

# RACE, BIAS, AND PROBLEM-SOLVING COURTS

Robert V. Wolf\*

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## INTRODUCTION

Prejudice against racial and ethnic minorities was once endemic among police, prosecutors, judges, and jurors.<sup>1</sup> Bias was manifest in countless ways: lynchings were common and tacitly sanctioned;<sup>2</sup> non-whites were

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\* Robert V. Wolf is director of communications at the Center for Court Innovation, a non-profit think tank that works with courts and criminal justice agencies to reduce crime and improve public trust in justice. This article was supported by the Bureau of Justice Assistance under Grant 2006-MU-MU-K003. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view and opinions in this document are those of the author and do not necessarily represent official positions or policies of the U.S. Department of Justice. Acknowledgements: The author thanks the following people for their assistance in the preparation of this article: Greg Berman, Joshua Bird, Sarah Bradley, Aryn M. Emert, Donald J. Farole Jr., Peter Hanink, Diana Karafin, Julius Lang, Jason Lynch, Diana L. Maldonado, Ruben Martino, Wayne S. McKenzie, Preeti P. Menon, Nellie Moulton, Kim Norris, Eileen Olds, Michael Rempel, Robert Russell, Brett Taylor, Carolyn Turgeon, and Chris Watler.

1. See KATHERINE J. ROSICH, AM. SOC. ASS'N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM 2 (2007) (describing “prosecutorial and judicial bigotry” as “common, particularly in the southern criminal justice systems” in the early decades of the 20th century; police playing an “instrumental” role in “racial violence;” and bias in sentencing toward blacks). See also, Rodolfo O. de la Garza & Louis DeSipio, *A Satisfied Clientele Seeking More Diverse Services: Latinos and the Courts*, 19 BEHAV. SCI. & L. 237, 248 (2001) (describing Latinos’ “negative experiences with the criminal justice system”).

2. See Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950*, YALE-NEW HAVEN TEACHERS INST., available at <http://www.yale.edu/ynhti/cur->

systematically excluded from juries;<sup>3</sup> blacks and minorities, especially those convicted of victimizing whites, received harsher penalties than non-minorities convicted of similar crimes.<sup>4</sup>

Thankfully, over the last half century, the situation has changed dramatically. Changes in law and culture have helped eliminate many overt forms of racial and ethnic discrimination. The Civil Rights Act, the Voting Rights Act, and the Fair Housing Act have attempted to redress egregious wrongs. In addition, numerous court decisions, such as those barring racial discrimination in jury selection<sup>5</sup> and those permitting the consideration of race and ethnicity in college decisions,<sup>6</sup> have tried to eliminate opportunities for bias or correct for past discrimination.<sup>7</sup>

Despite enormous strides, however, problems persist:<sup>8</sup> racial profiling,<sup>9</sup> police misconduct,<sup>10</sup> misuse of peremptory challenges to exclude mi-

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riculum/units/1979/2/79.02.04.x.html#b (last visited July 15, 2008) (describing how lynching was “common and tacitly sanctioned in the latter half of the 19th century and first half of the 20th century.”); *See also*, Oliver C. Cox, *Lynching and the Status Quo*, in *RACE, CRIME, AND JUSTICE: A READER* (Shaun L. Gabbidon & Helen Taylor Greene, eds., Routledge 2005) originally published in 1945 in *Journal of Negro Education* 14:576-588 (noting, among other things, that “during a lynching it would be foolhardy for Negroes of the community to seek the protection of the police station, the sheriff’s office or the courthouse” and that “Negroes have been lynched for such apparent trivialities as ‘using offensive language,’ ‘bringing suit against white men,’ ‘trying to act like white men,’ ‘frightening women and children,’ ‘being a witness,’ ‘gambling,’ ‘making boastful remarks,’ and ‘attempting to vote’”).

3. SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, *The Color of Justice: Race, Ethnicity, and Crime in America* 136-137 (Wadsworth 1996) (noting that for the nation’s first hundred years “blacks were systematically denied the right to be jurors,” and continued to be excluded in subsequent years through practices that the U.S. Supreme Court repeatedly declared unconstitutional); *See also* de la Garza, *supra* note 1 at 237 (noting that “for generations, Mexican Americans were excluded from jury duty in Texas”).

4. Marjorie S. Zatz, *The Convergence of Race, Ethnicity, Gender, and Class on Court Decisionmaking: Looking Toward the 21st Century*, in 3 *CRIMINAL JUSTICE 2000, POLICIES, PROCESSES, AND DECISIONS OF THE JUSTICE SYSTEM* 509 (Julie Horney ed., Nat’l Inst. of Just. 2000) (noting a “historical pattern of unfairly singling out African-Americans for harsh punishment when the victim is white”).

5. *See, for example*, *Turner v. Murray*, 476 U.S. 28 (1986); and *Snyder v. Louisiana* 128 S.Ct. 1203 (2008).

6. *See, for example*, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

7. *See also* ROSICH, *supra* note 1, at 2, (noting that “over the past fifty years . . . U.S. Supreme Court cases and legislation inspired and led by the civil rights movement, ‘due process,’ and other reform movements have made discrimination on the basis of race unconstitutional. Minority defendants are no longer routinely denied bail, charged indiscriminately, without legal representation, or punished disproportionately”).

8. *See also* ROSICH, *supra* note 1, at 2, (noting that “although overt discrimination has diminished in the criminal justice system over recent decades, at the beginning of the twenty-first century, we continue to grapple with the perceptions of and the reality of unfairness in our justice system. Racial and ethnic disparities persist in crime and criminal justice in the United States.”).

9. Ronald Weich & Carlos Angulo, *Racial Disparities in the American Criminal Justice System*, in *RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM* 187-190 (Dianne M. Piché, William L. Taylor, & Robin A. Reed eds., Citizens’ Comm’n on C.R. 2002), *available at* <http://www.ccr.org/Chapter14.pdf> (last visited July 16, 2008) (noting that “a growing body of statistical evidence demonstrates that black motorists are disproportionately stopped for minor traffic offenses because the police assume that they are more likely to be engaged in more serious criminal activity” and that racial profiling is “widespread”); Michael Wright, *Reversing the Prison Landscape: The Role of Drug Courts in Reducing Minority Incarceration*, 8 *RUTGERS RACE & L. REV.* 79, 79-80 (2006) (noting “research showing that police officers target minorities at far greater rates than Whites. Whether consciously or unconsciously, police arrest more minorities for drug use than Whites, although studies suggest that Whites are using drugs at greater rates than minorities.”).

10. Weich, *supra* note 9, at 190 (claiming that “minority citizens are . . . the prime victims

nority jurors,<sup>11</sup> disparities in sentencing,<sup>12</sup> and the disproportionate representation of certain racial and ethnic groups at all stages of the criminal justice process, from arrest to death row.<sup>13</sup>

As the Conference of State Court Administrators points out, “[r]acial and ethnic prejudice persists in American society today despite the achievements, legal and otherwise, that have been made over the years at both the local and national level to ensure that all citizens are treated fairly and equally.”<sup>14</sup> And the judicial system is not immune to the persistence of bias; it “faces both documented incidents and widespread perception of unequal treatment in the courts.”<sup>15</sup>

Many suggestions have been offered for how the judicial system can address both bias and the perception of bias, including involving community stakeholders—such as local residents, business owners, educators, clergy, elected officials and representatives of both government and non-government agencies—in setting justice system priorities, developing more alternatives to incarceration, and collecting better data.<sup>16</sup> Problem-solving courts, which include drug courts, mental health courts, domestic violence courts, community courts, and reentry courts, are engaged in many of these activities. Some proponents of problem-solving justice, including Michael Wright, a research fellow at the Mossavar-Rahmani Center for Business

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of police brutality and corruption.”) *See also* ALLYSON COLLINS, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 39-43 (Human Rights Watch 1998) (noting that “Race continues to play a central role in police brutality in the United States.”).

11. *See* WALKER, *supra* note 3, at 138 (noting that “prosecutors and defense attorneys can use their peremptory challenges—challenges without cause, without explanation, and without judicial scrutiny—as they see fit. They can use their peremptory challenges in a racially discriminatory manner.”).

12. A.B.A., JUSTICE KENNEDY COMMISSION REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES, (2004) *available at* <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> (last visited July 15, 2008) (noting that “African-American and Latino youth are treated more severely than their similarly situated white counterparts. In 1997, white youth represented 71% of the youth arrested for crimes across the country but only 37% of detained or committed juveniles. African-American youth were 48 times as likely as white youth to be sentenced to state juvenile facilities for drug offenses. Latino youth were 13 times as likely”); *See also* Weich, *supra* 9, at 198 (noting that in New York “state researchers concluded that one-third of minorities sentenced to prison would have received a shorter or nonincarcerative sentence if they had been treated like similarly situated white defendants”).

13. *See* KEVIN BURKE & STEVE LEBEN, AM. JUDGES ASS’N, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION 18-19 (2007), *available at* <http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf> (last visited July 16, 2008) (noting that “though true apple-to-apple case comparisons are difficult to make, African Americans are 4.8 times more likely to be incarcerated and are generally given much harsher sentences than white defendants.”); *See generally* ROSICH, *supra* note 1; and DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (Northeastern University Press 1990).

14. CONF. OF ST. CT. ADMIN., POSITION PAPER ON STATE COURTS’ RESPONSIBILITY TO ADDRESS ISSUES OF RACIAL AND ETHNIC FAIRNESS 1 (2001), [hereinafter POSITION PAPER] *available at* <http://cosca.ncsc.dni.us/WhitePapers/raciaethnicwhiteapr.pdf> [sic] (last visited July 15, 2008).

15. *Id.* at 2.

16. *See* A.B.A., *supra* note 12. *See also*, DENNIS SCHRANTZ & JERRY MCELROY, THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (Jenni Gainsborough & Marc Mauer eds. 2000), *available at* [http://www.sentencingproject.org/Admin/Documents/publications/rd\\_reducingrdmanual.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_reducingrdmanual.pdf) (last visited July 16, 2008).

and Government at Harvard University, have even been so bold as to suggest that problem-solving courts can help reduce racial disparities in the justice system.<sup>17</sup>

Whether or not problem-solving courts have realized this potential, however, is difficult to assess. To date, virtually nothing has been written about how these specialized courts—which collectively number more than 2,500 in the U.S.<sup>18</sup>—are addressing issues of race and bias.

The purpose of this paper is to spark discussion about the intersection of problem-solving courts and race,<sup>19</sup> bearing in mind the goal set forth by the American Bar Association in 2005 “to eliminate actual and perceived racial and ethnic bias in the criminal justice system.”<sup>20</sup> Although this paper provides an overview of the current literature, it does not aspire to be an exhaustive analysis of the subject. Rather it seeks to highlight key issues that are ripe for future research and analysis.

The discussion that follows is organized around two topics: firstly, race and the justice system; and secondly, race and problem-solving courts. Lastly, the paper concludes with a brief discussion about what researchers and practitioners can do to learn more about and respond to these important issues.

## I. RACE AND THE JUSTICE SYSTEM

Many researchers agree that “racial discrimination does occur in *some* stages of justice processing, *some* of the time, and in *some* places, and that *small* differences in treatment *accumulate* across the criminal justice system and over time, resulting in larger racially different outcomes.”<sup>21</sup>

Recent research on race and the justice system focuses on racial and ethnic disparities among those arrested, charged, sentenced, incarcerated, and/or placed under the supervision of community corrections. But these are by no means the only concerns. Another important concern is the way litigants are treated throughout the justice process—commonly referred to as procedural justice.<sup>22</sup> New York University professor Tom R. Tyler has drawn attention to the importance of procedural fairness, asserting that perceptions of fairness can be shaped by a large array of factors, from the way police treat offenders to the opportunities defendants have to express their views in court.<sup>23</sup>

Further complicating issues of race and the justice system are a myriad of other factors, including a lack of resources within the justice system (for example, inadequate staffing in public defender offices or the shortage of

17. See Wright, *supra* note 9, at 79.

18. C. WEST HUDDLESTON, III ET AL., NAT’L DRUG CT. INST., 1 PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 17 (May 2005), available at [http://www.ndci.org/publications/10697\\_PaintPict\\_fnl4.pdf](http://www.ndci.org/publications/10697_PaintPict_fnl4.pdf) (last visited July 16, 2008).

19. Race in this discussion is shorthand for more than just skin color but also ethnicity, culture, language, and worldview; for a fuller discussion of the challenges of defining race, see “Data Collection,” III. A.

20. A.B.A., *supra* note 12, at IV.

21. ROSICH, *supra* note 1, at 3.

22. BURKE & LEBEN, *supra* note 13, at 5.

23. *Id.* at 6, citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 22 (2006) at 22-23.

interpreters);<sup>24</sup> and the public's low confidence in the justice system—a confidence that is in many courts particularly low among minority populations.<sup>25</sup>

### A. *Racial/Ethnic Disparities*

Racial and ethnic disparities show up in one form or another at virtually every stage of the justice process whether one is looking at victims, neighborhoods targeted for enforcement, or those processed through the system.

According to the Bureau of Justice Statistics, a black male has a 1 in 3 chance of being imprisoned during his lifetime, compared to a 1 in 6 chance for a Latino male and a 1 in 17 chance for a white male.<sup>26</sup> On June 30, 2006, an estimated 4.8 percent of black men were in prison or jail, compared to 1.9 percent of Hispanic men and 0.7 percent of white men; more than 11 percent of black males age 25 to 34 were incarcerated, and black women were incarcerated in prison or jail at nearly 4 times the rate of white women and more than twice the rate of Hispanic women.<sup>27</sup>

Black Americans are victimized by robbery at a rate that is 150 percent higher than whites. They are the victims of rape, aggravated assault, and armed robbery at a rate that is 25 percent greater than whites.<sup>28</sup>

A body of evidence demonstrates that black motorists are disproportionately stopped for minor traffic offenses “because the police assume that they are more likely to be engaged in more serious criminal activity.”<sup>29</sup> When traffic stops by the Maryland State Police on Interstate 95 were monitored under a federal court consent decree, researchers found that from January 1995 to December 1997, 70 percent of the drivers stopped and searched by the police were black, while only 17.5 percent of overall drivers—as well as overall speeders—were black.<sup>30</sup> In 2002, researchers looking at data from 65 jurisdictions in Minnesota found that “if officers . . . had stopped drivers of all racial/ethnic groups at the same rate, approximately 18,800 fewer blacks, 5,800 fewer Latinos and approximately 22,500 more whites would have been stopped;” at the same time, “24 percent of

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24. Elizabeth Neeley, *Racial and Ethnic Bias in the Courts: Impressions from Public Hearings*, 40 CT. REV., 28, 29 (2004) (describing a “lack of qualified interpreters” and quoting a public defender who says his office has “the funding and the staff and the resources to serve about 15 percent of the need”).

25. David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24, 26, 28 (1999) (describing how the level of “trust/confidence in the ‘courts in your community’ is low compared to other public institutions” and how African Americans express lower levels of confidence than other groups).

26. BUREAU OF JUST. STAT., MORE THAN 5.6 MILLION U.S. RESIDENTS HAVE SERVED OR ARE SERVING TIME IN STATE OR FEDERAL PRISONS (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/press/piusp01pr.htm> (last visited July 16, 2008).

27. BUREAU OF JUST. STAT., PRISON AND JAIL INMATES AND MIDYEAR 2006 (2007) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (last visited October 15, 2008).

28. Weich, *supra* note 9, at 185, 206.

29. Weich, *supra* note 9, at 187 (adding that “this ironically labeled ‘driving while black’ syndrome has two deleterious effects. It causes a large number of innocent black drivers to be subjected to the hassle and humiliation of police questioning, and it results in a lopsided number of blacks being arrested for nonviolent drug crimes that would not come to the attention of authorities but for the racially motivated traffic stop.”).

30. *Id.*

discretionary searches of whites produced contraband compared to only 11 percent of searches of Blacks and nine percent of searches of Latinos.”<sup>31</sup> Based on data collected in 2002, the Bureau of Justice Statistics concluded that police were more likely to carry out some type of search on a black driver (10.2 percent) or Hispanic driver (11.4 percent) than a white driver (3.5 percent).<sup>32</sup>

In 1997, whites represented 71 percent of the youth arrested for crimes across the country but only 37 percent of detained or committed juveniles. African-American youth were 48 times as likely and Latino youth 13 times as likely as white youth to be sentenced to state juvenile facilities for drug offenses.<sup>33</sup>

The Justice Kennedy Commission of the American Bar Association, convened to explore racial disparities in the justice system, declared in 2004 that “there is reason for concern when two thirds of those incarcerated are African American or Latino.”<sup>34</sup> The committee found “evidence of discriminatory treatment of defendants and victims of color at various stages of the criminal process” and called upon “every jurisdiction [to] examine whether conscious or unconscious bias or prejudice may affect investigatory, prosecution, or sentencing decisions and take steps to eliminate such bias.”<sup>35</sup>

Racial and ethnic disparities undermine the promise of equal justice on which American society, at least ostensibly, was founded. Moreover, they threaten to undermine public confidence in justice. Eileen Olds, president of the American Judges Association, witnessed that lack of confidence first hand during her 13 years as a defense attorney: “I would say overwhelmingly when minority clients go into court it’s with the assumption that they don’t have a chance.”<sup>36</sup> Consequently, involvement in the justice system has helped to undermine the quality of life in minority neighborhoods, damaged families, and fueled a climate of despair.

### B. *Attitudes Toward the Justice System*

Numerous studies have found that racial and ethnic minority groups are distrustful of the police and the courts.<sup>37</sup> Levels of distrust tend to be highest among African Americans. The National Center for State Courts in 1999 found that “twice as many African Americans believed that court outcomes are ‘seldom’ or ‘never’ fair as believed that they are ‘always’ or ‘usually’ fair.”<sup>38</sup>

31. INSTITUTE ON RACE AND POVERTY, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 1, available at <http://www.irpumn.org/uls/resources/projects/aggregate%20report%2092303.pdf> (last visited October 14, 2008).

32. BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf> (last visited October 14, 2008).

33. A.B.A., *supra* note 12, at 49.

34. *Id.* at 7-8.

35. *Id.*

36. Telephone Interview with Eileen Olds, President, Am. Judges Ass’n. (Nov. 7, 2007).

37. Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI & L. 215, 217 (2001).

38. DAVID B. ROTTMAN, RANDALL HANSEN, NICOLE MOTT, & LYNN GRIMES, NAT’L CTR. FOR ST. CTS., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERI-

Minority concerns often focus on “racial profiling, the excessive use of force, and the disproportionate impact of drug laws on the minority community,” according to sociologist Tom R. Tyler.<sup>39</sup> Sociologist Elizabeth Neeley, of the University of Nebraska Public Policy Center, found that the most “significant concerns” about the courts common to “all nonwhite racial and ethnic groups” expressed during public hearings in five Nebraska cities in May 2002 were “differential sentencing and acquiring quality legal services.”<sup>40</sup> A recurring theme of the hearings was the belief many had that minorities received harsher sentences.<sup>41</sup> But different racial and ethnic groups emphasized different concerns. “A dominant theme to emerge from Latino/Latina populations was interpreter services. For Native Americans, jurisdictional issues were of primary concern. [In addition to concerns about police,] blacks were particularly concerned with the justice system’s workforce being representative of the population.”<sup>42</sup>

When members of various racial and ethnic groups (Hispanic, African American, white and Asian) were surveyed about the probability of fair outcomes in court, all agreed on one thing: African Americans, low-income people, and non-English speakers can expect “worse results.”<sup>43</sup>

### C. Sources of Disparities

What is fueling these racial disparities? What role, if any, does actual bias play? If bias exists, how does it manifest itself? And what roles do other factors that are not overtly associated with bias play? For instance, how does the fact that public defenders in many jurisdictions have overwhelmingly large caseloads and limited resources to investigate cases impact the perception that the system is biased?

The trajectory of any individual defendant or case is determined by a series of small decisions made by different actors within the system. These decisions, as Arizona State University professor Marjorie Zatz points out,

“include police decisions about where to focus their surveillance efforts and when an arrest is warranted rather than a warning; the prosecutor’s decision to accept or reject a case and which of several potential criminal charges to file; the judge’s decision about whether to release a defendant pending trial and, if so, the bail amount and other conditions of release; the prosecutor’s and defense attorney’s decisions regarding plea bargains and other negotiated sentences; and the judge’s or jury’s decision about guilt in trial cases.”<sup>44</sup>

Even if race plays a small role in any one of these decisions, the cumulative impact can be significant. According to Zatz, the “general resulting pattern is that white and middle-class defendants are more likely to be filtered out of the system at earlier decision points than are poor defendants and defendants of color.”<sup>45</sup>

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ENCE, RACE AND ETHNICITY 36 (2003), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PerceptionsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PerceptionsPub.pdf) (last visited July 16, 2008).

39. Tyler, *supra* note 37, at 217.

40. Neeley, *supra* note 24, at 27.

41. *Id.*

42. *Id.* at 26, 28-9.

43. BURKE & LEBEN, *supra* note 13, at 18.

44. Zatz, *supra* note 4, at 507.

45. *Id.*

Whether or not race plays a role in a particular situation is often in the eyes of the beholder. For example, there are two ways of looking at police enforcement activities in minority neighborhoods. There are, as Zatz points out, “competing demands on criminal justice officials to treat minority defendants fairly while also ensuring the safety of poor blacks and Latinos living in high-crime areas.”<sup>46</sup> Residents of such neighborhoods often suffer higher rates of victimization than residents in other neighborhoods, and understandably expect the police to ensure their safety; on the other hand, many minority group members are wary of police and the criminal justice system in general. This results in a Catch-22 that can be difficult to unravel.

The “war on drugs” has also had a disproportionate impact on minorities, especially young black males.<sup>47</sup> Ninety percent of defendants facing drug charges in federal court are minorities; and police arrest more minorities on drug charges than whites despite the fact that studies suggest whites use drugs at greater rates than minorities.<sup>48</sup> Disparities in sentencing have been compounded by federal sentencing guidelines adopted in 1986 that mandated more severe penalties for possession of crack cocaine, which tends to be marketed on streets in poor, urban communities, than powder cocaine, which tends to be sold in wealthier communities.<sup>49</sup>

#### D. *Problems with the Data*

One of the difficulties of unraveling the impact of race in criminal justice decision-making is that there are countless other factors that may play small or large roles in how individual cases are handled. Clearly, economic factors play a part: according to the American Bar Association’s Kennedy Commission, “it is frequently difficult to distinguish whether an individual experiences different treatment because of his socio-economic status or because of his race or ethnicity.”<sup>50</sup> Studies have found gender, age, and even mode of conviction can have an effect on how a defendant is treated.<sup>51</sup> Common sense dictates that the cultural background and life experiences of the arresting officer, prosecutor, defense attorney, judge, court staff and others involved in the case can also play a role.

It is worth noting that while much of the data highlighting racial/ethnic disparities in the justice system may appear clear cut, researchers report problems with the data. Differences in methodology, theoretical

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46. *Id.* at 509.

47. *Id.* at 524. Marc Mauer, executive director of The Sentencing Project, notes that in communities with more resources, “drug abuse is more likely to be treated as a public health issue, with diversion to treatment as a common option [while] in low-income communities it is more likely to be defined as a criminal justice problem, resulting in frequent use of imprisonment.” *Testimony of Marc Mauer, Executive Director, The Sentencing Project, Before the Maryland Commission on Capital Punishment on Race and the Criminal Justice System* (2008), available at <http://www.goccp.org/capital-punishment/documents/mauer-testimony.pdf> (last visited October 15, 2008).

48. Wright, *supra* note 9, at 79-80, 105.

49. ROSICH, *supra* note 1, at 6.

50. A.B.A., *supra* note 12, at 54-5.

51. Zatz, *supra* note 4, at 517.

frameworks, and the quality of data “are just a few areas that produce debate.”<sup>52</sup> In some justice system datasets, for example,

“Latinos and Latinas are coded white, thus artificially inflating the number of whites in those samples. In addition, Spanish-speaking Afro-Caribbeans are sometimes coded on the basis of a Spanish surname (in which case they would be coded white) and, at other times, . . . on the basis of appearance (in which case they would be coded black).”<sup>53</sup>

Furthermore, many Native Americans have Spanish surnames, which may mean that they too could get coded as white.<sup>54</sup>

#### E. *Attempts to Address Bias in the Justice System*

The fight against bias in the criminal justice system has moved, by and large, from a focus on overt discrimination to an emphasis on subtle and unintentional bias—that is, decisions, policies, or structures that may on their face be race-neutral, but ultimately have a disproportionate impact on a particular population.<sup>55</sup>

Prominent organizations have proposed a number of ways to address the situation. The Kennedy Commission in 2004 called for the creation of racial and ethnic task forces that would, among other things, document the extent of racial and ethnic disparities, seek community input, and “make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.”<sup>56</sup>

The Sentencing Project in 2000 issued a manual for reducing racial disparity in the criminal justice system which, among other things, called for: service providers in minority neighborhoods to develop programs that can serve as alternatives to arrest and detention; police to engage community stakeholders in discussions about the identification of priority problems in the community and the formulation of new “problem-solving strategies” and tactics; prosecutors to participate in collaborative problem-solving efforts and to support alternative services for appropriate defendants; and judges to understand that “relationships between judges and defendants/offenders can make a difference. Offenders can be affected by the realization that judges are trying to help them and are concerned about their problems. The personal consideration that is frequently extended to the privileged defendant is a model for individualized treatment that should be offered to all defendants.”<sup>57</sup> Further, The Sentencing Project re-

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52. ROSICH, *supra* note 1, at 3.

53. Zatz, *supra* note 4, at 510.

54. *Id.*

55. SCHRANTZ & MCELROY, *supra* note 16, at 10 (“Many observers suggest that overt bias in criminal justice decision-making has declined dramatically in the last couple of decades, and that racial disparity is essentially a consequence of policies, strategies, and decisions that unintentionally and indirectly produce disparate effects. While much of the research that has been conducted in the recent past tends to support that belief, racist attitudes persist among some people in all American institutions. For example, the U.S. Supreme Court recently set aside the death sentence in a Texas case in which the offender’s Hispanic origin had been presented by the state as an indicator of likely ‘future dangerousness’—an aggravating factor pointing to death rather than life in prison as the appropriate punishment.”).

56. A.B.A., *supra* note 12, at 47.

57. SCHRANTZ & MCELROY, *supra* note 16, at 29, 30, 40, 55.

port suggests that more resources be made available to support defenders working in drug courts, domestic violence courts, and community courts.<sup>58</sup>

Interestingly, these specialized courts—known more generally as problem-solving courts—seem to provide some of the very interventions that the American Bar Association and The Sentencing Project have recommended. Many problem-solving courts have developed community advisory boards to engage community stakeholders and the police in discussions about safety priorities and enforcement strategies.<sup>59</sup> They seek to address the underlying causes of offending through the provision of alternative services.<sup>60</sup> Practitioners in problem-solving courts are strong advocates of gathering data and developing new management information systems which, in theory, could be applied to analyzing the prevalence of bias.<sup>61</sup> Some problem-solving courts have been credited with encouraging the expansion of community-based initiatives, which, in turn, provide courts with more sentencing options beyond incarceration and, in some instances, help people avoid the criminal justice system entirely.<sup>62</sup> Problem-solving courts consult with community stakeholders to identify priority

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58. *Id.* at 48.

59. ERIC LEE, BUREAU OF JUST. ASSISTANCE, COMMUNITY COURTS: AN EVOLVING MODEL 7 (2000), available at [http://www.courtinnovation.org/\\_uploads/documents/communitycourts-evolvingmodel.pdf](http://www.courtinnovation.org/_uploads/documents/communitycourts-evolvingmodel.pdf) (last visited September 25, 2008).

60. PAMELA M. CASEY, DAVID B. ROTTMAN, & CHANTAL G. BROMAGE, NAT'L CTR. FOR ST. CTS., PROBLEM-SOLVING JUSTICE TOOLKIT 4 (2007), available at [http://www.ncsconline.org/D\\_Research/Documents/ProbSolvJustTool.pdf](http://www.ncsconline.org/D_Research/Documents/ProbSolvJustTool.pdf) (last visited July 16, 2008) (“The problem-solving court approach focuses on defendants and litigants whose underlying medical and social problems (e.g., homelessness, mental illness, substance abuse) have contributed to recurring contacts with the justice system. The approach seeks to reduce recidivism and improve outcomes for individuals, families, and communities using . . . the integration of treatment and/or social services with judicial case processing.”); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL’Y 121, 131 (2001) [hereinafter Berman & Feinblatt, *Problem-Solving*], available at [http://www.courtinnovation.org/pdf/prob\\_solv\\_courts.pdf](http://www.courtinnovation.org/pdf/prob_solv_courts.pdf) (last visited July 16, 2008) (“Problem-solving courts use their authority to forge new responses to chronic social, human and legal problems—including problems like family dysfunction, addiction, delinquency and domestic violence—that have proven resistant to conventional solutions.”); Anthony C. Thompson, *Access to Justice: The Social Responsibility of Lawyers: Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63 (2002) (“By utilizing multi-disciplinary approaches in their handling of individual cases and by integrating social services, health, and drug treatment with what has traditionally been the role of probation, drug courts are able to address the root causes of an individual’s involvement in the criminal justice system.”).

61. See MICHAEL REMPEL, CTR. FOR CT. INNOVATION, ACTION RESEARCH: USING INFORMATION TO IMPROVE YOUR DRUG COURT (2005), available at [http://courtinnovation.org/\\_uploads/documents/Action%20Research.pdf](http://courtinnovation.org/_uploads/documents/Action%20Research.pdf) (last visited July 16, 2008); JOHN FEINBLATT & GREG BERMAN, CTR. FOR CT. INNOVATION, INFORMED DECISIONS: TECHNOLOGY IN THE COURTROOM (1999), available at [http://www.courtinnovation.org/pdf/info\\_deci.pdf](http://www.courtinnovation.org/pdf/info_deci.pdf) (last visited July 16, 2008).

62. See ROBERT V. WOLF, EXPANDING THE USE OF PROBLEM SOLVING: THE U.S. DEPARTMENT OF JUSTICE’S COMMUNITY-BASED PROBLEM SOLVING CRIMINAL JUSTICE INITIATIVE 9-10 (Center for Court Innovation 2007) available at [http://www.courtinnovation.org/\\_uploads/documents/Expanding%20PS.pdf](http://www.courtinnovation.org/_uploads/documents/Expanding%20PS.pdf) (last visited Sept. 25, 2008) (providing examples of problem-solving courts helping to generate new initiatives and expand services, such as the Athens County (Ohio) Substance Abusing/Mentally Ill Court Project that contributed to the training of local police through a program called the Crisis Intervention Team); e.g. DAVID C. ANDERSON, CTR. FOR CT. INNOVATION, STREET OUTREACH SERVICES: A PARTNERSHIP BETWEEN POLICE AND MIDTOWN COMMUNITY COURT SOCIAL WORKERS TO HELP PEOPLE LIVING ON THE STREETS, (1998) available at [http://www.courtinnovation.org/\\_uploads/documents/Street%20OutreachServices.pdf](http://www.courtinnovation.org/_uploads/documents/Street%20OutreachServices.pdf) (last visited Feb. 13, 2009) (where the Midtown Community Court established a program called Street Outreach Service to engage people with services before they enter the justice system).

problems.<sup>63</sup> And problem-solving courts encourage judges to develop personal relationships with defendants and craft individualized sentences.<sup>64</sup>

## II. PROBLEM-SOLVING COURTS

Problem-solving courts emerged in the 1980s and 1990s as a response to a number of developments, including “increasing frustration—both among the public and among system players—with the standard approach to case processing and case outcomes in state courts.”<sup>65</sup> Problem-solving courts have grown to include more than 2,500 projects across the United States<sup>66</sup> and more overseas.<sup>67</sup>

Problem-solving courts take many forms, including drug courts, mental health courts, domestic violence courts, and community courts. Although they focus on different problems, practitioners have identified six principles that underlie most of them. The Center for Court Innovation, with input from national leaders in the field of problem-solving justice, has defined the principles as follows:<sup>68</sup>

(1) Enhanced Information: Through staff training (about complex issues like domestic violence and drug addiction) and better information (about litigants, victims, and the community context of crime), problem-solving courts can help improve the decision making of judges, attorneys, and other justice officials.

(2) Community Engagement: Citizens and neighborhood groups have an important role to play in helping the justice system identify, prioritize, and solve local problems. By actively engaging citizens, problem-solving courts help improve public trust in the justice system.

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63. See generally LESLIE PAIK, BUREAU OF JUST. ASSISTANCE, SURVEYING COMMUNITIES: A RESOURCE FOR COMMUNITY JUSTICE PLANNERS (2003) available at [http://www.courtinnovation.org/\\_uploads/documents/surveyingcommunities.pdf](http://www.courtinnovation.org/_uploads/documents/surveyingcommunities.pdf) (last visited Sept. 25, 2008) (describing how community justice projects could identify community priorities and outlining strategies used by the Red Hook Community Justice Center to survey the community).

64. See GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE ch. 4, (THE NEW PRESS 2005) [hereinafter BERMAN & FEINBLATT, GOOD COURTS]; NAT'L JUD. C., EFFECTIVE JUDGING FOR BUSY JUDGES (2006), available at [http://www.judges.org/pdf/effectivejudging\\_book.pdf](http://www.judges.org/pdf/effectivejudging_book.pdf) (last visited July 15, 2008); Peggy Fulton Hora, William G. Schma, & John T. A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (“The fact that only one judge will deal with the offender’s case through frequent, mandatory court appearances allows the judge and offender to develop ‘an ongoing, working relationship.’ This one-on-one relationship tends to facilitate honesty through familiarity and permits the [drug treatment court] judge to become ‘a powerful motivator for the offender’s rehabilitation,” citing JUDGE JEFFREY S. TAUBER, CALIFORNIA CENTER FOR JUDICIAL EDUCATION AND RESEARCH, DRUG COURTS: A JUDICIAL MANUAL 9 (1994) at 14).

65. Berman and Feinblatt, *Problem-Solving*, *supra* note 60, at 128.

66. HUDDLESTON ET AL., *supra* note 18.

67. Robert V. Wolf, *Community Justice Around the Globe: An International Overview*, CRIME & JUST. INT'L, 4-22, July/August 2006, (noting that community courts are in operation or planning in South Africa, England and Wales, Canada, and Australia); DIANA L. KARAFIN, OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA, COMMUNITY COURTS ACROSS THE GLOBE: A SURVEY OF GOALS, PERFORMANCE MEASURES AND OPERATIONS (2008) at v (noting that “there are currently more than 50 community courts open in the US and abroad, including 17 in South Africa alone”).

68. The list that follows is adapted from ROBERT V. WOLF, CTR. FOR CT. INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE (2007), available at [http://www.courtinnovation.org/\\_uploads/documents/Principles.pdf](http://www.courtinnovation.org/_uploads/documents/Principles.pdf) (last visited Sept. 25, 2008).

(3) Collaboration: By bringing together justice players (e.g., judges, prosecutors, attorneys, probation officers, court managers) and reaching out to potential stakeholders beyond the courthouse (e.g., social service providers, victims groups, schools), problem-solving agencies improve inter-agency communication, encourage greater trust between citizens and government, and foster new responses—including new diversion and sentencing options, when appropriate—to problems.

(4) Individualized Justice: Problem-solving courts use valid evidence-based risk and needs assessment instruments to link offenders to individually tailored community-based services with the goal of helping reduce recidivism, improve community safety, and enhance confidence in justice.

(5) Accountability: The justice system can send the message that all criminal behavior—even low-level quality-of-life crime—has an impact on community safety and has consequences. By insisting on regular and rigorous compliance monitoring—and clear consequences for non-compliance—the justice system can improve the accountability of offenders. It can also improve the accountability of service providers by requiring regular reports on their work with participants.

(6) Outcomes: The active and ongoing collection and analysis of data are crucial for evaluating the effectiveness of operations and encouraging continuous improvement.

What impact has problem-solving justice had on issues such as racial bias, disproportionate minority involvement in the criminal justice system, and cynicism about justice among minority groups? Are problem-solving courts fostering a new relationship between racial and ethnic minorities and the criminal justice system? Are they creating new challenges around race that have yet to be fully recognized or acknowledged?

#### A. *Linking Participants to Social Services*

Some who have expressed concern about the large number of low-level cases that have flooded state courts in recent years, including New York's Chief Judge, Judith S. Kaye, and members of the defense bar, have argued that the justice system should devote more resources to help address offenders' underlying problems.<sup>69</sup> Many problem-solving courts attempt to do just that. The Midtown Community Court, for example, provides space for social service providers to address the underlying problems of defendants, including substance abuse, housing, health, education and employment problems.<sup>70</sup> This idea—that the justice system should

69. See Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK (Oct. 11, 1999) (asserting that courts "should play a role in trying to solve the problems that are fueling our caseloads"); Berman & Feinblatt, *Problem-Solving*, *supra* note 60, at 173 (noting that "defense attorneys have been arguing for years that courts should make more aggressive use of drug treatment, mental health counseling, and other alternative sanctions.") See also, e.g., ROBERT V. WOLF, CALIFORNIA'S COLLABORATIVE JUSTICE COURTS: BUILDING A PROBLEM-SOLVING JUDICIARY 4,6 (Judicial Council of California 2005) (describing a judge in Placer County, California, who helped develop youth courts as "a more flexible strategy. . . that emphasized both rehabilitation and prevention" for teenage offenders and a deputy public defender in San Diego who launched the nation's first homeless court out of frustration with traditional approaches, such as fines or jail, that "do little to help [the homeless] find a permanent home or link them to services that might help them improve their lives").

70. MICHELLE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 3, (Harwood 2000).

link offenders to individually tailored community-based services—is reflected in the work of problem-solving courts around the country.<sup>71</sup>

Prevention is another goal of the Midtown Court. On-site services, which take up the entire fifth floor of the courthouse, are available not only to offenders but to non-defendants—basically, anyone from the community who seeks them.<sup>72</sup> In fact, the court performs street outreach to engage people with services *before* they enter the justice system.<sup>73</sup>

Local residents served by the Red Hook Community Justice Center in Brooklyn, N.Y., advocated for a similar approach. While some residents of the predominantly minority neighborhood “expressed suspicion of any institution connected to the criminal justice system,” others thought that establishing a community court could help address “drug use and all that came with it,” especially if the court provided services to “everyone touched by crime in Red Hook—defendants, victims, and those in the community who were simply worried about safety.”<sup>74</sup> After the justice center opened, residents began visiting it to take GED classes, get housing assistance, and seek voluntary drug treatment.<sup>75</sup>

Sociologists Robert J. Sampson of Harvard University and Stephen Raudenbush of the University of Chicago have argued that it is possible to inhibit both crime and disorder in minority communities by increasing “collective efficacy,” defined as a sense of “cohesion among neighborhood residents combined with shared expectations for informal social control of public space.”<sup>76</sup> The question is: do problem-solving courts help increase collective efficacy and, in so doing, do they help reduce minority involvement in the criminal justice system?

On the other hand, some have raised concerns about relying on the justice system to solve problems like the rampant use of drugs. These critics wonder whether problem-solving courts lead to “net widening”—bringing even more people into the criminal justice system and increasing state involvement in offenders’ lives. James R. Neuhard, director of the State Appellate Defender’s Office in Michigan, expressed concern that problem-

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71. WOLF, PRINCIPLES, *supra* note 68, at 7 (noting that “by customizing punishment, problem-solving courts seek to address offenders’ underlying problems, thereby reducing the likelihood of repeat offending and increasing the likelihood that the offender can become a productive member of society”).

72. ERIC LEE & JIMENA MARTINEZ, CTR. FOR COURT INNOVATION, *HOW IT WORKS: A SUMMARY OF CASE FLOW AND INTERVENTION AT THE MIDTOWN COMMUNITY COURT 6* (1998) (noting that “the Court offers a variety of services that are open to any defendant or community member on a voluntary basis”).

73. SVIRIDOFF ET AL., *supra* note 70, at 29, 64-65 (describing how the Midtown Community Court operated a program called Street Outreach Services that sent a police officer teamed with a court social worker into the neighborhood to encourage homeless individuals to voluntarily seek services in the courthouse); ANDERSON, *supra* note 62.

74. BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 64, at 79-80.

75. *Id.* at 80.

76. ROBERT J. SAMPSON AND STEVE RAUDENBUSH, NAT’L INST. OF JUST., *DISORDER IN URBAN NEIGHBORHOODS: DOES IT LEAD TO CRIME?* 1, 2 (2001) (The authors state that “in neighborhoods where collective efficacy was strong, rates of violence were low, regardless of sociodemographic composition and the amount of disorder observed. Collective efficacy also appears to deter disorder: Where it was strong, observed levels of physical and social disorder were low, after controlling for sociodemographic characteristics and residents’ perceptions of how much crime and disorder there was in the neighborhood.”).

solving courts “are setting up a wider net in the guise of help or treatment for our clients.”<sup>77</sup>

Morris B. Hoffman, a district judge in Denver, writes that “in Denver, the number of drug cases nearly tripled two years after the implementation of drug court” and “prison sentences more than doubled.”<sup>78</sup> According to Hoffman, “It is clear that the very presence of drug courts is causing police to make arrests in, and prosecutors to file, the kinds of ten- and twenty-dollar hand-to-hand drug cases that the system simply would not have bothered with before.”<sup>79</sup> Williams College Professor James L. Nolan says drug courts also expand judicial authority “into the lives of drug court clients in unprecedented ways.”<sup>80</sup>

Some have alleged that minorities are particularly vulnerable to net widening. Not only are drug sweeps often conducted in minority and low-income neighborhoods, but “poor and minority defendants [may] accept diversion into drug court where others would not,” writes Eric Miller, associate professor at Western New England College School of Law.<sup>81</sup>

The local defense bar argued that the establishment of the Midtown Community Court “would lead to punishment for offenders who otherwise might have been released with no sanction.”<sup>82</sup> This was no surprise, however; it was, from the outset, one of the court’s overt goals to strengthen penalties for low-level offenders.<sup>83</sup>

In response to critics who speculate that community courts bring more people to court, Judge Ruben Martino, who presides over the Harlem Community Justice Center, feels his court’s presence does not change the

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77. John Feinblatt & Derek Denckla, *What Does it Mean to be a Good Lawyer: Prosecutors, Defenders, and Problem-Solving Courts*, 84 JUDICATURE 206, 210 (2001) [hereinafter Feinblatt & Denckla, *Good Lawyer*].

78. James L. Nolan Jr., *Community Courts and Community Justice: Commentary: Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1562 (2003) (quoting Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT’G REP. 172 (2001/2002)).

79. *Id.* JUDGE William G. Meyer, who co-founded the Denver Drug Court, and THEN-DENVER DISTRICT ATTORNEY A. WILLIAM RITTER have DISPUTED HOFFMAN’S CLAIMS, WRITING: “There is absolutely no evidence—scientific or otherwise to support these contentions” that drug courts net widen or increase prison populations. They add that “the research on almost one hundred drug courts fails to establish any pattern where the drug courts are actually sending more people to prison than a traditional sentencing program.” William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENT’G REP. 179 (2001/2002).

80. Nolan, *supra* note 78, at 1562.

81. Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1568 (2004) (“The differential impact of the criminal justice system on poor individuals may be exacerbated for minorities, who are much more likely to receive incarcerative sentences than non-minorities. Such factors may lead poor and minority defendants to accept diversion into drug court where others would not.”).

82. John Feinblatt, Greg Berman, & Michelle Sviridoff, Nat’l Inst. of Just., *Neighborhood Justice at the Midtown Community Court*, in CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION 87 (1998).

83. *Id.* (“When [conventional criminal] courts allow offenders to walk, letting the process become the punishment, they send the wrong message to offenders, victims, police, and community residents. The message is that nobody cares, that the justice system is little more than a revolving door. It is precisely this perception that the Midtown Community Court was created to address. At Midtown, many defendants who might have escaped sanctions in a traditional court find themselves ordered to paint over graffiti or participate in drug treatment. Clearly there were holes in the net; the Midtown Community Court simply sought to mend them.”).

number of cases in the system. “We don’t control the cases that are brought here. If the cases weren’t coming here, they’d be going to a traditional court.”<sup>84</sup>

From Martino’s perspective, what is different is not the number or types of cases coming in the Harlem courthouse doors—it is what happens to the cases once they get there. For example, the justice center’s housing court provides litigants with more resources than a conventional courthouse. It has an on-site housing information center to help landlords identify resources to improve their buildings and assist tenants in applying for government entitlements. It also runs several programs to engage at-risk youth.<sup>85</sup>

Martino imposes more requirements on young people arrested for non-violent offenses. Not only must they appear regularly in court to promote accountability, but the young offenders must fulfill customized mandates, such as participating in tutoring. “I take the cases a lot more seriously than they’re taken [in a conventional courtroom] where the attitude is, ‘Oh it’s just trespassing, let them go.’ In contrast, I say, ‘Let’s put them on probation, let’s give them tutoring, counseling,’” Martino said. “I think if it gets these kids back on the right track, it’s worth it.”<sup>86</sup>

## B. *Legal Services*

It is no secret that the indigent defense system in the United States is under tremendous stress—caseloads are high and lawyers are stretched to their limits. Some say that problem-solving courts only exacerbate the situation. “In a criminal justice system that is overcrowded, defense resources are really stretched in specialty [problem-solving] courts,” says Lisa Schriebersdorf, director of Brooklyn Defender Services.<sup>87</sup>

Do pressures that public defenders face adversely affect the experience of minority participants in problem-solving courts? Do public defenders lack the time or resources to fully participate in problem-solving court proceedings? And do problem-solving courts present public defenders with new challenges—for example, increasing the levels of coercion faced by defendants to plead guilty or making it more difficult to challenge the statements of law enforcement?<sup>88</sup> Kevin Burke, a district judge in Hennepin

84. Telephone Interview with Ruben Martino, Judge, Harlem Community Justice Center (Jan. 25, 2008).

85. See CAROLYN TURGEON, CTR. FOR CT. INNOVATION, WORKING TOGETHER: HOW A NEIGHBORHOOD JUSTICE CENTER IN HARLEM IS BUILDING BRIDGES AND IMPROVING SAFETY (2007) available at [http://www.courtinnovation.org/\\_uploads/documents/working\\_together.pdf](http://www.courtinnovation.org/_uploads/documents/working_together.pdf) (last visited Sept. 25, 2008) (providing an overview of the Harlem Community Justice Center).

86. Martino, *supra* note 84.

87. Symposium, *The Birth of a Problem Solving Court*, 29 FORDHAM URB. L.J. 1758, 1776 (2002).

88. Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 59 (2000/2001) (pointing out that “the institutional pressure to plead guilty is quite strong. A good number of drug treatment court defendants are arrested and held on bail for several days before the treatment court judge sees them. Once in treatment court, they may be told that they will be released that day to an out-patient drug treatment program if they plead guilty. They are certainly entitled to reject the treatment-based plea offer and fight their case, but, unless they have the means to post bail, they will have to assert their innocence from behind bars.” Feinblatt & Denckla, *Good Lawyer*, *supra* note 77, at 209-10 (quoting Kim Taylor-Thompson, professor of clinical law at New York

County, Minnesota, acknowledges that drug courts may place extra pressure on low-income, minority defendants, asking, “Should defendants be forced to choose between treatment and their right to challenge racial profiling?”<sup>89</sup>

Clearly, some defense attorneys are not pleased with problem-solving courts. Law professor Kim Taylor-Thompson, in a roundtable discussion about the changing roles of lawyers in problem-solving courts, rejected the notion that defense attorneys should be more interested in getting drug-addicted defendants sober than limiting their client’s court involvement. “I take issue with the notion that defense lawyers should have a ‘yearning’ to do more than get their clients out of the system. When I get my client’s case dismissed, charges reduced, or sentence shortened, my yearning is satisfied. If the client needs or wants treatment, they should be able to gain access to it outside of the coercive atmosphere of a criminal proceeding.”<sup>90</sup>

This raises an important question about which there is, at the moment, little data: Do some attorneys automatically discourage their clients—regardless of the clients’ race or ethnicity—from participating in problem-solving courts? If so, this question may be particularly relevant to minority clients who, because they live in poor or underserved communities, often have limited access to appropriate drug or mental health treatment. For them, a problem-solving court might offer the best shot at recovery and avoiding incarceration or conviction.

It would be difficult to argue that problem-solving courts have addressed the issues of staff resources and the climate of coercion that many defenders complain about. On the other hand, it would be difficult to argue that they have made the situation worse. Indeed, most problem-solving courts have sought to promote rehabilitation at the expense of incarceration—a priority for many public defenders, including advocates of “community” or “holistic” defense, who feel defense attorneys should “look at all the problems facing our clients, not just the Fourth Amendment search.”<sup>91</sup>

At the very least, problem-solving courts add another element to the mix for defenders—they now must assess not only the chances of trial victory but their client’s physical or mental readiness for treatment. As Josh Bowers, of the University of Chicago Law School, puts it, “Ultimately, it is

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University School of Law, who notes a distinction between pre-plea and post-plea drug courts: “If we’re talking about a problem-solving court that seeks to address defendants’ issues pre-plea, then defenders become very concerned about excessive coercion. It becomes an impossibly difficult either/or question—either you access treatment or you face trial. Worse still, you can opt to protect your constitutional rights through a suppression motion and forego treatment or you can waive those rights and receive treatment. But, if you’re talking about a court that offers defendants treatment or services presentencing or post-plea, then we’re in a very different situation. There is far less coercion.”).

89. AUBREY FOX, *CTR. FOR CT. INNOVATION, BRIDGING THE GAP: RESEARCHERS, PRACTITIONERS, AND THE FUTURE OF DRUG COURTS* 14 (2004) [hereinafter Fox, *BRIDGING THE GAP*].

90. Feinblatt & Denckla, *Good Lawyer*, *supra* note 77, at 209.

91. ROBERT V. WOLF, *CTR. FOR CT. INNOVATION, BREAKING WITH TRADITION: INTRODUCING PROBLEM SOLVING IN CONVENTIONAL COURTS* 5 (2007) available at [http://www.courtinnovation.org/\\_uploads/documents/break%20with%20trad.pdf](http://www.courtinnovation.org/_uploads/documents/break%20with%20trad.pdf) (last visited Feb. 13, 2009) (quoting Cait Clarke, former director of the National Defender Leadership Institute at the National Legal Aid and Defender Association).

the addict's drug habit—not the lawyer's legal knowledge, training, or reason—that will dictate failure or success.”<sup>92</sup>

### C. *Alternatives to Incarceration*

One observer has suggested that the use of alternatives to incarceration, like drug courts, has the “potential, not only to reduce minority incarceration, but also to heal minority communities.”<sup>93</sup>

Writing in *Rutgers Race and the Law Review*, Michael Wright, a research fellow at the Mossavar-Rahmani Center for Business and Government at Harvard University, declared: “The ‘problem solving court’ provides a compassionate and effective way to quickly soften the blow of politicized drug campaigns and institutionalized racism that contribute to minorities bearing the brunt of society’s ‘race to incarcerate.’ . . . The problem solving model . . . facilitates the empowerment of minorities and their communities.”<sup>94</sup>

Wright sees drug courts as “a viable alternative to end the imprisonment of minorities” in part because of their ability to adapt, from jurisdiction to jurisdiction, to the unique needs of varied communities.<sup>95</sup> For this reason, “the drug court model is highly likely to fit and be successful in any community facing drug related crime.”<sup>96</sup>

In Wright's view, drug courts—by offering an alternative to incarceration and helping to reduce the rate of re-offending<sup>97</sup>—offer a stark contrast to conventional approaches: “The conventional system keeps the cycle going by using incarceration as a means of punishment and ultimately yielding a re-arrest rate of well over 60 percent. As a result, minority defendants are subjected to an even longer sentence.”<sup>98</sup>

Others see the situation differently. Eric Miller, associate professor at Western New England College School of Law, argues that drug courts, while perhaps diverting some defendants from formal incarceration, nonetheless impose restrictions on clients that, in his view, can be tantamount to incarceration: “Treatment sites may be inherently incapacitatory and require the offender to remain under observation in a designated place, such as a probation center or drug clinic, for more or less extended periods of time.”<sup>99</sup>

Miller expresses concern that advocates of drug courts, in an effort to establish an alternative to what many see as an overly punitive justice sys-

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92. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 818.

93. Wright, *supra* note 9, at 81.

94. *Id.*

95. *Id.* at 97.

96. *Id.*

97. *Id.* at 88. In support of the assertion that drug courts reduce re-offending, Wright cites Berman & Feinblatt, *Problem-Solving*, *supra* 60, at 126. See also generally MICHAEL REMPEL, DANA FOX-KRALSTEIN, AMANDA CISSNER, ROBYN COHEN, MELISSA LABRIOLA, DONALD FAROLE, ANN BADER & MICHAEL MAGNANI, CTR. FOR CT. INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS (2003) (finding significant reductions in recidivism in New York drug courts—an average of 29 percent over a three-year post-arrest period. When researchers looked at just drug court graduates, they documented a 71 percent reduction in recidivism.).

98. Wright, *supra* note 9, at 105.

99. Miller, *supra* note 81, at 1568.

tem, have failed to fully recognize drug courts' drawbacks. He believes drug courts have encouraged net widening (by "channel[ing] into the court those offenders who would otherwise escape the criminal justice system") and subjected this larger population to potential infringements on liberty that include judges with "tremendous discretion" and treatment regimes that are "often much longer than the alternative prison sentence."<sup>100</sup>

Miller, Bowers and others, including researchers from the Center for Court Innovation, note that those who fail in drug court often face "alternative . . . sentences that *exceed* customary plea prices."<sup>101</sup> The flipside, however, is that drug court participants who succeed in treatment reap substantial benefits by avoiding jail or prison entirely.<sup>102</sup>

These observations can be seen as attempts to answer a larger question: Do drug courts (and other problem-solving courts) give all participants—regardless of race, ethnicity or class—a fair shot at avoiding incarceration? The question must be asked at all phases of the process, from intake (when eligibility is determined), to assessment (when participants' treatment plans are shaped), to treatment (when cultural competency becomes particularly relevant), to court appearances, and to determinations about when (and what kind of) sanctions and rewards should be issued.

Unfortunately, there is a dearth of data. Rather than answers, researchers at the moment have only more questions. When it comes to eligibility, for example, what kinds of populations should drug courts seek? Should they create a mix of clients that reflects the racial composition of offenders in the courthouse? Or should they establish a population that reflects—in an attempt to compensate for an over-representation of minorities in the justice system—the racial composition of the community?

Robert Russell, who founded the Buffalo Drug Treatment Court and is a former chairman of the board of the National Association of Drug Court Professionals, has expressed concerns that some drug courts' eligibility criteria have the unintended effect of excluding minorities. A rule excluding all but first-time offenders, for example, might render a disproportionate number of black or Hispanic offenders ineligible. Or assessment criteria intended to weed out those considered "high-risk" may have the practical effect of creating a court population that tends to be more white and middle class.<sup>103</sup>

Russell acknowledges that historically many drug courts, in an attempt to establish themselves as a viable alternative to conventional case processing, deliberately shied away from the most challenging cases.

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100. *Id.* at 1558, 1480, 1501, and 1479.

101. Bowers, *supra* note 92, at 786 (emphasis added); Miller, *supra* note 81, at 1574 (noting "some drug court judges acknowledge that offenders spend more time in prison as a result of electing drug court than if they simply chose to proceed through the criminal justice system.") See also REMPEL, *supra* note 97, at 271 ("While drug court participants are less likely to be sentenced to jail or prison, the evidence does show that when they *are* sentenced to jail or prison, their sentences tend to be longer (in five of the six courts studied).").

102. See REMPEL, *supra* note 97, at 271 (noting "the substantial benefits accrued by drug court graduates, who avoid jail or prison").

103. Telephone Interview with Robert Russell, Founder, Buffalo Drug Treatment Court (Nov. 2, 2007).

“I think it was just the culture at the time approaching this new endeavor in a gingerly way. And it wasn’t just the court, it was the D.A.s saying, ‘Wait a minute. Who are we giving this chance to avoid jail? We want to work with people who haven’t had much contact with the criminal justice system,’”

Russell said.<sup>104</sup>

Diana L. Maldonado, who presides over a drug court in Chelsea, Massachusetts struggles with this issue. “I’m in a community that has a culturally diverse population and yet my drug court population is not as culturally diverse. Right now in our drug court we haven’t had one African American for about five or six months, and I know African Americans have been convicted of drug charges in Chelsea District Courts.”<sup>105</sup>

Russell believes drug courts can work effectively with high-risk populations, and that practitioners will come to see that working with clients who have a longer criminal history and greater addiction problems will provide drug courts with “the best bang for your buck.”<sup>106</sup> The first step is identifying whether or not current approaches used by drug courts are “retaining subgroups like blacks, Hispanics, women, youth to the same degree that they’re retaining other populations,” Russell said.<sup>107</sup> Researchers have found that drug court participants who are unemployed, low-wage earners or are less educated experience lower retention and graduation rates.<sup>108</sup>

Chris Watler, director of the Harlem Community Justice Center, calls drug courts an “off ramp” from the justice system, adding that “you want to provide as many off ramps as possible.” However, while no one “would argue that getting someone into treatment is a bad thing,” Watler notes, “the trick is to learn how to be culturally competent so that you have more success with the treatment options.”<sup>109</sup>

Still, Wright feels that drug courts are not only moving in the right direction but can compensate for other biases in the justice system: “We may not be able to change the unconscious, or even conscious, decisions of police when choosing neighborhoods to target for arrests. But, we can provide hope and healing to communities of color.”<sup>110</sup> Even more promising is the movement to integrate drug court principles into state courts, he writes. Such a movement has the potential to not only “transform minority perceptions of justice in the aggregate” but ensure that “thousands more minori-

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104. *Id.*

105. Telephone Interview, Diana L. Maldonado, Drug Court Judge, Chelsea, Mass. (Jan. 25, 2008).

106. Russell, *supra* note 103 (noting that research has shown that “drug courts have been most effective with ‘high-risk’ offenders who had more-severe criminal histories and drug problems”). See Victor Flango, *Problem-Solving Courts Under a Different Lens*, in FUTURE TRENDS IN STATE COURTS 44 (Nat’l Ctr. for St. Cts. 2007).

107. Russell, *supra* note 103.

108. VALERIE BRYAN, INDIVIDUAL AND COMMUNITY-LEVEL SOCIOECONOMIC FACTORS AND DRUG COURT OUTCOMES: ANALYSIS AND IMPLICATIONS, PRESENTED AT THE 2006 - 18TH NATIONAL SYMPOSIUM ON DOCTORAL RESEARCH IN SOCIAL WORK, (2006), available at <https://kb.osu.edu/dspace/bitstream/1811/25147/3/18VALERIEBRYANPAPER.pdf> (last visited Sept. 25, 2008).

109. Interview with Chris Watler, Director, Harlem Community Justice Center (Oct. 17, 2007).

110. Wright, *supra* note 9, at 105

ties in each state will have the opportunity for help and healing as an alternative to arrest, jail-time, and inevitably, re-arrest.”<sup>111</sup>

#### D. *Procedural Justice*

Wright is not alone in believing that drug courts have the potential to change the attitudes of minority populations toward the justice system. Burke, the district judge in Hennepin County, Minnesota, thinks drug courts offer the “potential to positively impact communities of color and their distrust of the justice system. This is a population that has no confidence in the justice system’s fairness. The potential here is to show that courts are a place where people are treated with respect and in a positive manner.”<sup>112</sup>

This notion ties into recent research about procedural fairness, which has found that “most people care more about procedural fairness—the kind of treatment they receive in court—than they do about ‘distributive justice,’ *i.e.*, winning or losing the particular case.”<sup>113</sup>

Some have argued that problem-solving courts can improve perceptions of procedural justice by offering offenders and other court participants contact with the justice system that is smaller scale and more individualized. Victoria Malkin, an anthropologist, found that “individuals processed through the Red Hook Community Justice Center receive a better version of ‘justice’ inside the courtroom . . . compared with the downtown version of plea bargain mills.”<sup>114</sup> Malkin continued:

For defendants, regardless of their disposition and mandate, they too appreciate an improved social and physical environment [offered by the smaller, community-based Red Hook Community Justice Center] compared to the downtown pens and courts where waiting times can reach two days and the courts frequently leave them feeling humiliated and ignored. Downtown, the arraignment and disposition alone is a process of punishment, even before the disposition and sentence. And aside from the punitive ideal, this downtown experience offers little benefit for the relationship between government and its citizens for building public trust and confidence.<sup>115</sup>

Following up on this idea, the Center for Court Innovation compared defendant perceptions of fairness in a “regular” criminal court and the Red Hook Community Justice Center. Eighty-six percent of those surveyed at the community court said that their case was handled fairly—a significant improvement on the regular criminal court. Just as important, the results were consistent across racial and ethnic lines and socioeconomic backgrounds as well.<sup>116</sup>

This finding is reinforced by the National Center for State Courts, which, in its national public opinion survey, found that African Americans

111. *Id.* at 100-01.

112. FOX, BRIDGING THE GAP, *supra* note 89, at 14.

113. BURKE & LEBEN, *supra* note 13, at 5.

114. Victoria Malkin, *Community Courts and Community Justice: Commentary: Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1587 (2003).

115. *Id.* at 1587-88.

116. M. Somjen Frazer, *Examining Defendant Perceptions of Fairness in the Courtroom*, 91 JUDICATURE 36, 37 (2007).

and Latinos show more support than whites for the new practices and procedures promoted by problem-solving courts: “There is overwhelming approval for the judicial and court roles associated with drug courts and other problem-solving courts. African-American respondents tend to be the most supportive of the new roles, followed closely by Latinos.”<sup>117</sup>

#### E. *Community Collaboration*

Support for community collaboration as a tool to fight bias and discrimination is reflected in a Conference of State Court Administrators position paper on racial and ethnic fairness that encourages judiciaries to “engage in outreach to increase awareness about how the courts work, especially in minority communities. The more these communities learn about the courts, the more confidence they will have to participate in the court process, whether as a litigant, juror or spectator.”<sup>118</sup> It is also reflected in The Sentencing Project’s report on reducing racial disparity in the justice system; the report recommends that police engage community stakeholders in discussions about “the identification of priority problems in the community; in the formulation of strategies and tactics by the police and other relevant agencies to address those problems, in the decision to deploy the resources of the police and other relevant agencies; and in the process of monitoring and assessing the effects of the problem-solving strategies.”<sup>119</sup>

But whether or not such a strategy can serve as an effective tool against bias depends on how the justice system defines community and the manner in which it engages community representatives. New York University law professor Anthony C. Thompson notes that a number of community courts were created with the strong support of local businesses who were seeking a way to clean up urban centers. In Thompson’s view these courts fail “to serve the interests of the entire community including the interests of the poor and disenfranchised.”<sup>120</sup>

Victoria Malkin, who conducted fifteen months of ethnographic research at the Red Hook Community Justice Center, describes numerous ways the justice center’s staff interacts with the community, including regular meetings of a court-sponsored community advisory board, permitting local social service agencies and community groups to provide services in the justice center itself, and having court staff attend meetings in the community. Yet, Malkin writes that while these different mechanisms permit the court “to receive local input” they don’t always mean the justice center and the community see eye to eye. She writes, “[w]hile the court and community may agree in their diagnosis of ‘quality of life’ problems, they do not necessarily coincide in their understanding of the solution.” She goes on to explain that while justice center leaders feel that mandated participation in social and community services is an appropriate sanction for those arrested or summoned for quality-of-life crimes, the defendants she spoke to felt that quality-of-life enforcement generated too many tickets and focused too heavily on “minority populations.” Defendants “frequently

117. ROTTMAN, PERCEPTIONS OF THE COURTS, *supra* note 38, at 4-5.

118. POSITION PAPER, *supra* note 14, at 6.

119. SCHRANTZ & MCELROY, *supra* note 16, at 30.

120. Thompson, *supra* note 60, at 90.

raised race and class issues, stating, for example, that they believed they were part of a social system that allows them to be targeted in order to provide police overtime and quotas.”<sup>121</sup>

Similarly, Professor Robert J. Sampson of Harvard University, says quality-of-life enforcement activities have the potential to sow tensions in minority neighborhoods. “There is mounting evidence that a strict police crackdown on minor disorder offenses may jeopardize the ability of the police to work as a partner with minority neighborhoods.”<sup>122</sup>

The relationship between court and community is a complicated one. After all, community courts are criminal justice projects that seek to keep offenders in the neighborhood rather than incarcerate them.<sup>123</sup> On its face, this would seem a tough sell, particularly to minority communities that have more than their share of unwanted projects. But planners of community courts have been able to win minority support for their projects in neighborhoods around the country. Why? If the Red Hook Community Justice Center and Harlem Community Justice Center are guides, because of the planners’ commitment to consultation, communication and collaboration.<sup>124</sup> The idea of giving local residents a greater voice in the justice system is a powerful one.

### III. NEXT STEPS

Much of what we know about problem-solving courts and race is speculative. Practitioners often base their knowledge on their personal exper-

121. Malkin, *supra* note 114, at 1583-5. It is beyond the scope of this article to look at the potential racial implications of enforcement strategies, but it is worth noting that a recently published study of misdemeanor marijuana arrests in New York City supports the notion that quality-of-life enforcement falls disproportionately on minorities. Researchers found that the “vast burden of arrests for smoking marijuana in public in New York City, a focal point of the NYPD’s so-called ‘quality-of-life’ policing, . . . fell on black and Hispanic citizens.” In addition, black and Hispanics who were arrested “were more likely to endure pretrial detention, to be convicted, and to suffer incarceration than whites arrested for the same crime.” See David B. Harris, *The Importance of Research on Race and Policing: Making Race Salient to Individuals and Institutions within Criminal Justice*, 6 CRIMINOLOGY & PUB. POL’Y 5, 6-7 (2007) (citing Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL’Y 131 (2007)).

122. Robert J. Sampson, *Neighborhood and Community: Collective Efficacy and Community Safety*, 11 NEW ECONOMY 106, 110 (2004).

123. JOHN FEINBLATT & GREG BERMAN, CTR. FOR CT. INNOVATION, COMMUNITY COURT PRINCIPLES: A GUIDE FOR PLANNERS (2000) available at <http://www.courtinnovation.org/uploads/documents/Communitycourtprinciples.pdf> (last visited Sept. 25, 2008).

124. Rolando Acosta, the first presiding judge at the Harlem courthouse, said the planning team “understood that the success of the Justice Center was going to be largely dependent upon the full support of the community in which the Center would be located. The community itself had to buy into the innovative community-based approach to dispensing justice.” See *The Birth of a Problem-Solving Court*, *supra* note 87, at 1760-61. In Red Hook, planners relied on community surveys, among other resources, to learn that “70 percent thought the community needed programs offering job training, victim services, day care, legal services, medical care, drug treatment, and high school equivalency diploma education”—information planners used to shape the roster of services available at the justice center.” See ROBERT V. WOLF, CTR. FOR CT. INNOVATION, DEFINING THE PROBLEM: USING DATA TO PLAN A COMMUNITY JUSTICE PROJECT 3 (1999) available at <http://www.courtinnovation.org/uploads/documents/Defining%20the%20Problem.pdf> (last visited Sept. 25, 2008). For further background on how planners consulted with the Red Hook community, see Greg Berman & Aubrey Fox, *Justice in Red Hook*, 26 JUST. SYS. J. 77 (2005).

iences rather than concrete data. But many working with problem-solving courts want to know more. The plea of William Ray Price Jr., a member of the Missouri Supreme Court and chairman of the Missouri Drug Court Commission, reflects a broad yearning for more information: “In Missouri, our most difficult people to treat are young African-American males. We need to know more about how to work with this population—I can’t go to the legislature asking for more money unless we can say we know what to do with our biggest problem.”<sup>125</sup>

In order to ensure that problem-solving courts work as fairly and effectively as possible with all populations, more research needs to be done. In the meantime, researchers and practitioners can focus on two important activities: they can collect more and better data, and they can improve their cultural competency.

### A. *Data Collection*

In order to draw conclusions about race and the criminal justice system—and specifically about race and problem-solving courts—researchers and practitioners need data. Of course, it’s not simply enough to say, “Collect data.” The question quickly becomes, “What kind of data?” This is a task best suited to professional researchers, who in coming years will hopefully incorporate race and ethnicity into rigorous studies of problem-solving courts. Still, individual questions of problem-solving courts cannot be expected to wait years for results. They need to know sooner rather than later if certain populations are affected in unique ways by problem-solving courts—and, if the affects are adverse, how to improve the situation.

To help practitioners in the field begin to answer these questions, at least preliminarily, problem-solving projects can collect their own data. Useful data starts with tracking the racial/ethnic breakdown of caseloads. For comparative purposes, problem-solving projects also need to know the racial/ethnic breakdown of: the larger defendant population; those screened for admission; those determined eligible; those who accept and don’t accept admission; and graduates.

Unfortunately, collecting racial and ethnic information isn’t easy. The first challenge is to define “race,” a word that, despite its familiarity, lacks an objective definition. Those who study race agree that race is a fluid concept: “Race is a matter of self-identity (what group a person chooses to identify with), social identity (what group others think a person belongs to), and legal identity (what group name appears on a person’s birth certificate).”<sup>126</sup>

Criminal justice researchers have long been aware that data on race is inadequate and inconsistent across databases. Not only are there discrepancies about definitions of race, but many databases have neglected whole categories of people, such as Hispanics, Asian Americans, and Native

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125. FOX, BRIDGING THE GAP, *supra* note 89, at 13.

126. Paul Knepper, *The Alchemy of Race and Crime Research*, in *THE SYSTEM IN BLACK AND WHITE: EXPLORING THE CONNECTIONS BETWEEN RACE, CRIME, AND JUSTICE* 15, 20 (Michael W. Markowitz and Delores D. Jones-Brown eds., Greenwood 2001).

Americans.<sup>127</sup> On top of that, race and ethnicity alone tell only part of the story. Socioeconomic factors are just as important, if not more so, suggesting that researchers and practitioners would benefit from collecting and analyzing that data as well.

Some numbers may be virtually impossible to gather. A particularly challenging category of crime is domestic violence. Research has found that “victims of color prefer to handle their problems without official intervention,” raising the possibility that numerous but unquantifiable acts of violence against minority victims never make it to court in the first place.<sup>128</sup>

In general, “when you talk about race or ethnicity variables, in 60 to 70 percent of databases it’s not really there,” said Wayne S. McKenzie, director of the Prosecution and Racial Justice Program at the Vera Institute of Justice. The problem is that “if you can’t count it, you can’t measure it, and if you can’t measure it, you can’t problem-solve around it effectively.”<sup>129</sup>

The Conference of State Court Administrators acknowledges that data is important to “highlight existing inequities in the justice system, but only when the method of collection and presentation is unassailable, i.e., when its objectivity is not in doubt.” The Conference also points out that “credible data collection would also, as a general matter, enhance the courts’ accountability with the public.”<sup>130</sup>

## B. *Cultural Competency*

Why does cultural competency matter? Arizona State University professor Marjorie Zatz offers this telling example:

Because looking an authority figure in the eye is a sign of disrespect for traditionally raised Latinos and many American Indian tribes, deferential Latino and Indian defendants will likely gaze downward when being interrogated by police, prosecutors, or judges. Yet in the dominant Euro-American culture, not looking an authority figure in the eye suggests the opposite—that one is lying.<sup>131</sup>

Training is one way to address issues of cultural competency. Hiring is another. Hiring diverse staff also helps build confidence in the justice system. As a woman who worked in the Nebraska court system for 30 years explained: “When [people] go in to any system and they do not see anybody that looks like them . . . administering those systems . . . then I think the perception automatically [is] that they’re not going to get fair treatment.”<sup>132</sup>

The Sentencing Project takes a similar view: “Criminal justice practitioners, like others, are likely to identify with those who look and act like

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127. SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, *The Color of Justice: Race, Ethnicity, and Crime in America* 13 (Wadsworth 1996). See also, *Race and Crime: Early Writings, in RACE, CRIME, AND JUSTICE: A READER 2* (Shaun L. Gabbidon & Helen Taylor Greene, eds., Routledge 2005) (noting “Native Americans continue to be one of the least studied groups in criminology and criminal justice”).

128. Joanne Belknap & Hillary Potter, *The Trials of Measuring the ‘Success’ of Domestic Violence Policies*, 4 CRIMINOLOGY & PUB. POL’Y 559 (2005).

129. Telephone Interview with Wayne S. McKenzie, Dir. of the Prosecution and Racial Justice Program at the Vera Inst. of Justice (Nov. 9, 2007).

130. POSITION PAPER, *supra* note 14, at 9.

131. Zatz, *supra* note 4, at 533-4.

132. Neeley, *supra* note 24, at 30.

them. Thus, judges and prosecutors may be more receptive to consideration of pretrial or sentencing options for defendants with whom they feel some connection.”<sup>133</sup>

The Harlem Community Justice Center has taken this idea a step further. Not only has it tried to hire a diverse staff, but it also deliberately sought employees from the neighborhood it serves. “Some of the people who work here are known by the people who come here. They shop in the same places, live in the same buildings, are members of the same churches and organizations,” said Judge Ruben Martino. “It not only makes visitors to the courthouse feel more comfortable, but the staff feels differently, too. I think our staff will go the extra yard, knowing that they’re really doing something for the benefit of their neighbors.”<sup>134</sup>

Perhaps the most basic component of cultural competency is language. If a litigant can’t communicate with the judge and staff in a problem-solving court, the chances of a positive outcome diminish considerably. But having a translator available for court appearances isn’t always sufficient. Judge Diana L. Maldonado, who presides over the drug court in Chelsea, Massachusetts, points out that in a drug court “the whole courtroom becomes a stage for learning and supporting the participant’s recovery.”<sup>135</sup> Participants are expected to watch and learn from their peers’ interactions with the judge, but few (if any) courts can afford to spare a translator to sit all morning or afternoon with individual offenders, translating the proceedings word for word. “If you have someone sitting there but not really understanding everything, then they’re not getting the full benefit of drug court. I don’t know how you compensate for that,” Maldonado said.<sup>136</sup>

Cultural sensitivity is also a concern for service providers. Many communities lack providers attuned to the specific needs of subpopulations. Even when a culturally appropriate provider is available, it can be hard to access. “Say you have a treatment provider that works well with young male African Americans, but it’s far from the courthouse. It might take the client half a day on public transportation to go back and forth. There are money, transportation and time issues. Even though you’re being culturally sensitive, it’s a double edged sword, because you’re also making treatment burdensome, and you can’t make treatment hard for people who don’t really want it,” Maldonado said.<sup>137</sup>

## CONCLUSION

Much has been written about the issue of bias and the criminal justice system. While the trend has been toward creating a fairer system where people of all races enjoy equal access and treatment, there is still room for improvement.

This article focuses on a single, relatively new justice system phenomenon: problem-solving courts. We know from current research that these courts—which combine treatment and/or sanctions with rigorous judicial

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133. SCHRANTZ & MCELROY, *supra* note 16, at 10.

134. Martino, *supra* note 84.

135. Maldonado, *supra* note 105.

136. *Id.*

137. *Id.*

monitoring—are influencing courthouse practice, changing public attitudes toward the justice system and impacting key outcomes like recidivism and public safety.

But what impact are they having on the debate about race and the justice system? Are they perpetuating bias already manifest in the justice system? Or are they helping ameliorate bias? Are they taking into account, when appropriate, issues of race and ethnicity? Or are they, perhaps in an effort to be race neutral, ignoring the topic?

This paper has highlighted key areas where race and bias are likely to have an impact. In some instances, these areas hold both promise and potential risks. Most problem-solving courts, for example, link offenders and sometimes victims to social services. While some have said access to culturally competent social services can improve outcomes for minority offenders, others have accused problem-solving courts of bringing more minority offenders into the system in the first place. Similarly, some defense advocates embrace problem-solving courts, while others worry that they do more harm than good; they say, among other things, that while problem-solving courts may help some offenders avoid jail, they can also do the opposite: for those who fail in treatment, they may generate sentences that are harsher than what might have originally been imposed.

Many of these concerns are relevant to all participants, regardless of race. Other concerns, however, are more specific to the experience of racial and ethnic minorities, including the all-important questions: which populations do best in problem-solving courts and which practices and procedures are most effective for which groups?

In order to answer these questions, more research needs to be done. By gathering and analyzing data that focus on the intersection of problem-solving courts and race, researchers and practitioners can hopefully better ensure that problem-solving courts provide equal access, appropriate treatment, and the fullest range of opportunities to litigants, victims, and communities, regardless of race, ethnicity, or socio-economic status.