SYMPOSIUM
DRUG LAWS: POLICY AND REFORM

INTRODUCTION

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This symposium comes at a dramatic transitional moment in the evolution of our drug laws, and the editors and authors have provided their readers with an array of insights perfectly suited to this time of national self-appraisal. Most observers of the War on Drugs now accept that whatever its original intentions, it has misfired in ways that require a fair amount of self-criticism by our legal system. Meanwhile, binary views on the pros and cons of decriminalization of drugs have given way to less dramatic but more realistic considerations of efficacy and rationality in criminal justice, as reflected in the New York legislature's careful reconsideration and partial reform of the infamous Rockefeller mandatory minimum laws of the 1970s. Harsh criminal laws and penalties, even in the drug area, may deserve some credit for the great reduction in our crime rates in the 1990s, but as those rates level off, we have to ask whether we are getting fair return for our vast investment in them.

It is this sense that drug laws are neither perfect righteous instruments of national survival nor unmitigated racist evils that is captured in Judge Robert Sweet's call for the mundane but crucial hard work of cost-benefit analysis in our drug laws. Judge Sweet had issued a stern clarion warning call in 1989 that the War on Drugs was as much a problem as a solution. Clearly entitled to an "I told you so" twenty years later, Judge Sweet first reminds us of the undeniable key facts: We have the highest incarceration rate in the world; over forty percent of our state inmates and a full half of our federal inmates are incarcerated for nonviolent drug crimes; drug arrests have tripled in the last three decades, with over eighty percent essentially for mere possession; the generic cocaine charge in the federal system will predictably lead to seven years in prison; and all this while cocaine use rates in the United States have remained unchanged. As Judge Sweet poignantly notes, the drug trafficking industry "remains untaxed and undeterred excerpt by street corner violence and drive-by shootings." The federal government spends many billions for drug control, even independent of prosecution and incarceration, but a pittance for proven programs of inmate rehabilitation. Federal judges are mandated by Congress to impose sen-

tences that are "sufficient, but not greater than necessary," and yet they find this mandate undermined by Congress's own mandatory minimums and the absence of any rehabilitative mission in the correctional system.

Thus, Judge Sweet argues, the time has come for viewing criminal drug laws as what they are—a regulatory program that needs to be held responsible to prove its own social efficacy. Indeed, he optimistically notes that in many states, commission-style reforms have subjected criminal legislation to the demands of economic and social justification rarely seen in America's politics of crime.

Assessing the actual cost-benefit ratio of our decades-long drug law efforts, Jamie Fellner somberly reviews the numbers in more detail. And her target is the most infamous of numbers, the racial disproportion in American drug arrests, convictions, and incarcerations—numbers she amasses in as concise and comprehensive a form as one can read anywhere. The record is clear: Whites generally use and transfer drugs to the same degree as, or even to a slightly greater degree than, blacks. But blacks get caught at every stage of criminal justice at no less than four times the rate of whites. In New York State, where blacks in New York City represent a tenth of the overall state population, they account for forty percent of the state's drug arrests.

And Fellner finds plenty of explanations in facially race-neutral policies, such as the tendency of police to exploit the easy path of focusing on open-air drug markets, or of satisfying the media-driven need to promote crack as the most dangerous of drugs. Thus, in one of the nation's most liberal cities, Seattle, where the majority of those using and distributing almost all drugs except crack are white, the national racial disparity in prosecution holds. Fellner clarifies that disparity cannot be justified by differences in the comparative role of racial groups in the drug market: Whites distribute drugs in the same proportions as they use them, nor is there any evidence to support the common perception that the high-managerial figures in the distribution chain are typically black. And in any event, those "leaders" could hardly account for more than a minuscule fraction of the huge numbers of drug criminals who get ensnared.

But Fellner also addresses the question of the legal regime under which these numbers must be tested, and she laments that the ritual focus on equal protection law, and its demand for proof of purposeful racial discrimination, may provide no solution here. Whether in individual cases or class actions, this legal hurdle often proves insurmountable, and Fellner suggests that the way to overcome it is essentially to declare it irrelevant. Instead, Fellner argues for a different standard, one reflected in the International Convention on the Elimination of All Forms of Discrimination (ICERD). The ICERD would find sufficient proof of illicit discrimination where state policy manifests a significant disproportionate impact that the state cannot justify by showing the policy in question serves some other, superior public interest and that it has tried all feasible means to mitigate the disparity.

In terms of American law, that standard closely mirrors that of the fair cross section requirement of the Sixth Amendment right to a jury trial,[1] and is far more generous to the party claiming discrimination than the equal protection clause. The U.S. has ratified this convention, but it has dodged the issue of its own non-compliance with it through rather feckless dodges about how the disparities might reflect differential involvement in crime among racial groups and that some disparities simply remain unexplained. Fellner acknowledges that the Convention is not enforceable against the signers, but she argues that this is beside the point. In her view the ICERD is relevant as a moral commitment that should cause us to look to our national conscience and reconsider our criminal justice policies, regardless of whether it can every support a cognizable claim in an American court.

If we have failed to develop a sensible cost-benefit approach to drug laws on a national scale, does that mean that all the actors in the system are acting irrationally? Quite the opposite, argues Bruce Benson. Indeed, some of the key actors operate under perfectly rational cost-benefit analysis, except the incentives of the system are skewed so that the benefits are too narrowly internalized to them and the costs too externalized to the rest of us. Benson relentlessly marshals data to show that law enforcement agencies are all too well motivated to investigate and partly prosecute drug crimes in order to generate finds from seizures and forfeitures, and a key result of that heightened motivation is that police resources get so overly allocated to drug crimes and underenforcement in other areas may actually increase serious non-drug crimes. These are daunting claims, but Benson makes a powerful empirical case for them.

The War on Drugs may *cause* other crime by reallocating resources toward easy targets, and the reason for this reallocation is not just a legislatively driven preference for targeting drug crime as the greatest social danger. Rather, it is significantly driven by an executive branch preference for exploiting the great financial incentive of seizures and forfeitures. Indeed, argues Benson, it is not even the case that this executive branch profit motive is a secondary effect of the public's authentic demand for better drug enforcement: Benson makes the historical case that for decades politicians, abetted by the media, have created an apparent public demand for precisely the kind of law enforcement efforts that proves so profitable. Forfeiture, he argues, is not just a legal remedy for a criminal prosecution—it operates equally as a tax or user fee on a semi-regulated activity. Law enforcement manuals even explicitly mandate that the purpose of a seizure is to serve the general interests of the jurisdiction, as if it were just a revenue-raising device. And even if that goal were benign, it gets thwarted by the ease with which police agencies can allocate that supposedly general-use money back to their own discretionary budgets.

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1. *See* Duren v. Missouri, 439 U.S. 357 (1979).

The federal-state dynamic in implementing forfeiture is complex and fascinating. Available mechanisms of federal forfeiture motivate state law enforcement to invoke federal procedures to arrange massive forfeitures of real and personal property that remit the great bulk of that property back to the state. Indeed, a state police agency can act wholly in its own and then arrange for a retroactive "adoption" of its action by the federal government. The states have their own forfeiture laws, but many of those state laws make forfeiture a much more constrained remedy, often not allowing seizure of real estate and often with a higher burden of proof on the state. Moreover, in many states, forfeited funds go into the general treasury or get allocated into a variety of public agencies according to a state formula. But if local officials can deploy the federal procedures, they can win greater forfeitures and take the funds right back into police budgets. To make things more complex still, state officials may reduce annual budget allocations to the police to wash out the amount of the forfeiture. This might weaken the incentive, but once this state-local dynamic comes into play, it is risky for the local police to reduce forfeiture activity because they still may face, at least in the short term, a reduced budget. So the net effect is to make it very profitable for the police to direct their resources to forfeit-worthy drug crimes. And the ultimate effect, he argues, is that the state under-prosecutes and therefore may indirectly increase, non-drug violent or property crime, or, equally perniciously, may drive drug criminals from certain profitable nonviolent drug transactions to others that may have more potential for violence.

Benson observes a number of other striking mis-incentives. Instead of deploying seizure as the remedy for a prosecution, police may use it as substitute, arranging the seizure and then dropping the criminal charge. Or they may charge more heavily on the more profitable side of drug transactions—so that Florida police are more likely to charge southbound suspects carrying money than northbound ones carrying drugs, regardless of whether that is the most efficacious crime-prevention strategy. On the other hand, overly harsh prosecution and penalties may lead to prison crowding problems and then exigent releases of prisoners to avoid budgetary or legal consequences. As a result of these skewed motivations, ground-level police who may not appreciate or enjoy the benefits of departmental police profit from seizures suffer loss of morale when they see their recent or potential arrestees on the streets.

No doubt Benson's own data and the studies he synthesizes will provoke great debate among the econometricians of crime, but to open the issues as audaciously as he does is itself a major contribution to our national self-appraisal.

The remaining quartet of articles in this symposium address two key components of the War on Drugs that need to be part of any national self-stocktaking. One of these components has suffered from a gross under-examination, and the other from an arguably misguidedly positive examination.

The under-examined component is the role of drugs in rural America. The

public image of drug crime, one endlessly reinforced by media imagery but also by actual governmental policy, is that drug crimes are an inner-city phenomenon. If that image is wrong, the consequences are multiply bad: We may be sorely neglecting the need for better funded and smarter drug law enforcement of drug laws in rural areas. And the media imagery may only compound the racial disproportion in drug enforcement, both by overly targeting inner city youth but also, in a terrible cycle, underscoring the public image that it is the inner city where the police "find" drug crimes.

As Lisa Pruitt demonstrates in her cultural study of drug abuse and drug enforcement in rural areas, the reason for this misperception is evident in American culture. We have a happy image of rural life where people are so deeply embedded in social and civic and religious life, and so tied to the supposedly morality-enforcing rootedness of life on the land, that we disbelieve that crime, or drug crime, can be a major problem there. Indeed, to the extent that there is drug crime in this perceived rural world, the "regulatory" mechanisms are the flexible and non-condemnatory social processes that drug reformers often tout. As Pruitt explains, even if this perception about pastoral life has some truth to it, American rural populations no longer live in this pastoral world. These days, rural people increasingly live in an itinerant, trailer-park world of broken families and social anomie, where the key indicia are poverty and isolation, and the methamphetamine epidemic is as widespread and criminogenic as is true of cocaine in the inner city. And as Pruitt shows, funding for drug education and abuse treatment is woefully low in rural areas, and the shortage is only exacerbated by the sheer logistical difficulty of providing adequate social services—even adequate conventional law enforcement—in thinly populated areas where sheer distance becomes a major obstacle to social control.

In her sharp critique of our regulation of rural drug abuse, Pruitt argues that the obsessive public imagery of inner-city drug crime has led to a distortion of our idea of proper drug regulation into a monolithic form that simply does not account for the special nature of rural life. That critique reviews the failure of the few efforts at drug abuse prevention that have been tried, especially the notoriously unsuccessful D.A.R.E. program. In that regard, Pruitt is skeptical that public messaging campaigns aimed at rural youth have much value. But counter-story is provided by Thomas Siebel and Steven Mange in their review of the Montana Meth Project, an unusually aggressive messaging campaign confronting young people with the dangers of meth.

Seibel and Mange point to a powerful correlation between introduction of this campaign and reduction in meth use among Montana youth, and although the correlation may require more data to justify a statistical inference of causality, the results are self-evidently impressive. The Montana Meth Project may seem to challenge Pruitt's critique—or it may be the perfect complement. This is not a top-down exertion of policy based on an over-generalized inner city model of drug regulation. It is a unique private a-public partnership that does

exactly what Pruitt encourages—tailoring a program to the distinct nature of rural drug use, and grounding it in empirical research about the local nuances of the drug culture. In that regard, future confirmation of the program's success will only reinforce the more general wisdom that Pruitt offers.

The last two articles in the symposium take on a component of drug regulation that has hardly gone unexamined. The advent of diversion of arrestees into specialized drug treatment courts (DTCs) has been widely noted and mostly praised, precisely as a humane and cost-efficient antidote to the brutal rigidities of conventional prosecution. But in two complementary evaluations of DTCs, Eric Miller and Michael O'Hear find plenty of reason to remain cautious, if not skeptical, in our acceptance of DTCs as salutary alternatives.

At the heart of Miller's treatment of DTCs are two key insights, the first subtle and perhaps implicit, the second explicit and central. The first insight is that there may be some division of motive, or ambivalence, among proponents of DTCs. One rationale is that DTCs are a constructive means of addressing an epidemic of drug abuse and drug crimes. Another is that the motivator for DTCs is not our epidemic of drug abuse but our epidemic of law enforcement abuse and its attendant overload effects on the criminal justice system, so that DTCs aim to cure a bad cure, not the alleged underlying disease.

This distinction is important because sorting out the motivations (or justifying values) of DTCs may help us to understand what underlies Miller's second, very explicit insight: That despite the sentimental view that some hold of drug courts, they actually represent a very aggressive, if unusual and creative, form of legal authority and indeed coercion. DTCs may be focused on, and employ the happy vocabulary of, "treatment," but they do not manifest a restraint on harsh state power so much as an inter-branch transfer of it—to judges. Indeed, although Miller does not make this point, they remind us of the general principle that judges are not supposed to engage in direct plea negotiations with criminal defendants because of the risk of excessive coercion and judicial bias. To Miller, DTCs pose the risk of forced therapy under a highly disciplinary judicial regime, rather than a social-service-focused rehabilitation approach. Moreover, Miller argues that in their morally didactic focus on individual responsibility, DTCs not only do not address, but they may even exacerbate, the dangers of racial disparity in drug law enforcement, because the disciplining judge will brook no purported excuses based on the social or economic environment in which the drug abuse occurred.

O'Hear raises parallel concerns. He observes that the limited jurisdiction of DTCs, with their arguably arbitrary line-drawing exclusion of crimes of violence or distribution, underestimate the great diversity of drug conduct and the many different forms and degrees of so-called distribution in relation to mere possession. As a corollary, he laments, DTCs pick the low-hanging fruit and can win superficial success because they do not tackle the hard cases left to regular criminal justice. Paradoxically, says O'Hear, even in these "easier" cas-

es DTCs may actually prove harsher than regular courts even in terms of regular incarceration, because the penalties they impose for noncompliance with the DTC judge's disciplinary protocols may lead to more jail time than a regular sentence would. Thus, DTCs may not reduce correctional crowding (especially in jails). Moreover, echoing Miller, O'Hear notes that to the extent that racial disparity is rooted in disparate arrest rates, they hardly address that source of disparity because their very predicate is that they divert defendants *after* arrest. So arrest disparities may go unremedied by DTCs--or even worsened if the prospect of non-jail consequences that will not worsen jail crowding spurs police to increase arrests.

Interestingly, the proposals for better alternatives than DTCs supplied by Miller and O'Hear take similar paths and rest on similar premises. Both strongly argue for a "community-based" approach that would resonate with the original philosophical principles that led many drug reformers to advocate for DTCs without the perhaps unintended actual operations of current DTCs. For Miller, the model is a grand jury-type mechanism with a wider social group serving as adjudicator, disciplinary authority, and treatment monitor for the defendant. For O'Hear it is something more akin to the increasingly common Restorative Justice model of the conference circle. Both these noble proposals to develop means of drug-abuse reduction that better respect the originating philosophy of the DTC movement of the DTC may prove subject to unrealistic and sentimental expectations—that there is such a salutary and coherent thing as a "community" that can be expected to be fairer and wiser and more humane than conventional prosecutorial regimes, but that still can be configured in a sufficiently formal way as to take the role of authorities.[2] But if these proposals underscore the fundamental theme of the Miller and O'Hear—that DTCs must be reassessed to measure their fidelity to their founding goals—they spur us in the right direction.

2. *See* Robert Weisberg, *Restorative Justice and the Dangers of Community*, 2003 UTAH L. REV. 343.