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# THE EFFECTS OF NET-WIDENING ON MINORITY AND INDIGENT DRUG OFFENDERS: A CRITIQUE OF DRUG COURTS

JOEL GROSS\*

## I. INTRODUCTION

Proponents of therapeutic justice praise the drug court system for surpassing the traditional criminal justice system in lowering recidivism rates and reducing the negative effects associated with quality-of-life offenses.<sup>1</sup> For example, a United States Department of Justice study of recidivism rates in the drug courts of Miami, Florida found that only 9.7 percent of defendants were re-arrested and convicted within twelve months after graduation.<sup>2</sup> The report compared this number with the sixty percent recidivism rate amongst drug offenders in Miami's general population who did not participate in the city's drug court system.<sup>3</sup> Legal practitioners in jurisdictions

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\* University of Maryland School of Law J.D. Candidate, 2011. University of Maryland, College Park, B.A., Journalism, 2008. In loving memory of my cousin, Avi, who sought peace and equality between all people, regardless of race or religion. Special thanks to Professor Richard Boldt for enlightening me on this topic, and to my parents and two brothers.

1. See Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 967 (2006) (stating that “[p]roponents of drug courts cite lower recidivism rates, a decrease in drug use among participants, drug-free babies, cost-effective treatment, higher employment rates, and the ability to keep families together as reasons why these courts are preferable to the traditional criminal court model”). Therapeutic justice is a system which turns against the traditional criminal justice system’s goals in that it aims to provide treatment instead of punishment. Stacey M. Faraci, *Slip Slidin’ Away? Will Our Nation’s Mental Helath Court Experiment Diminish the Rights of the Mentally Ill?* 22 QUINNIPIAC L. REV. 811, 816–17 (2004). More specifically, the therapeutic justice model operates under the belief that addiction is not a failure of morals or free will on the part of the defendant that requires incapacitation, but rather a condition requiring medical and therapeutic attention. *Id.* Quality of life offenses are relatively minor crimes—such as loitering or prostitution—that make neighborhoods less desirable for its residents to live in. Todd W. Daloz, *The Challenges of Tough Love: Examining San Francisco’s Community Justice Center and Evaluating Its Prospects for Success*, 6 HASTINGS RACE & POVERTY L.J. 55, 58–59 (2009).

2. Peggy Fulton Hora et al., *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, 485 (1999). Additionally, the report found that only 13.2 percent of the drug court graduates were re-arrested and convicted after eighteen months and only twenty-four percent were re-arrested and convicted five years after graduation. *Id.*

3. *Id.*

across the United States have relied upon such data as evidence of the efficacy of the problem-solving court model.<sup>4</sup>

Drug courts emerged as a collateral result of the War on Drugs<sup>5</sup>—a policy that has resulted in unprecedented rates of incarceration throughout the country—and the efforts of the criminal justice stakeholders to shift the system’s focus from incapacitation of drug offenders towards rehabilitation.<sup>6</sup> However, while supporters consistently point to low recidivism rates as an indication of the courts’ success, opponents of the drug court model question whether drug courts have actually had a significant impact on recidivism rates and dispute the statistics on which drug court supporters rely.<sup>7</sup> Colorado District Court Judge Morris B. Hoffman, for example, cites a major flaw in the many studies celebrating the low recidivism rates of drug courts in noting that “[m]any of these studies suffer from a fatal methodological defect—they target drug court graduates instead of all drug court defendants.”<sup>8</sup> In so doing, studies of drug court effectiveness fail to account for the fact that the implementation of drug courts has “[triggered] such massive net widening that they end up sending many more drug defendants to prison than traditional criminal courts ever did.”<sup>9</sup>

The net-widening phenomenon refers to “an expansion in the number of offenders arrested and charged after the implementation of [a drug court] because well-meaning police and prosecutors now believe there to be something worthwhile that can happen to offenders once they are in the system (i.e., rehabilitative treatment instead of prison).”<sup>10</sup> Indeed, many experts contend that police and prosecutors in

4. Filler & Smith, *supra* note 1, at 967.

5. The “War on Drugs” was an effort conceived during the presidency of Ronald Reagan, whereby President Reagan advocated for “stricter federal criminal laws against the production, possession, and distribution of narcotics.” By the end of the 1980s, the prison population in the United States had increased by 115 percent, due in part to the crackdown on drug crime and the imposition of mandatory minimum sentences for some drug crimes. Ryan S. Marion, *Prisoners For Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 232 (2009).

6. Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 417 (2009) [hereinafter *Drugs, Courts, and the New Penology*].

7. See e.g., Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT’G REP. 172, 172 (2001-2002).

8. *Id.*

9. *Id.*

10. NAT’L. ASS’N. OF CRIMINAL DEFENSE LAWYERS, AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 42 (2009) (quoting Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 482–83 (2009)),

some cities arrest and charge more people for drug offenses than they normally would due to their overreliance on the capacity of drug courts to serve this influx of offenders.<sup>11</sup> Because police officers conduct the majority of drug sweeps in low-income neighborhoods where drug sale and use is rampant and more arrests can be made, an increased number of minority and indigent residents of these communities are caught in the proverbial “net”.<sup>12</sup> As one practitioner put it, “police focus on certain communities because it is simply easier and cheaper to make arrests and find crime [there].”<sup>13</sup>

Drug court critics contend that, although the intent of net-widening may be to bring minority and indigent offenders from impoverished communities into the rehabilitative drug court setting, such defendants are underrepresented in the drug court system when compared with white drug offenders with more affluent backgrounds.<sup>14</sup> As a result, the racial makeup of drug court participants does not correspond with the demographics of the general criminal justice system.<sup>15</sup> Due to the fact that minority drug offenders thrust into the criminal justice system through net-widening are given less of a chance than white offenders to participate in drug treatment programs, and because rejection by drug courts means placement in the general criminal justice system, they are incarcerated at a higher rate.<sup>16</sup> Additionally, certain classes of offenders who *are* admitted into drug court programs—particularly minority and indigent offenders—face significant hurdles in successfully completing the program due to the strict requirements of treatment plans formulated by drug court judges.<sup>17</sup> If unsuccessful in the drug court system, these offenders may ultimately face harsher sentences than they would have had they been

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[http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/\\$FILE/problem-solvingreport\\_110409\\_629%28K+PMS3145%29.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/$FILE/problem-solvingreport_110409_629%28K+PMS3145%29.pdf)  
[hereinafter NAT'L. ASS'N. OF CRIMINAL DEFENSE LAWYERS].

11. *Id.*

12. Robert V. Wolf, *Race, Bias, and Problem Solving Courts*, 21 NAT'L BLACK L.J. 27, 41 (2009).

13. NAT'L. ASS'N. OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 43.

14. Wolf, *supra* note 12, at 41.

15. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 18 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf> (noting that as of June 30, 2008, there were 4,777 black male inmates and 1,760 Hispanic male inmates per 100,000 U.S. residents, meanwhile there were only 727 white male inmates per 100,000 U.S. residents).

16. *See infra* Part III.A.

17. *See infra* Part III.B.

processed through the traditional criminal justice system in the first place.<sup>18</sup>

In order to remedy the difficulties that minority and indigent drug offenders from low-income neighborhoods face as a result of net-widening, changes should be made at the front-end of the drug court system.<sup>19</sup> Rather than focusing primarily on lowering recidivism rates, drug court officials should focus on admitting individuals who are most in need of rehabilitative care. Specifically, drug courts should modify the stringent screening policies that currently exist in a number of jurisdictions in order to afford low-level minority and indigent drug abusers a greater opportunity to access drug treatment and other rehabilitative services.<sup>20</sup> Additionally, judges should ensure that the benchmarks they set for drug court participants—but particularly minority and indigent offenders—allow such offenders to work towards graduation without having to jump through impossible procedural hoops.<sup>21</sup> Implementing such strategies will go a long way towards ensuring that minority and indigent drug offenders from low-income communities are adequately represented in drug courts and that all drug court participants, regardless of race or class, are given an equal opportunity to succeed.

## II. BACKGROUND:

### THE RISE OF DRUG COURTS AND THE NET-WIDENING PHENOMENON

Drug courts represent a new development in the United States' legal system, having only been in operation for a little more than twenty years. The problem-solving model that spawned drug courts gained support because it stood as an alternative to the perceived ineffectiveness of the traditional adversarial approach that has long defined American jurisprudence.<sup>22</sup> Additionally, drug courts eased the pressures of prison overcrowding by providing a means by which drug offenders could be rehabilitated rather than incarcerated.<sup>23</sup> Critics of

18. Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 481 (2009).

19. See *infra* Part IV.A.

20. *Id.*

21. See *infra* Part IV.B.

22. E. Michelle Tupper, *Children Lost in the Drug War: A Call for Drug Policy Reform to Address the Comprehensive Needs of Family*, 12 GEO. J. ON POVERTY L. & POL'Y 325, 338–39 (2005).

23. Daniel F. Piar, *A Welfare State of Civil Rights: The Triumph of the Therapeutic in American Constitutional Law*, 16 WM. & MARY BILL RTS. J. 649, 658 (2008).

the drug court model, however, point to the fact that in some jurisdictions, the implementation of drug courts has caused even more drug offenders to be sentenced to prison terms than before due to a phenomenon called net-widening.<sup>24</sup> This section discusses a brief history of the origins of drug courts in the United States,<sup>25</sup> introduces the concept of net-widening, and discusses the negative impact it has had on minority and indigent drug offenders from low-income neighborhoods.<sup>26</sup>

### *A. A Brief History of Drug Courts in the United States*

During the 1980s, as the War on Drugs raged in the United States, there was a drastic increase in the number of drug convictions in both the state and federal court systems.<sup>27</sup> The massive influx of drug offenders into the criminal justice system overwhelmed prisons across the country, necessitating an alternative means to deal with such offenders.<sup>28</sup> This unprecedented overcrowding has been linked to increased funding for the prison system and tougher sentencing policies, both of which were components of the War on Drugs.<sup>29</sup> Drug courts were implemented “in order to divert certain drug-related cases from the correctional system and into treatment and rehabilitation programs.”<sup>30</sup> After the initially experimental, but ultimately successful, institution of a drug court pilot program in Miami, Florida in 1989, drug courts emerged at an alarming rate across the country.<sup>31</sup> Nearly 500 drug treatment courts were in existence just one decade after the

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24. Robert G. Lawson, *Drug Law Reform-Retreating From an Incarceration Addiction*, 98 KY. L.J. 201, 208 (2010).

25. See *infra* Part II.A.

26. See *infra* Part II.B.

27. See Donald J. Shoemaker & Danielle McDonald, *An Evaluation of the Drug Court of the Twenty-Third Judicial Circuit Court of Virginia: A Response to the War on Drugs*, 39 CRIM. L. BULL. 569, 569 (2003).

28. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1481 (2004) (Drug courts, according to Miller “constitute an alternative to the dominant liberal reaction to the War on Drugs...”) [hereinafter *Embracing Addiction*].

29. Lauren M. Cutler, *Arizona’s Drug Sentencing Statute: Is Rehabilitation a Better Approach to the “War on Drugs?”* 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 397, 401 (2009). According to the Department of Justice, 216,000 people were incarcerated in the United States in 1974. *Id.* By 2001, this number had risen to 1.3 million people, an increase of over 600 percent. *Id.*

30. Shoemaker & McDonald, *supra* note 27, at 570. The first drug court was established in 1989 in Miami, Florida. *Id.*

31. O’Hear, *supra* note 18, at 479.

creation of the first drug court, and by the end of 2004, there were over 1,600 drug courts nationwide.<sup>32</sup> Drug courts now exist in all fifty states.<sup>33</sup>

Drug courts, one of many specialized types of problem-solving courts, differ from traditional courts in that the judge, prosecutor, and defense counsel are members of a non-adversarial treatment team, the primary focus of which is rehabilitation, not incapacitation.<sup>34</sup> In the drug court setting, the judge's role was to ensure the defendant's treatment and rehabilitation, rather than merely determining guilt or innocence.<sup>35</sup> The drug court judge retained authority to set the terms and benchmarks of treatment plans for the defendant and monitored that plan moving forward.<sup>36</sup> The goal of the drug court system, therefore, was and still is to "use the court's sanctioning power to treat drug offenders rather than expedite the process of incarceration."<sup>37</sup> The hope was that, by focusing on rehabilitation, drug courts would improve the quality of life of drug abusing individuals and promote the positive integration of such individuals back into the community.<sup>38</sup> Jurisdictions throughout the United States implemented drug courts at a rapid pace throughout the 1990s and 2000s, and today there are approximately 2,000 drug courts nationwide.<sup>39</sup>

*B. The Drug Court System Causes Massive Net-Widening in Urban Neighborhoods Where Low-Level Drug Activity is Prevalent*

The War on Drugs, with its active encouragement of aggressive policing and harsh sentencing, caused drastic overcrowding in the American prison system.<sup>40</sup> During the 1980s, drug-related arrests rose nearly 126 percent, while arrests for all other crimes increased only twenty-eight percent, due largely to mandatory minimum sentences

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32. *Id.*

33. *Id.*

34. *Drugs, Courts, and the New Penology*, *supra* note 6, at 423.

35. *Id.* at 422–23.

36. *Embracing Addiction*, *supra* note 28, at 1481–82.

37. *Id.* at 1481.

38. *See, e.g.*, DRUG TREATMENT COURT COMMISSION: VISION STATEMENT (2003), <http://www.courts.state.md.us/opsc/dtc/pdfs/visionandmissionstatement.pdf>.

39. OFFICE OF NATIONAL DRUG COURT POLICY, DRUG COURTS: PROVIDING TREATMENT INSTEAD OF JAIL FOR NON-VIOLENT OFFENDERS (2008) [http://www.ondcp.gov/dfc/files/drug\\_courts.pdf](http://www.ondcp.gov/dfc/files/drug_courts.pdf).

40. *Drugs, Courts, and the New Penology*, *supra* note 6, at 421.

imposed for drug sale or possession.<sup>41</sup> In 2003, twenty percent of inmates in state prisons were serving time for drug convictions.<sup>42</sup> By December 2005, there were over 2.2 million prisoners in federal or state prisons or local jails in the United States.<sup>43</sup> Those within the Miami, Florida justice system, the home of the first drug court, perceived the implementation of drug courts as a way of relieving this overcrowding of the prison system.<sup>44</sup>

As a result of the proliferation of drug courts, well-meaning police officers and prosecutors arrested and charged more offenders under the assumption that something worthwhile could happen to such offenders once they were in the penal system and eligible for drug court rehabilitation.<sup>45</sup> Officers targeted areas where they were certain that a substantial amount of drug dealing and possession took place—low-income neighborhoods with large minority populations.<sup>46</sup> Police officers targeted low-level drug offenders who were involved in “\$10 and \$20 hand-to-hand drug cases that the system simply would not have bothered with before.”<sup>47</sup> A Department of Justice study found that “disproportionate minority arrests for drug possession and distribution” were taking place, a notion validated by the fact that in 1997, eighty-six percent of offenders sentenced in federal court on crack cocaine offenses were African-Americans, despite sixty-six percent of crack cocaine users being Caucasian or Hispanic.<sup>48</sup>

The effect that net-widening has had on the drug offender incarceration rate in jurisdictions with drug courts is noticeable. For example, the general court system in Denver, Colorado has seen a massive influx of drug offenders since the implementation of its drug

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41. Douglas J. Quivey, *Market-Oriented Approach to Determining Drug Quantity Under the Federal Sentencing Guidelines*, 1993 U. ILL. L. REV. 653, 654 n.5 (1993). “Mandatory minimum sentences” force judges to deliver fixed sentences to individuals convicted of a crime, regardless of culpability or other mitigating factors. Aron M. Zimmerman, *Home Alone: Children of Incarcerated Mothers in New York City Under the Rockefeller Drug Laws*, 12 CARDOZO J.L. & GENDER 445, 445 (2005).

42. Theodore M. Shaw, *Keynote Address: Maintaining Hope in the Struggle Against the Constitutional Tolerance of Racial Discrimination*, 39 COLUM. HUM. RTS. L. REV. 59, 69 (2007). In the same year, nearly 87,000 people were being held in federal prison for drug offenses. *Id.*

43. *Id.* To put this number in perspective, one out of every 136 residents of the United States was being held in prison or jail. *Id.*

44. John S. Golkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 947 (2000).

45. O’Hear, *supra* note 18, at 483.

46. Wolf, *supra* note 12, at 40.

47. NAT’L. ASS’N. OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 42.

48. Shaw, *supra* note 42, at 70.



courts.<sup>49</sup> In the year before the implementation of Denver's drug court system, 265 drug offenders were sentenced to prison in cases decided in the Denver District Court.<sup>50</sup> In the first year after Denver began its drug court program, 434 drug offenders received prison sentences.<sup>51</sup> Just two years later, that number jumped to 625 drug offenders.<sup>52</sup> Although the percentage of drug offenders sentenced to prison has remained constant in the Denver criminal justice system, the number of drug defendants sentenced to prison has more than doubled since the implementation of drug courts.<sup>53</sup> The phenomenon occurring in Denver is a classic example of net-widening—more drug offenders being brought into the system and sentenced to prison as a result of the implementation of drug courts in the jurisdiction.<sup>54</sup> The rise in incarceration rates despite the implementation of drug courts in jurisdictions such as Denver flies in the face of drug court objectives, which aim to rehabilitate, rather than incapacitate, the offender.<sup>55</sup> Denver's problems are indicative of a number of jurisdictions around the country, particularly those with large urban communities.

### III. PROBLEMS MINORITIES AND INDIGENTS FROM LOW-INCOME NEIGHBORHOODS FACE DUE TO NET-WIDENING

The net-widening phenomenon presents a major problem in that it counteracts one of the main purposes of implementing drug courts in the first place—the alleviation of prison populations across the United States. The increased number of drug offenders in Denver's prison population since the drug court system was established there illustrates this point. Net-widening, however, is even more of a problem when viewed in the context of race- and class-based disparities. Specifically, net-widening has swept minority and indigent drug offenders from low-income communities into the criminal justice system, where many are either ineligible for or unable to complete

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49. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1510 (2000).

50. *Id.* The 265 drug offenders who were sentenced to prison represented nearly eighty-six percent of the total number of offenders who sustained drug convictions in Denver District Court in 1993. *Id.*

51. *Id.* at 1510–11. The 434 drug offenders who were sentenced to prison represented nearly eighty percent of the total number of offenders who sustained drug convictions in the Denver Drug Court in 1995. *Id.*

52. *Id.* at 1511.

53. *Id.*

54. *Id.*

55. *Id.* at 1511–12.

drug treatment programs. This section discusses how drug court screening requirements in many jurisdictions make it difficult for minority and indigent offenders from low-income communities to gain access to drug treatment programs.<sup>56</sup> Even if such minority or indigent offenders from low-income communities *are* accepted into drug treatment programs, they are often doomed to fail out of the program and end up incarcerated as a result of the demanding procedural requirements of drug treatment programs in many jurisdictions.<sup>57</sup>

*A. Minorities are Less Likely to Gain Access to Drug Court Rehabilitation Programs than Caucasian Drug Offenders*

Despite the disproportionate number of minorities who are charged with low-level drug offenses, minority offenders are less likely to be given the opportunity to enter drug court programs compared with white offenders because of the strict screening requirements of many drug courts.<sup>58</sup> The net-widening phenomenon brings minority offenders into the system, but “as long as blacks continue to be dramatically overrepresented at the front end of the system, it is unlikely that they will be anything but dramatically overrepresented at the back-end, in prison.”<sup>59</sup> As a result of drug court proponents focusing on the recidivism rates of graduates, drug courts create standards that admit only offenders that are likely to avoid the criminal justice system after graduating from the drug court program. For example, in Baltimore, Maryland, admission into the drug court system requires, among other things, that the offender have an indication of serious or chronic substance abuse and not have any convictions for “violent offenses.”<sup>60</sup> Likewise, in the Miami drug court program, offenders who “have a history of violent crime, have been

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56. *See infra* Part III.A.

57. *See infra* Part III.B.

58. NAT'L. ASS'N. OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 42 (noting that California drug courts in four separate counties admitted a proportionately greater number of Caucasian offenders even though persons of color comprise a disproportionately large percentage of the drug offender population eligible for drug court services. Additionally, there were no African Americans admitted into the drug court system in Pima County, Arizona, and Hispanics “are way under-represented”).

59. O'Hear, *supra* note 18, at 479.

60. Denise C. Gottfredson et al., *Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study*, 2 J. EXPERIMENTAL CRIMINOLOGY 67, 70 (2006).

arrested for drug sale or trafficking, or have more than two previous nondrug felony convictions are typically ineligible.”<sup>61</sup>

Rigid screening requirements, such as those mentioned above, present a tremendous disadvantage for low-level drug offenders, many of whom are minorities or indigents who hope to receive treatment through a drug court program.<sup>62</sup> These low-level offenders are often from low-income communities with weaker social support networks and fewer resources available to help them avoid criminal activity.<sup>63</sup> Socioeconomic circumstances of drug-dependent minorities from urban areas tend to cause the group to rely on “ancillary criminal activity in order to support their dependency.”<sup>64</sup> Often times, such ancillary criminal activity includes crimes of violence, meaning that minority drug offenders from low-income communities often have more extensive criminal records than white drug offenders.<sup>65</sup> As a result, an increasing number of minority and indigent low-level drug offenders are automatically ineligible for drug court programs in some jurisdictions because their history of violent crime prevents them from satisfying those drug courts’ screening requirements.<sup>66</sup>

The policies outlined above, which many drug courts across the nation currently institute in screening drug offenders for admission into drug treatment programs, yield predictable results.<sup>67</sup> Capacity to cease drug use is often directly related to the participant’s affluence, social supports, and degree of addiction.<sup>68</sup> Participants who need the help of the drug courts the most—low-level minority or indigent offenders whose drug use rises to the level of pathological addiction—often are denied entrance into the drug court program and end up going to prison or are released back into society without the aid of any rehabilitative services, while those who can more easily complete the requirements are accepted.<sup>69</sup> This trend reflects, to some extent, that

61. Miami-Dade County Drug Court, Frequently Asked Questions, *available at*, [http://www.jud11.flcourts.org/programs\\_and\\_services/drug\\_court.htm#dcq2](http://www.jud11.flcourts.org/programs_and_services/drug_court.htm#dcq2) (last visited February 26, 2010).

62. O’Hear, *supra* note 18, at 479.

63. *Id.* at 470.

64. *Id.* African-Americans and other minorities who reside in urban areas littered with drug use and sale tend to be exposed to family dysfunction, reduced access to education and job opportunities, and poverty. Donald C. Nugent, *Judicial Bias*, 42 Clev. St. L. Rev. 1, 46 (1994).

65. O’Hear, *supra* note 18, at 470.

66. *Id.* at 478.

67. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. Rev. 783, 822–23 (2008).

68. *Id.*

69. *Id.*

low-level minority and indigent offenders swept into the criminal justice system through net-widening are typically less affluent, lack social support systems, and have more extensive criminal records due to their exposure to ancillary criminal activity.<sup>70</sup>

The effect of drug court screening requirements on minorities and indigents is readily apparent in many jurisdictions. For example, the Honorable Diana L. Maldonado, who presides over a drug court in Chelsea, Massachusetts, noted the following:

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>71</sup>

Judge Maldonado's comments reflect the paradox that characterizes the net-widening phenomenon—despite increasing arrests of low-level, minority and indigent drug offenders due to the implementation of the drug court system, many such offenders never get to take advantage of rehabilitative programs offered by the drug courts and instead end up incarcerated. This is directly attributable to the fact that many minority and indigent offenders are exposed to ancillary criminal activity and have prior criminal activity on their records.<sup>72</sup> This result comes from police and prosecutorial net-widening at the arrest and charging stage and from drug courts' desire to have low graduate recidivism rates at the admission stage.

Robert Russell, founder of the Buffalo, New York, Drug Treatment Court and former chairman of the board of the National Association of Drug Court Professionals, asserts 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."<sup>73</sup> Russell believes, however, that drug courts *can* work effectively with "high-risk" populations, and that practitioners will realize that if drug courts accept clients who have a

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70. O'Hear, *supra* note 18, at 470.

71. Wolf, *supra* note 12, at 45 (quoting the Honorable Diana L. Maldonado).

72. O'Hear, *supra* note 18, at 470–71.

73. Wolf, *supra* note 12, at 44.

longer criminal history and greater addiction problems, it will provide the best “bang for your buck.”<sup>74</sup>

Currently, however, net-widening brings low-level, minority and indigent drug offenders into the criminal justice system at a rapid pace, many of whom are automatically ineligible for drug courts.<sup>75</sup> In order to curtail the discrimination that currently pervades the drug court system, drug court officials should modify screening standards to ensure that the racial composition of drug courts is indicative of the racial makeup of the criminal justice system or the community as a whole.<sup>76</sup>

*B. Minority and Indigent Drug Offenders Face Comparatively Difficult Hurdles In Completing Drug Court Programs and Avoiding Incarceration*

Net-widening has not only resulted in problems for the low-level minority and indigent drug offenders who are denied access to drug courts and subsequently incarcerated, but also for those low-level offenders who *do* qualify for and are admitted into drug court treatment programs.<sup>77</sup> High failure rates for minority and indigent offenders—which often result from the procedural requirements of drug court programs—consistently undermine the effectiveness of drug courts as a prison diversion program.<sup>78</sup> Once admitted into a drug court program, offenders face a system where failure may amount to a greater prison sentence than would non-participation in the drug court program altogether.<sup>79</sup> In fact, participants in drug treatment courts are not guaranteed a more lenient sentence than nonparticipants.<sup>80</sup> In some

74. *Id.* at 45.

75. Vickie Baumbach, *The Operational Procedure of Drug Court: Netting Positive Results*, 14 TRINITY L. REV. 97, 115–16 (2007).

76. *See* Wolf, *supra* note 12, at 44.

77. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 42–43.

78. *Id.* For example, although graduation rates fluctuate depending on the jurisdiction, generally drug courts graduate between one-quarter and two-thirds of its participants. Although there are about 70,000 drug treatment court participants at any given time, the annual graduate rate for drug treatment courts is only 16,000, illustrating the high failure rate. O’Hear, *supra* note 18, at 480.

79. O’Hear, *supra* note 18, at 480.

80. *Id.* Even drug court graduates may face substantial prison time for missteps they make during their time in the drug court program. A study of drug courts in Santa Clara, California, showed that the average time spent in jail for those completing the drug court program was fifty-one days. A similar study of drug courts in Baltimore city found that drug court participants spent approximately fifty-five days in jail for non-compliance with program conditions. *Id.* at 480–81.

jurisdictions, violating a drug-treatment requirement through acts such as positive drug tests, missed appointments, or re-arrest is punished through a system of graduated sanctions that may include jail time.<sup>81</sup> Repeated failures will eventually result in revocation of deferred judgment or probation and the imposition of a sentence, typically imprisonment.<sup>82</sup>

As a result of socioeconomic conditions, minority and indigent offenders from low-income communities are prone to be at a disadvantage in completing the benchmarks of the drug court program compared with more affluent offenders.<sup>83</sup> Many drug courts require frequent court appearances, self-help meetings, and travel for random drug screenings.<sup>84</sup> For those low-level offenders from poor socioeconomic backgrounds, fulfilling the stringent requirements of a drug court program may be nearly impossible, particularly considering that many such offenders do not have adequate transportation and work longer hours in order to make enough money to support their families.<sup>85</sup>

Criminal defense lawyers around the country have voiced concern over the issues that clients from low-income neighborhoods face in completing drug court requirements.<sup>86</sup> Speaking of the requirements for a Pennsylvania drug court, one lawyer said that “[t]he fees and transportation requirements of this court preclude indigent participation.”<sup>87</sup> These concerns are buttressed by the fact that some treatment programs include multiple individual and group therapy sessions each week.<sup>88</sup> Many drug courts also require participants to seek employment, submit five to seven urine tests per week, and attend weekly court appearances.<sup>89</sup> Many drug offenders from low-income communities do not have access to reliable transportation and need to arrange transportation to a number of different locations several days a

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81. *Id.*

82. *Id.* at 480.

83. NAT'L. ASS'N. OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 43.

84. *Id.*

85. *Id.*

86. *Id.* For example, in some jurisdictions, African-Americans are thirty percent more likely than white participants to fail out of a drug treatment program. O'Hear, *supra* note 18, at 480.

87. NAT'L. ASS'N. OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 43.

88. *Id.*

89. *Id.*

week in order to satisfy the program's requirements.<sup>90</sup> As a result, steps should be taken to ensure that procedural guidelines are put in place to give drug offenders from low-income communities the opportunity to receive the rehabilitative care they need and graduate from drug treatment programs.

IV. REMEDIES:  
REDUCING PROBLEMS STEMMING FROM NET-WIDENING FOR  
MINORITIES AND INDIGENTS IN DRUG TREATMENT PROGRAMS

Although net-widening results in tremendous hardships for minorities and indigents from low-income communities at both the front-end of the drug court system and in drug treatment programs themselves, changes can be made to give such offenders a better opportunity to successfully be rehabilitated back into society. This section proposes changes that can be made to drug courts' screening requirements in order to allow minority and indigent offenders from low-income communities—many of whom have been exposed to criminal activity in the past—to take advantage of rehabilitative treatment programs provided by drug courts.<sup>91</sup> Additionally, this section discusses ways in which the procedural requirements of drug treatment programs can be made more feasible for minority and indigent drug offenders from low-income communities to attain.<sup>92</sup>

*A. Drug Court Screening Requirements Should be More Sensitive to Race and Class Biases and Less Focused on the Offender's Chances of Graduation*

It is unrealistic to think that dismantling the drug court regime is a feasible solution to the problems caused by net-widening, so changes must be made to the current system to correct problems for minority and indigent offenders at the front-end of the system. Drug court admission criteria should be tweaked so as not to exclude those who need treatment for addiction but may be a higher risk to graduate

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90. *Id.* Studies show that African-Americans, whether poor or not, rely more heavily on public transportation than do poor whites. The use of public transportation by African-Americans is 8 times higher than for whites, and the use of public transportation for Hispanics is 4 times higher than for whites. Tsilly Dagan, *Commuting*, 26 VA. TAX REV. 185, 221 n.73 (2006) (quoting John Pucher et al., *Socioeconomics of Urban Travel: Evidence from the 1995 NPTS*, 52 TRANSP. Q. 15, 25 (1998)).

91. See *infra* Part IV.A.

92. See *infra* Part IV.B.

the program due to lesser means.<sup>93</sup> In identifying who to admit into the treatment programs, “. . . drug courts need to be sensitive to class and race bias, real or apparent. . . [because] [u]nless care is taken, diversion courts may tend disproportionately to work with white and middle-class substance abusers.”<sup>94</sup>

One set of screening procedures drug courts could use to eliminate some of the disadvantages that minorities and the poor face in being accepted into drug courts due to past violent crimes is an approach tailored for offenders who are in the aging-out process of drug abuse.<sup>95</sup> The aging-out process occurs when drug users have internalized a commitment to therapeutic intervention and have become more committed to seeking drug treatment.<sup>96</sup> Once an offender shows evidence of a chronic addiction and a commitment to get clean, he or she could choose, or “opt-in,” to enter the program with the incentive of expunging past crimes from their record upon a showing that their addiction to drugs was a driving force behind the crime’s commission.<sup>97</sup> Under the “opt-in” approach, offenders with a past criminal history who could demonstrate a chronic addiction and evidence of “aging out” would have an improved chance at entrance and graduation from drug court programs as compared to the current drug court structure, which systematically excludes certain drug offenders based on past criminal history in many states.<sup>98</sup> By showing that past crimes were committed because of a dependency on drugs, low-level offenders could use drug court rehabilitative services to both eradicate their dependency and show that recidivism is unlikely to occur in the future. Approaches such as the “opt-in” approach could lead to a fairer front-end screening process for minority and indigent offenders and allow drug courts to continue its goal of rehabilitating offenders.

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93. NAT’L. ASS’N. OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 42.

94. NATIONAL INSTITUTE OF JUSTICE, THE REBIRTH OF REHABILITATION: PROMISE AND PERILS OF DRUG COURTS 5 (2000), <http://www.ncjrs.gov/pdffiles1/nij/181412.pdf>.

95. Bowers, *supra* note 67, at 831.

96. *Id.*

97. *Id.*

98. See *id.* at 831–32.



*B. Drug Courts Should Revise Procedural Benchmarks to Ensure that all Participants are Equipped to Complete the Program, Regardless of Race or Class*

The number of drug court sessions, required meetings, and drug tests are a heavy burden for minority and indigent drug court participants who may lack resources to keep up with such stringent requirements.<sup>99</sup> Although drug courts should maintain benchmarks that accomplish rehabilitative goals, the requirements should not force participants to quit their jobs or otherwise raise insurmountable barriers to success.<sup>100</sup> Drug courts in larger cities should make transportation vouchers available to participants—and in areas where public transportation is unavailable, drug courts should provide transportation or adopt schedules that make it possible for participants to secure transportation in order to complete the benchmarks of the programs.<sup>101</sup> The current drug court system simply requires too much of indigent offenders because participants without transportation have to arrange transportation several days a week in order to satisfy their obligations to the drug court program.<sup>102</sup> The burden for those offenders who live in low-income neighborhoods with less-developed public transportation systems make completion of drug treatment programs impracticable and can hold up the participant's progress significantly, or even lead to sanctions of jail time and eventual expulsion from the program.<sup>103</sup> These procedural changes are especially necessary given that, in many cases, minority and indigent offenders are only in drug courts as a result of net-widening. If procedural benchmarks required for drug court program completion are made more attainable for minority and indigent drug offenders, such offenders will undoubtedly be more likely to receive the rehabilitative aid they need to graduate from drug court programs.

## V. CONCLUSION

The drug court model currently in place in many jurisdictions across the country has caused such massive net-widening that certain groups—such as minority and indigent residents of low-income

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99. NAT'L. ASS'N. OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 45.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

neighborhoods—face significant disadvantages when compared with white offenders.<sup>104</sup> Due to the mistaken belief that the implementation of drug courts warrants the arrest and charging of a greater number of drug offenders, police are arresting and prosecutors are charging an increasing number of low-level drug offenders.<sup>105</sup> Because the easiest place for police to arrest such offenders is in urban areas, where drug dealing is prevalent amongst people from poor socioeconomic backgrounds, officers are making increasing arrests in “the kinds of \$10 and \$20 hand-to-hand drug cases that the system simply would not have bothered with before.”<sup>106</sup> Although an increasing number of low-level drug offenders, many of whom are minorities and indigent, are being arrested as a result of drug court implementation, few of them are actually admitted into drug court programs.<sup>107</sup> This is because a number of drug courts have strict screening requirements which exclude drug offenders with histories of violent crime, which many low-level drug offenders have as a result of their poor socioeconomic backgrounds.<sup>108</sup> Even for those minority and indigent offenders from low-income neighborhoods who *are* admitted into drug court programs, often times the stringent procedural benchmarks that drug courts implement put those offenders at a disadvantage compared to other offenders.<sup>109</sup>

As the drug court system is unlikely to be eradicated, the focus should be on how to make the front-end of the drug court system more accessible to minority and indigent offenders so that those groups can take advantage of the rehabilitative model.<sup>110</sup> This can be accomplished only if drug courts in all jurisdictions ensure that their screening requirements and procedural benchmarks give all drug offenders who have the potential to succeed in a drug court treatment program that opportunity.<sup>111</sup> If efforts are made to reduce the problems faced by minorities and indigents at the front-end of drug courts, the impact on such offenders caused by the net-widening phenomenon can be alleviated in that those minority and indigent drug offenders who are brought into the criminal justice system will actually receive the rehabilitative aid that the drug treatment courts can provide them

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104. *See supra* Part II.B.

105. NAT'L. ASS'N. OF CRIMINAL DEFENSE LAWYERS, *supra* note 10, at 42.

106. *Id.*

107. *See supra* Part III.A.

108. *Id.*

109. *See supra* Part III.B.

110. *See supra* Part IV.A.

111. *See supra* Part IV.B.

instead of ending up in prison. As such, drug courts will be able to achieve their goal of allowing offenders to avoid incarceration and will soften the negative impact of net-widening, which many critics point to as one of the biggest flaws of the problem-solving court system.