

# Access Differential: Comparing Problem-Solving Courts and Probation

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## Abstract

*Since their inception in 1989, problem-solving courts (PSCs) offer a therapeutic justice intervention for individuals with non-violent offense charges/convictions in an attempt to address the underlying social issues that resulted in an initial arrest. Prior research points out that Black and Hispanic/Latinx people tend to be underserved in PSCs compared to incarceration and probation populations (Marlowe, Hardin, & Fox, 2016). The question is whether there are differences in the populations served by probation and PSCs, as both are alternatives to incarceration; however, PSCs are considered to be more rehabilitative than probation. This commentary presents an explorative comparison of the demographic characteristics (i.e., gender, race, ethnicity) of clients participating in either probation or PSCs in 2018 or 2019. We use a survey of 497 problem-solving court coordinators (Faragó et al., 2022) and a survey of 381 probation agencies from the Bureau of Justice Statistics (Oudekerk & Kaeble, 2021) to compare client demographic information reported in the surveys. This comparison identifies discrepancies in the diversity of clients on probation compared to PSCs; we find that more men and Black individuals are sentenced to probation, whereas more women and white individuals agree to participate in PSC programs.*

**Keywords:** equity, inclusion, problem-solving courts, probation, access

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Community-based corrections serve to offer non-incarcerative sentences and operate in a wide variety of contexts such as front-end probation, reentry and reintegration programs, parole, problem-solving courts (PSCs), and/or residential and out-patient treatment programs, to name a few. For this commentary, we will focus on PSCs because they offer a comprehensive approach to addressing the needs of individuals through a mix of treatment, testing, status hearings, and intensive case management. This integrated approach is a foundational aspect of PSCs from their inception in 1989 and continuing through today. PSCs began nearly 30 years ago as a therapeutic justice intervention for non-violent offenses (e.g., primarily drug possession) which are rooted in addressing the underlying social issues that resulted in an arrest (e.g., mental health disorders, substance use disorders). For example, PSCs made it possible for individuals arraigned and/or convicted of a drug-offense to avoid incarceration by undergoing a supervised substance use disorder (SUD) treatment program and participating in intensive case management under the guidance of a drug court with judicial power (Andraka-Christou, 2016). PSCs are more effective than traditional probation or incarceration, particularly in reducing recidivism rates (Mitchell et al., 2012), but the nature of the services that account for the positive outcomes are still to be uncovered.

The aim of this commentary is to determine if there are racial, ethnic, or gender differences in the populations served by probation and PSCs by comparing the number of clients they serve across demographic categories. Black and Hispanic/Latinx people tend to be underserved in PSCs compared to incarceration and probation populations (Marlowe, Hardin, & Fox, 2016). Further, men tend to be underrepresented in PSCs as well (Ho, Carey, & Malsch, 2018). To be admitted to a PSC, prosecutors and judges must offer this alternative option and clients must volunteer to participate in the program, as long as they meet eligibility criteria. This process is different from probation, where a judge orders clients into probation as part of a sentence. According to the Bureau of Justice Statistics (BJS), probation is a “court-ordered period of correctional supervision in the community, generally as an alternative to incarceration” (Oudekerk & Kaeble, 2021, p. 2). PSCs and probation are similar in that both are alternatives to incarceration that take place in the community.

## **Commentary Scope**

This commentary presents an explorative comparison of the demographic characteristics of clients participating under supervision within probation in 2019, or PSCs in 2018 or 2019. In a recent study of 849 PSC coordinators across the United States, a survey collected information about the characteristics of individuals that participate in PSCs in terms of gender, race, and ethnicity (Faragó et al., 2022). Of the 849 respondents, 497 court coordinators (59%) provided demographic information on the populations participating in their PSC for the year 2018 or 2019. For clients under probation supervision in 2019, the BJS surveyed 454 probation agencies on their client populations. They collected similar demographic information (i.e., gender, race, and ethnicity) from 381 probation agencies on individual clients on probation supervision across the United States (Oudekerk & Kaeble, 2021).

We compared responses obtained from similar surveys that contain information about these two different justice-involved populations (i.e., PSC clients and probation clients). Such a

comparison can identify demographic discrepancies in the diversity of clients on probation or in PSC programs. Given the well-known gender, racial, and ethnic disparities in the criminal legal system where people of color and men are overrepresented in the system (Sawyer & Wagner, 2019), examining the differences in participation of more rehabilitative corrections pathways can reveal barriers to involvement in different types of programming. To ensure equity in access to punishments that offer programming with proven potential to reduce recidivism, a focus on diverting historically underserved individuals (i.e., people of color) into PSCs is crucial.

## Overview of PSCs

Given the many benefits of PSCs, justice-involved individuals should be afforded the opportunity to enter PSCs as an alternative to incarceration. More than 3,848 PSCs are reported to exist in the United States (National Drug Court Resource Center (NDCRC), 2021)<sup>1</sup>. The typical PSC process lasts for 18 months which is about the same length as the average probation sentence (i.e., 22 months). PSCs offer opportunities for treatment and services related to SUDs, domestic violence, mental health disorders, houselessness, gambling, and more (Miller, 2020). PSCs typically involve the use of five crucial mechanisms:

- continuous monitoring of clients through judicially driven status reviews,
- a team-based approach for case management and monitoring progress,
- a rehabilitative orientation with an emphasis on providing corrective treatment and other services,
- a shift in traditional adjudication roles where the judge, prosecutor, and defense attorney do not operate as arbitrators of their position but instead serve as a multidimensional case management team, and
- an emphasis on problem-solving to address substance abuse and legal problems (Nolan, 2010).

This approach may be responsible for more successful outcomes of clients working their way through the program hoping to get well, but also to reduce involvement in the criminal legal system (Aos, Miller, & Drake, 2006; Cross, 2011; Dirks-Linhorst & Linhorst, 2012; Lowencamp, Holsinger, & Latessa, 2005; Mitchell et al., 2012; Shaffer, 2006; Kearley & Gottfredson, 2020).

The PSC approach has the potential to facilitate a more effective support response for individuals attempting to “address drivers” that initiated their behavior deemed criminal. As included in the National Association of Drug Court Professionals (NADCP) best practice standards (2013, 2015) and their standards specific to diversity and inclusion (NADCP, 2019), drug courts should pay close attention to disproportionate demographic participation in their courts and attempt address any discrepancies (Marlowe et al., 2018). The necessity for equity, diversity, and inclusion is a central feature of the PSC process; thus, it should not uphold the

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<sup>1</sup> The authors and team compiled a list of PSCs which totaled more than 4,000 for the study described in the comparison (Farágó et al., 2022).

practices of over-surveillance, over-criminalization, and eventual over-incarceration of men and people of color. In this way, it should ensure that individuals have equal access to PSCs.

## **Methodology**

### **The PSC Study**

In early 2019, a list of PSCs was compiled from various sources including American University's National Drug Court Resource Center (<https://ndcrc.org/>), a directory of 3,400 PSCs provided by the NADCP, and publicly available information about PSCs through county and other government websites. Using such list, a nationally representative sample of PSC coordinators was selected and surveyed with the permission of their state-wide PSC coordinator about the provision of medication-assisted treatments (MATs) for clients, including additional contextual information on PSC operations, client demographics, and more. The survey was administered from March 2019 to August 2020 to local PSC coordinators using a mixed-mode approach via three distribution strategies: an online web survey, computer-assisted telephone interviews (CATI) through the University's survey lab, and a U.S. Postal Service mailed survey. Participation was encouraged in mailed survey packets via tokens of appreciation in the form of stress balls, rubber bracelets, and a letter of support from the NADCP.

A total of 849 local PSC coordinators completed the survey. At the beginning of the local PSC coordinator survey, demographic questions asked court coordinators, "Do you have information on the gender, race, and ethnicity of participants in your problem-solving court(s)?" After indicating "yes," the demographic question allowed respondents to input the number of clients by gender (i.e., male, female, other), race (i.e., American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, white, multiracial, other), and ethnicity (i.e., Hispanic or Latino, not Hispanic or Latino). PSC coordinators also indicated the year that the data represented, which for respondents was either 2018 or 2019.

All research protocols were approved by the University's Institutional Review Board prior to data collection. For the purposes of this commentary, we consider only court client demographic data (i.e., race, ethnicity, and gender) provided by 497 PSC coordinators as the basis for our comparative analysis presented in the results.

### **The BJS Study**

Per the methodology of the BJS report on probation and parole in the United States., probation data on adult clients under supervision was obtained via the 2019 Annual Probation Survey sent to 454 probation agencies nationwide (Oudekerk & Kaeble, 2021). This annual survey is distributed to state, county, and local probation agencies to collect probation population information. This commentary uses these 2019 survey results. Their final sample consisted of 381 probation agencies. Data on individuals under federal supervision was collected through BJS' Federal Justice Statistics Program, information they collect each year from the

Office of Probation and Pretrial Services and the Administrative Office of the U.S. Courts. In collecting client information, BJS asked probation agencies to report race/ethnicity together (i.e., American Indian or Alaska Native, Asian, Hispanic, Native Hawaiian/Other Pacific Islander, Black or African American, white, two or more races, unknown) and sex (i.e., male, female, unknown). This probation data is the basis of our comparative analysis presented in the results.

## Analytic Strategy

Both studies of PSC coordinators and probation agencies used surveys to obtain client information in 2018 or 2019. Samples of PSCs and probation agencies include a similar sample size of respondents (PSC coordinators  $n = 497$ ; probation agencies  $n = 381$ ) even though far more clients are served under probation supervision as compared to PSCs. Further, both surveys asked for demographic information using similar categorical options for race/ethnicity and sex/gender. Specifically, the race and ethnicity categories asked in two separate items in the PSC survey are the same categories presented as one singular item in the probation survey. Further, the PSC survey uses the language “multiracial” whereas the probation survey uses the language “two or more races.” Similarly, the gender category with male and female response options and a third response option exists in both the PSC and probation surveys. Since there is minimal data for the third response option in both surveys, the “other” or “unknown” sex/gender category is not analyzed in the comparative analysis. Therefore, we believe comparing the client demographic data reported by PSC coordinators and probation agencies is valid.

To conduct the comparative analysis of client demographics under probation and PSC supervision during 2018 or 2019, aggregated data from the 2019 Annual Probation Survey on probation client information was extracted from the BJS report (Oudekerk & Kaeble, 2021). From the PSC study, capturing client data from 2018 or 2019, we ran basic descriptive statistics of the demographic information on clients provided by court coordinator respondents to obtain similarly aggregated information to the probation population data in the BJS report. Percentages of total client samples were computed to compare the demographic differences between the probation and PSC samples for the year of 2018 or 2019. No further in-depth analysis occurred for this commentary, as we sought to update the field’s current understanding of racial, ethnic, and gender discrepancies in PSC access as compared to probation. To do this, we extended prior studies comparing racial, ethnic, or gender demographic differences individually by comparing across all demographic factors in larger, nationwide samples of PSCs and probation populations.

## Results

### Comparison of Probation and PSC Populations

The following comparison includes the clients of 497 PSCs and 381 probation agencies. Within our nationwide PSC study (Fragó et al., 2022), an accurate number of total PSC

clients could not be obtained because clients' information in certain demographic categories (i.e., race, ethnicity, or gender) were not reported by responding PSC coordinators. Summed demographic categories resulted in total PSC client figures that do not match each other (i.e., race  $n = 27,022$  clients; ethnicity  $n = 20,883$  clients; gender  $n = 30,580$  clients). PSCs indicated that their clients consisted of 35% ( $n = 10,636$ ) women and 65% ( $n = 19,868$ ) men. In addition, less than 1% of clients in PSCs identified with a gender identity outside the binary ( $n = 76$ ), such as "other," non-binary, or transgender. The racial breakdown of PSC clients was 72% white ( $n = 19,420$ ), 19% Black or African American ( $n = 5,252$ ), 4% other ( $n = 970$ ), 2% multiracial (i.e., two or more races;  $n = 484$ ), 2% American Indian or Alaska Native ( $n = 426$ ), 1% Asian ( $n = 315$ ), and 1% Native Hawaiian or Other Pacific Islander ( $n = 155$ ). As for ethnicity, PSC clients were reported to be: 12% Hispanic/Latinx ( $n = 2,493$ ) or 88% non-Hispanic/Latinx ( $n = 18,390$ ).

The 2019 demographic estimates (e.g., race/ethnicity, sex) for probation settings show some notable differences between the two justice populations. In 2019, the BJS reported that of adults (i.e., persons 18 years or older) on probation in the United States ( $n = 3,492,880$ ), 75% were men and 25% were women. BJS did not present information on gender identities outside of the sex binary, male and female; they presented an "unknown" sex category. There is a gender contrast between clients in PSCs as compared to probation; PSCs supervised more women by 10% than probation. This means that more men were sentenced to probation while more women agreed to partake in PSC programs (Oudekerk & Kaeble, 2021). A similar gendered discrepancy was revealed in Ho, Carey, and Malsch's (2018) study comparing probation clients and PSC clients in 142 PSCs. In comparing race and ethnicity, clients on probation were 54% white, 30% Black, 13% Hispanic/Latinx, 1% American Indian or Alaska Native, and 1% Asian. The PSC clients were less likely to be diverse than probation clients with 18% more white clients and 11% fewer Black clients participating in PSCs. However, the percentage of Hispanic/Latinx, American Indian or Alaska Native, Asian, Native Hawaiian or other Pacific Islander, and multiracial individuals were similar in that there were no significant differences in clients of other racial or ethnic groups.

## **Conclusion**

Demographic differences exist between the individuals who are placed on probation compared to individuals who participate in PSCs. Specifically, we see that more men and Black individuals are sentenced to probation, whereas more women and white individuals volunteer for PSC programs. There is hope for changing the significant demographic differences in participation of PSCs; it starts with the knowledge to understand why differences exist, tools to help PSCs determine what needs to change to shift the numbers, implementation of necessary shifts in PSC practices, and participatory messaging to inform individuals involved in the criminal legal system of the PSC program option.

An interesting finding, and limitation, is that PSC coordinators did not tend to have demographic data on their clients. This suggests a greater problem in that local PSCs cannot currently monitor their populations to examine equity of access for the diverse population that is justice-involved individuals. For example, in our survey, coordinators were able to report

on race for 27,022 individuals but could only report on ethnicity for 20,883 individuals. However, they could report on gender for 30,580 individuals. These discrepancies in total number of clients served by PSCs are problematic for data analysis purposes but highlights a major issue in data collection and management at the individual court level. There could also be an unwillingness to share their client information.

There may be similar problems in probation agencies as well. The BJS survey of probation agencies was also limited in its ability to collect demographic data from all probation agencies asked to participate in the study. These data issues, or perhaps unwillingness to report, suggest that local PSC coordinators should begin to gather data on and review the demographic characteristics of their populations to ensure that individuals regardless of race, ethnicity, or gender find participation in PSCs beneficial. Marlowe, Hardin, and Fox (2016) suggest that stakeholders of local PSCs collect data on the demographics of court clients and their varying needs and examine the demographic differences regarding who is involved in which punishment alternatives (PSCs or otherwise). In addition, the authors suggest local PSCs recruit marginalized individuals into their programs to eliminate any discrepancies in program participation. Recruitment strategies may require public messaging to help justice-involved individuals understand the benefits from participation in a PSC, especially pertaining to how it can meet their needs.

Recognizing the unequal participation in PSCs by men and people of color, we recommend that PSCs explore the role of gatekeepers. These gatekeepers may influence decisions related to offering individuals entrance to PSCs. Examining the processes that lead up to individuals being enrolled in a PSC would ensure that every individual who makes contact with the criminal legal system is given an equal opportunity for program participation. NADCP, a primary stakeholder of PSCs, has recognized this significant difference in racial make-up of drug court clients. NADCP developed the Equity and Inclusion Assessment Tool (EIAT) to help PSCs examine issues related to compliance with their equity best practice standards (Cheesman, Genthon, & Marlowe, 2019). This toolkit is useful for PSCs to identify issues that may affect inclusion in their courts and address racial or other disparities. An action plan can then be developed to determine the populations that are not obtaining equal access to PSCs (NADCP, 2019). It would be useful to conduct research on the EIAT to assess how PSCs are using the tool and identify obstacles to inclusion and equity.

The potential benefit of PSCs is their orientation to therapeutic jurisprudence that uses the sentencing as a tool for rehabilitation, and given prior evaluation results, PSCs have the greatest potential for reducing future offending behavior. Without equitable usage of this treatment-oriented adjudication route, it is challenging to understand for whom PSCs work and to effect change to correct the inequitable access to alternative punishments. From the criminal legal system, an emphasis on equity and inclusiveness fosters more trust in the legal system by ensuring the system is fair and unbiased.

Future research should seek to understand what is causing the demographic discrepancies in participation within PSCs by expanding upon the basic comparative analysis offered in this commentary, via in-depth analysis on the impact of practices, protocols, policies, perceptions, and more from surveys with PSC coordinators and other stakeholders. Specifically,

why does the discrepancy cross racial and gender lines? It could be due to sentencing disparities that result in more frequent felony-level or distribution charges among people of color, which are often exclusionary criteria for entrance into PSCs (Mitchell & Caudy, 2017). If individuals are eligible, the disparities could be due to a lack of knowledge of the benefits of PSCs, or means (i.e., time), on the part of defense attorneys whose role it is to inform individuals of their option to participate in PSCs. All individuals should be offered an opportunity to participate in PSCs based on their needs, particularly men and Black individuals.

While studies on why different individuals agree to participate in PSCs would be useful, it is also apparent that there is a great need for local PSCs to collect data on the characteristics of individuals screened (i.e., assessed for eligibility) and those who agree to participate in PSCs. Without this critical demographic data, it is unlikely that PSCs can achieve equity and inclusiveness. It is also unlikely that corrective actions can be taken to ensure that PSCs are widely utilized to address certain problem behaviors stemming from social inequalities (e.g., drug use, mental health disorders, houselessness). PSCs are a valuable resource which should be widely available to all individuals as they seek to aid communities in addressing crime-related issues by targeting broader social problems.

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