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 an 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, judges, and state or territory . However, the NADCP is widely regarded as a professional membership and training organization, which are typically governed by the administrative office of the courts, Supreme Court, or attorney disciplinary board in each state or territory . But the NADCP has no enforcement authority over drug courts, 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.

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Footnotes


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 Prohibition 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 proba); 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).


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 104 American adults behind bars in 2008).

8. One in 100, supra note 7, at 6.

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

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).


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).


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 MAIER, 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).


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.
II. MINORITY ACCESS TO DRUG COURTS

Drug courts have been alternately accused of unfairly excluding minority citizens from participation in the programs and over-targeting minorities—thus drawing them deeper into the criminal justice system—a phenomenon known as net-widening.\(^2\) Virtually all of these assertions have been anecdotal\(^24\) because representative data are sparse and very difficult to come by.\(^2\)

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.\(^28\)

Table 1: Minority Representation in Drug Courts Compared with Other Criminal Justice Programs in 2008

<table>
<thead>
<tr>
<th></th>
<th>African-American</th>
<th>% Difference in Drug Courts</th>
<th>Hispanic and Latino or Latina</th>
<th>% Difference in Drug Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug Courts</td>
<td>21%</td>
<td>-10%</td>
<td>10%</td>
<td>0%</td>
</tr>
<tr>
<td>Arrestees</td>
<td>28%</td>
<td>-7%</td>
<td>Not Reported</td>
<td>-3%</td>
</tr>
<tr>
<td>Probationers &amp; Parolees</td>
<td>28%</td>
<td>-7%</td>
<td>13%</td>
<td>-3%</td>
</tr>
<tr>
<td>Jail Inmates</td>
<td>39%</td>
<td>-18%</td>
<td>16%</td>
<td>-6%</td>
</tr>
<tr>
<td>Prison Inmates</td>
<td>44%</td>
<td>-23%</td>
<td>20%</td>
<td>-10%</td>
</tr>
</tbody>
</table>


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. POL’Y INST., supra note 17, at 26 (advocating for voluntary community-based treatment 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. POL’Y 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 disproportionate 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.

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-American participants in drug court.40 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. Roisman 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).

29. See supra notes 6-8 and accompanying text.
31. See generally Maier, 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.
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American males between the ages of 18 and 25 years. Being young and male are well-documented risk factors for failure in drug courts and other correctional rehabilitation programs, 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. 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.

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. For example, 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. 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. In that study, 55% of Caucasian participants graduated from the drug courts as compared to only 28% of African-Americans. However, greater proportions of the African-American participants were also unemployed (56% vs. 39%), unmarried (91% vs. 83%), living with unrelated individuals (31% 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. After taking these variables into account, race was no longer predictive of outcomes. 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.

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

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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. A commonly cited example of this phenomenon relates to California’s Proposition 36, 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. Not surprisingly, treatment outcomes were also significantly poorer for these minority groups.

No quantitative data have yet been reported on whether such disparities exist within drug courts. 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. 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.” Instead, they expressed a predilection for receiving employment and educational services.

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. 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.

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).


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
Interventions focus less on the expression of feelings and instead take a more active, problem-solving approach to managing drug-related problems. 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.

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. 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.

Rehabilitation 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); Martinelli-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).


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. Guastaferro & 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 3 (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. POLY 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. POLY 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. 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.

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. 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 exacerbated 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 selfsame 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.

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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).
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).