. Stein et al., *Predicting Success and Failure in Juvenile Drug Treatment Court: A Meta-Analytic Review*, J. SUBSTANCE ABUSE TREATMENT, available at <http://dx.doi.org/10.1016/j.jsat.2012.07.002> (finding non-Caucasian participants had lower graduation rates and higher recidivism rates than Caucasians in juvenile drug courts).

39. See, e.g., STEVEN BELENKO, NAT'L CTR. ADDICTION & SUBSTANCE ABUSE, *RESEARCH ON DRUG COURTS: A CRITICAL REVIEW*, 2001 UPDATE 26 (2001) (reviewing studies reporting lower graduation rates for minorities in drug courts of approximately 30 to 40 per-

A critical unanswered question is whether this disparity is a function of race per se or whether it might reflect the influence of other factors that are correlated with race.

American males between the ages of 18 and 25 years.⁴⁰ Being young and male are well-documented risk factors for failure in drug courts and other correctional rehabilitation programs,⁴¹ and it appears that combining these two risk factors with racial-minority status may multiply the likelihood of failure.

These findings are by no means universal, however, as a smaller but growing number of evaluations has found no racial differences in outcomes or superior outcomes for minorities as compared to Caucasians, including for those between the ages of 18 and 25 years.⁴² Nevertheless, there does appear to be a plurality trend that African-Americans are less likely to succeed in many drug courts as compared to their non-racial-minority peers.⁴³

A critical unanswered question is whether this disparity is a function of race *per se* or whether it might reflect the influence of other factors that are correlated with race. Many studies have found that participants' drug of choice (particularly cocaine or heroin), employment status, and criminal history also predicted poorer outcomes in drug courts, and racial groups differed significantly on these variables.⁴⁴ For example,

percentage points); WIEST ET AL., *supra* note 38, at 32 (reporting lower graduation rate for non-Caucasians of 25 percentage points); Sechrest & Shicor, *supra* note 38, at 139 (reporting lower graduation rates of approximately 37 percentage points for African-Americans and 27 percentage points for Hispanics).

40. See, e.g., INST. APPLIED RESEARCH, AN ANALYSIS OF THE YOUNG PERSON TRACK OF THE ST. LOUIS CITY ADULT FELONY DRUG COURT 5 (2003) (finding in a drug court that 94.9% of terminated participants between 17 and 20 years of age were African-American).

41. See generally Douglas B. Marlowe et al., *Amenability to Treatment of Drug Offenders*, 67 FED. PROBATION 40 (2003) (reviewing risk factors for failure in correctional rehabilitation programs, including drug courts).

42. See Gennaro E Vito & Richard A. Tewksbury, *The Impact of Treatment: The Jefferson County (Kentucky) Drug Court Program*, 62 FED. PROBATION 46, 49, Table 1 (1998) (finding approximately 42% graduation rate for African-American drug-court participants, compared to only 22% for Caucasians with a high school diploma or G.E.D. and 7% for Caucasians without a high school diploma or G.E.D.); Randal Brown, *Drug Court Effectiveness: A Matched Cohort Study in the Dane County Drug Treatment Court*, 50 J. OFFENDER REHAB. 191, 197 (2011) (finding better outcomes in a drug court for African-Americans and other minorities than for non-minorities); Andrew Fulkerson, *Drug Treatment Court Versus Probation: An Examination of Comparative Recidivism Rates*, 8 SW. J. CRIM. JUST. 30, 35 (2012) (finding greater reductions in recidivism in a drug court for African-Americans than Caucasians); Christine A. Saum et al., *Violent Offenders in Drug Court*, 31 J. DRUG ISSUES 107, 121 (2001) (finding race had no apparent effect on drug-

court graduation); JULIAN M. SOMERS ET AL., *MEDIATORS OF DRUG TREATMENT COURT OUTCOMES IN VANCOUVER CANADA* (Simon Fraser Univ., 2012) (finding better outcomes for aboriginal natives in a Canadian drug court).

in some communities African-Americans were more likely than Caucasians to be abusing crack cocaine, and it is possible that the severely addictive and destructive nature of this particular drug could have been largely responsible for their poorer outcomes.⁴⁵ This possibility requires evaluators to statistically take into account the influence of variables that are correlated with race, such as participants' drug of choice, and then determine whether race continues to predict poorer outcomes after such extraneous variables have been factored out. Only then might it be justified to conclude there are disparate racial impacts in drug courts.

In fact, a statewide study of ten drug courts in Missouri suggested that other factors might be responsible for some of the apparent racial differences in outcomes.⁴⁶ In that study, 55% of Caucasian participants graduated from the drug courts as compared to only 28% of African-Americans.⁴⁷ However, greater proportions of the African-American participants were also unemployed (56% vs. 39%), unmarried (91% vs. 83%), living with unrelated individuals (51% vs. 37%), childless (69% vs. 56%), abusing cocaine as their primary drug of choice (45% vs. 13%), experiencing low levels of family support (38% vs. 29%), and of a lower SES.⁴⁸ After taking these variables into account, race was no longer predictive of outcomes.⁴⁹ The top three factors predicting graduation from the drug courts were participants' employment status at entry, SES, and cocaine as the primary drug of abuse.⁵⁰

The results of this study suggest that racial disparities in drug-court-graduation rates (at least in Missouri) might be explained by broader societal burdens, which may be borne

43. Cf. Michael W. Finigan, *Understanding Racial Disparities in Drug Courts*, 6 DRUG CT. REV. 135 (2009).

44. See BELENKO, *supra* note 39, at 26 (noting lower graduation rates among minorities might have been influenced by greater likelihood of abusing cocaine or heroin); Wolf, *supra* note 18, at 45 (noting researchers have consistently reported poorer retention and graduation rates in drug courts for participants who were unemployed, low-wage earners, or less educated, regardless of race or ethnicity); Hartley & Phillips, *supra* note 38, at 114, Table 1 (finding participants more likely to graduate from drug court if they entered the program employed, obtained work during the program, finished high school, or abused drugs other than cocaine).

45. See generally J. Mitchell Miller & J. Eagle Shutt, *Considering the Need for Empirically Grounded Drug Court Screening Mechanisms*, 31 J. DRUG ISSUES 91 (2001) (finding graduation rate for African-American drug-court participants not significantly lower than for Caucasians after accounting for crack cocaine as drug of choice and lower social stability).

46. Anne Dannerbeck et al., *Understanding and Responding to Racial Differences in Drug Court Outcomes*, 5 J. ETHNICITY IN SUBSTANCE ABUSE 1 (2006).

47. *Id.* at 11, Table 1.

48. *Id.* at 11-13, Table 1.

49. *Id.* at 13.

50. *Id.* at 14, Table 3.

disproportionately by minorities, such as lesser educational or employment opportunities or a greater infiltration of crack cocaine into some minority communities. If this finding holds true in further research, it would point to obvious and concrete measures that drug courts could take to increase minority completion rates. For example, drug courts might enhance vocational rehabilitation or educational services in their programs to offset any related disadvantages experienced by minority participants.⁵¹ They might also focus on delivering interventions that are proven to be successful for treating cocaine and other stimulant addictions.⁵²

IV. TREATMENT SERVICES FOR MINORITIES IN DRUG COURTS

There is ample evidence that racial-and-ethnic-minority citizens may receive lesser-quality treatment in the criminal justice system than non-minorities.⁵³ A commonly cited example of this phenomenon relates to California's *Proposition 36*,⁵⁴ a statewide diversion initiative for nonviolent drug-possession offenders. A several-year study of Proposition 36 by researchers at UCLA found that Hispanic participants were significantly less likely than Caucasians to be placed in residential treatment for similar patterns of drug abuse, and African-Americans were less likely to receive medically assisted treatment for addiction.⁵⁵ Not surprisingly, treatment outcomes were also significantly poorer for these minority groups.⁵⁶

No quantitative data have yet been reported on whether such disparities exist within drug courts.⁵⁷ Qualitative interviews with minority participants in drug courts do not suggest

they perceived themselves as receiving lesser-quality treatment. To the contrary, in at least one study, minority participants were seemingly exasperated by receiving the same services as non-minorities and expressed a preference for a more individualized and less one-size-fits-all approach.⁵⁸ Some minority participants in that study were particularly resentful about being required to attend 12-step meetings, such as Narcotics Anonymous (NA) or Alcoholics Anonymous (AA). They reported feeling uncomfortable sharing their feelings in groups and being encouraged to accept the label of "addict."⁵⁹ Instead, they expressed a predilection for receiving employment and educational services.⁶⁰

Given how little research has addressed this question, it is not possible to conclude at this juncture whether treatment services in drug courts are or are not appropriately suited to the needs of minority participants.⁶¹ Future studies must empirically examine this issue in a more objective manner.

Until such direct evidence is garnered, drug courts should, at a minimum, apply generic principles of evidence-based treatment in their programs. For example, several studies have demonstrated improved outcomes, including for minority participants, when drug courts administered manualized, structured, cognitive-behavioral curricula.⁶² Cognitive-behavioral

[I]t is not possible to conclude at this juncture whether treatment services . . . are or are not appropriately suited to the needs of minority participants.

51. See Laura S. Cresswell & Elizabeth P. Deschenes, *Minority and Non-Minority Perceptions of Drug Court Program Severity and Effectiveness*, 31 J. DRUG ISSUES 259, 277 (2001) (concluding minority and non-minority participants viewed drug court as similarly helpful, but minorities were more appreciative of employment assistance, and non-minorities were more appreciative of substance-abuse treatment); John R. Gallagher, *Evaluating Drug Court Effectiveness and Exploring Racial Disparities in Drug Court Outcomes: A Mixed Methods Study* 94 (2012) (unpublished Ph.D. dissertation, Univ. of Texas at Arlington) (on file with author) (finding African-American drug-court participants preferred employment assistance to treatment interventions); see also Carl Leukefeld et al., *Employment and Work Among Drug Court Clients: 12-Month Outcomes*, 42 SUBSTANCE USE & MISUSE 1109 (2007) (finding better outcomes in drug court when participants received augmented vocational services).

52. See generally Patricia Marinelli-Casey et al., *Drug Court Treatment for Methamphetamine Dependence: Treatment Response and Posttreatment Outcomes*, 34 J. SUBSTANCE ABUSE TREATMENT 242 (2008) (reporting superior outcomes for drug courts utilizing the "MATRIX Model" curriculum for stimulant dependence); Richard A. Rawson et al., *A Multi-Site Comparison of Psychosocial Approaches for the Treatment of Methamphetamine Dependence*, 99 ADDICTION 708 (2004) (same).

53. See generally William B. Lawson & Anthony Lawson, *Disparities in Mental Health Diagnosis and Treatment Among African Americans: Implications for the Correctional Systems*, in CRIME, HIV & HEALTH: INTERSECTIONS OF CRIMINAL JUSTICE AND PUBLIC HEALTH CONCERNS (B. Sanders et al. eds., forthcoming 2013), available at DOI: 10.1007/978-90-481-8921-2_4 (reviewing disparities in sub-

stance-abuse and mental-health diagnoses, treatment access, and treatment outcomes for minorities); Anne Dannerbeck-Janku & Jiahui Yan, *Exploring Patterns of Court-Ordered Mental Health Services for Juvenile Offenders: Is There Evidence of Systematic Bias?*, 36 CRIM. JUST. & BEHAV. 402, 414 (2009) (finding African-American juvenile offenders were less likely than Caucasians to be referred for needed mental-health services); Steven R. Lopez et al., *From Documenting to Eliminating Disparities in Mental Health Care for Latinos*, 67 AM. PSYCHOLOGIST 511 (2012); Lonnie R. Snowden, *Health and Mental Health Policies' Role in Better Understanding and Closing African American-White American Disparities in Treatment Access and Quality of Care*, 67 AM. PSYCHOLOGIST 524 (2012).

54. California Substance Abuse and Crime Prevention Act of 2000, CAL. PENAL CODE § 1210 et seq. (West 2000) [hereafter Proposition 36].

55. UNIV. CAL. LOS ANGELES, INTEGRATED SUBSTANCE ABUSE PROG., EVALUATION OF THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT: FINAL REPORT 5 & 82 (2007).

56. *Id.* at 4 (finding treatment completion in Proposition 36 was lower for Hispanics and African-Americans).

57. See, e.g., Wolf, *supra* note 18, at 48 (concluding much of what is known about problem-solving courts and race is "speculative").

58. Gallagher, *supra* note 51, at 87, 94.

59. *Id.* at 90-91.

60. *Id.* at 88.

61. Cf. Wolf, *supra* note 18, at 52 (concluding more research needs to be done on race and drug courts).

62. See generally Cary E. Heck, *MRT: Critical Component of a Local Drug Court Program*, 17 COGNITIVE BEHAV. TREATMENT REV. 1, 2 (Correctional Counseling 2008) (finding addition of "Moral

[T]here is some evidence that providing culturally proficient or culturally sensitive interventions may improve results for minorities

interventions focus less on the expression of feelings and instead take a more active, problem-solving approach to managing drug-related problems.⁶³ Several resources are available to help clinicians in drug courts select manualized cognitive-behavioral curricula that are proven to produce positive benefits for minority participants.⁶⁴

In addition, there is some evidence that providing culturally proficient or culturally sensitive interventions may improve results for minorities in drug courts. At least one drug-court program run by an experienced African-American clinician and utilizing culturally tailored interventions demonstrated superior effects for young male African-American participants over Caucasian participants.⁶⁵ Efforts are underway to examine the intervention used in that study—presently named Habilitation, Empowerment & Accountability Therapy (H.E.A.T.)—in a controlled experimental study.

V. SANCTIONS AND INCENTIVES FOR MINORITIES IN DRUG COURTS

A commonly expressed concern about drug courts is that minority participants might be sanctioned more severely than non-minorities for comparable infractions. Anecdotal observations have typically been proffered to support this allegation,⁶⁶ and minority participants in at least one focus group did report feeling more likely than other participants to be ridiculed or laughed at during court sessions in response to violations.⁶⁷ No empirical study, however, has borne out the assertion. To the contrary, what little research has been conducted suggests that problem-solving courts, including drug courts, appear to administer sanctions in a racially and ethnically even-handed manner.⁶⁸ Considerably more research is required, however, to study this important issue in a more systematic manner and in a representative range of drug-court programs.

A related concern is that minority participants might be sentenced more harshly than non-minorities for failing out of drug court.⁶⁹ This is a particularly important matter because, as previously discussed, minorities may be more likely to be terminated from drug court than non-minorities.⁷⁰ Although this issue is far from settled,⁷¹ there is some evidence that participants who were terminated from a few drug courts did

Reconciliation Therapy” [MRT] to drug-court curriculum produced better outcomes); Robert A. Kirchner & Ellen Goodman, *Effectiveness and Impact of Thurston County, Washington Drug Court Program*, 16 COGNITIVE BEHAV. TREATMENT REV. 1, 4 (Correctional Counseling 2007) (finding the completion of each additional step of MRT in a drug court was associated with an 8% further reduction in recidivism); Marinelli-Casey et al., *supra* note 52 (reporting superior outcomes for drug courts utilizing the MATRIX Model for stimulant dependence); Scott W. Henggeler et al., *Juvenile Drug Court: Enhancing Outcomes by Integrating Evidence-Based Treatments*, 74 J. CONSULTING & CLINICAL PSYCHOL. 42, 51 (2006) (finding addition of “Multi-Systemic Therapy” [MST] and “contingency management” [CM] improved outcomes in a juvenile drug court).

63. See generally AARON T. BECK ET AL., COGNITIVE THERAPY OF SUBSTANCE ABUSE (1993) (describing cognitive-behavioral treatments for addiction); ALBERT ELLIS ET AL., RATIONAL-EMOTIVE THERAPY WITH ALCOHOLICS AND SUBSTANCE ABUSERS (1988) (same); G. ALAN MARLATT & JUDITH R. GORDON, RELAPSE PREVENTION: MAINTENANCE STRATEGIES IN THE TREATMENT OF ADDICTIVE BEHAVIORS (1985).

64. The Substance Abuse and Mental Health Services Administration (SAMHSA) maintains an internet directory of evidence-based treatments called the National Registry of Evidence-Based Programs and Practices (NREPP). The NREPP website may be searched specifically for interventions that have been evaluated among substantial numbers of racial and ethnic minority participants, at <http://www.nrepp.samhsa.gov/AdvancedSearch.aspx> (last visited Nov. 1, 2012). See also Stanley J. Huey & Antonio J. Polo, *Evidence-Based Psychosocial Treatments for Ethnic Minority Youth*, 37 J. CLIN. CHILD & ADOLESCENT PSYCHOL. 262 (2008) (reviewing effective treatments for Hispanic and Latino/Latina youths).

65. See Vito & Tewksbury, *supra* note 42, at 49 (reporting better outcomes for young, male African-American participants when drug court provided culturally proficient services delivered by an African-American clinician).

66. See, e.g., NACDL REPORT, *supra* note 17, at 43 (citing personal observation of one lawyer that Caucasian participants are given more chances before a violation than minorities in a drug court).

67. Gallagher, *supra* note 51, at 93 (reporting the perceptions of three African-American drug-court participants that the judge, staff, and/or observers laughed at them or were disrespectful during sanction hearings).

68. See generally Wendy P. Guastaferrro & Leah E. Daigle, *Linking Noncompliant Behaviors and Programmatic Responses: The Use of Graduated Sanctions in a Felony-Level Drug Court*, 42 J. DRUG ISSUES 396, 410, Table 5 (2012) (finding race was not related to the imposition of sanctions in a felony drug court); Patricia L. Arabia et al., *Sanctioning Practices in an Adult Felony Drug Court*, 6 DRUG CT. REV. 1 (2008) (finding a felony drug court serving 62% African-American participants and 25% Hispanic participants administered sanctions in a gradually escalating manner consistent with effective principles of behavior modification); Lisa Callahan et al., *A Multi-Site Study of the Use of Sanctions and Incentives in Mental Health Courts*, LAW & HUMAN BEHAV. 1, 4 (2012), available at DOI: 10.1037/h0093989 (finding no demographic characteristics, including race, predicted the imposition of jail sanctions in several mental-health courts); M. SOMJEN FRAZER, CTR. FOR CT. INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS 18, Table 3 (2006) (finding race was not related to participants’ perceptions of procedural fairness when sanctions and incentives were imposed in a community court).

69. See, e.g., O’Hear, *supra* note 17, at 480 (suggesting failure in drug court may lead to harsher sentences for minorities than not participating in drug court); NACDL REPORT, *supra* note 17, at 43 (same); JUST. POL’Y INST., *supra* note 17, at 24.

70. See *supra* notes 38-43 and accompanying text for a discussion of graduation rates among minorities and non-minorities in drug courts.

71. See JUST. POL’Y INST., *supra* note 17, at 24 (acknowledging very few studies have compared dispositions for participants who failed drug court to those traditionally adjudicated).

appear to receive relatively harsher sentences than traditionally adjudicated defendants charged with comparable offenses.⁷² There is no evidence, however, to suggest whether this practice differentially impacts minorities as compared to non-minorities. Moreover, no information is available on whether there might have been a rational basis for the judges in those cases to augment the sentences as they did.

How and when augmented sentences are imposed in drug courts is among the most important questions that need to be carefully studied by researchers. Currently, there appears to be no clear consensus about whether, or under what circumstances, it is appropriate to increase a presumptive sentence for one who fails a diversion opportunity, such as drug court; however, participants must be informed of the possibility of an augmented sentence when they execute waivers to enter the program.⁷³

Ideally, defense attorneys and potential participants should be armed with more than just the mere knowledge that an augmented sentence could be imposed. Where possible, they should be armed with data about how likely this is to occur and what factors the judge is apt to take into account when rendering such a decision. Researchers need to enlighten the drug-court field about how these important matters are determined and, most important, whether these decisions may unfairly or disproportionately impact racial-or-ethnic-minority participants.

VI. CONCLUSIONS

Much of the discourse surrounding racial- and ethnic-minority experiences in drug courts has shed more heat on the matter than light. Anecdotal impressions have been miscast as scientific data, simple correlations have been misinterpreted as proof of causality, and simplistic, even nihilistic solutions have been proffered to address complex problems of crime and drug policy.

Here is what is known:

- African-Americans appear to be underrepresented in adult drug courts by an average of a few percentage points.
- African-American participants, and to a lesser extent Hispanic and Latino/Latina participants, are considerably less likely than Caucasians to graduate from a plurality of drug courts, but not all drug courts. This difference does not appear to be a function of race or ethnicity *per se*, but rather a function of other socio-demographic characteristics which may be correlated with race or ethnicity.
- Evidence suggests graduation rates for African-American and Hispanic participants may be substantially increased by:
 - providing vocational services and assistance;
 - administering structured, cognitive-behavioral treatment curricula;

- administering treatments that are focused on the prevalent drugs of choice in minority communities (e.g., cocaine and heroin);
 - better preparing minority participants for what to expect before referring them to 12-step meetings; and
 - administering culturally tailored interventions for young African-American males.
- Empirical evidence does not support the assertion that minority participants receive different sanctions for comparable infractions in drug courts; however, insufficient research has addressed this question.
 - No valid research has investigated whether minority participants are sentenced more harshly than non-minorities for failing drug court.

Clearly, the drug-court field is left with more questions than answers. More research is needed to determine what services minority participants typically receive in drug courts, how to enhance minority outcomes in drug courts, and what consequences typically ensue from program failure. Moreover, little is known about the impacts of drug courts on minority groups other than African-Americans and Hispanics. Researchers need to make extra efforts to recruit a diverse range of citizens into their studies and validly assess disparate impacts across the full spectrum of racial and ethnic subgroups that are enrolled in drug-court programs or charged with drug-related offenses.

Drug courts are, first and foremost, *courts*, and the most fundamental principles of due process and equal protection continue to apply to their operations.⁷⁴ Drug courts came into being to solve some of our most dire social ills, and it would be a tragedy if programs designed to help people exacerbate their problems. Moreover, drug courts were created to correct certain social injustices emanating from the War on Drugs, and they must not turn a blind eye to the faintest possibility that they might be exacerbating some of those self-same injustices. It is incumbent upon drug courts to take a fearless inventory of their actions, admit their shortcomings where applicable, and continue striving to perform their vital work ever more effectively and humanely.⁷⁵



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72. See Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792 (2008) (concluding sentences for participants who were terminated from drug courts in New York were two to five times longer than for conventionally adjudicated defendants).

73. See generally William G. Meyer, *Constitutional and Legal Issues in Drug Courts*, in NAT'L DRUG CT. INST., THE DRUG COURT JUDICIAL BENCHMARK 159, 164 (Douglas B. Marlowe & William G. Meyer

eds., 2011) (noting waiver of trial rights in drug courts must be knowing, voluntary, and intelligent).

74. See, e.g., *id.* at 163 (noting drug courts must safeguard the due-process rights of participants).

75. Some readers might recognize these principles as stemming from the precepts of AA and NA. See ALCOHOLICS ANONYMOUS WORLD SERVICES, TWELVE STEPS AND TWELVE TRADITIONS 6-8 (1981).