

1-1-2009

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Publication Information

Michael M. O'Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 Stan. L. & Pol'y Rev. 463 (2009)

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## Repository Citation

O'Hear, Michael M., "Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice" (2009). *Faculty Publications*. Paper 140.

<http://scholarship.law.marquette.edu/facpub/140>

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# RETHINKING DRUG COURTS: RESTORATIVE JUSTICE AS A RESPONSE TO RACIAL INJUSTICE

Michael M. O'Hear\*

Since their first appearance in Miami in 1989, specialized drug treatment courts have grown phenomenally popular, with nearly 2,000 now in existence.<sup>1</sup> Although their effectiveness is a matter of debate among academics,<sup>2</sup> their political appeal remains strong. This popularity stems in large part from the *unpopularity* of what is generally seen as the principal policy alternative, that is, a continued reliance on the traditional criminal justice responses to drug offenses—or, more colloquially, on the “war on drugs.” Public support for the war flagged as it became clear that many drug offenders were unresponsive to threats of harsh sentences,<sup>3</sup> prison populations (and hence prison budgets) were escalating wildly,<sup>4</sup> and many poor minority communities were being devastated

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1. Nat'l Drug Court Inst., *Drug Courts: A National Phenomenon*, <http://www.ndci.org/courtfacts.htm><http://www.ndci.org/courtfacts.htm> (last visited May 17, 2008).

2. For skeptical academic views of drug treatment courts, see JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* (2001); Josh Bowers, *Contraindicated Drug Courts*, 55 *UCLA L. REV.* 783 (2008); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 *OHIO ST. L.J.* 1479 (2004). Another prominent critic has been Judge Morris B. Hoffman. *See, e.g.*, Morris B. Hoffman, *The Drug Court Scandal*, 78 *N.C. L. REV.* 1437 (2000).

3. *See, e.g.*, Douglas B. Marlowe et al., *A Sober Assessment of Drug Courts*, 16 *FED. SENT'G. REP.* 153, 153 (2003) (“It is clear that drug abusers do not respond to imprisonment. In some studies, over 95% of drug-abusing offenders returned to drug use within three years of their release from prison . . .”).

4. *See, e.g.*, Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Corrections?*, 15 *FED. SENT'G. REP.* 41, 41, 44 (2002) (discussing 601 percent increase in corrections expenditures over two decades and resulting legislation in several states intended to reduce sentence lengths for drug and other nonviolent offenses).

by the collateral damage.<sup>5</sup> Against this backdrop, it is easy to understand the appeal of a reform that promises to divert drug offenders from prison warehousing into court-supervised treatment: it would seem that drug courts could hardly help but be an improvement on a dismal status quo.<sup>6</sup>

Recent events in Milwaukee, Wisconsin, nicely illustrate the political dynamic propelling the growth of drug courts, and, in particular, a curious link between drug courts and racial justice concerns. Pressure has been growing in recent years for Wisconsin to address glaring racial disparities in its prison system, which is ranked as sixth-worst in the nation.<sup>7</sup> The Governor appointed a blue-ribbon Commission on Reducing Racial Disparities to study the problem in 2007, and the Commission, in turn, recommended greater use of community-based sentencing alternatives, including drug treatment courts.<sup>8</sup> Released in February 2008, the Commission's report gained even greater salience following the May publication of two studies by national organizations that highlighted the racial disparities in Wisconsin and Milwaukee. In one report, Human Rights Watch determined that blacks in Wisconsin are forty-two times more likely than whites to receive a prison term for a drug conviction—the highest such disparity in the nation.<sup>9</sup> In the second report, The Sentencing Project determined that blacks in Milwaukee are seven times more likely than whites to be arrested for a drug offense—the second-highest such disparity among the forty-three major American cities analyzed.<sup>10</sup>

The May reports received considerable coverage in the local press<sup>11</sup> and

5. See, e.g., DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* 4 (2004) (“Davida and others living in impoverished neighborhoods are also deeply injured by mass incarceration. The disassembling of our society’s most vulnerable families has wreaked material, emotional, and social havoc in the lives of millions . . . .”); Tracey L. Meares, *Mass Incarceration: Who Pays the Price for Criminal Offending?*, 3 *CRIMINOLOGY & PUB. POL’Y* 295, 297-300 (2004) (discussing evidence that that the “families of those incarcerated (and likely whole communities) bear substantial costs that are not overcome by any crime-reduction benefit”).

6. The drug treatment court model is described in more detail below in Part II.A.

7. BRENDA R. MAYRACK, *WIS SENT’G COMM’N, RACE AND SENTENCING IN WISCONSIN: SENTENCE AND OFFENDER CHARACTERISTICS ACROSS FIVE CRIMINAL OFFENSE AREAS* 2 (2007).

8. *COMM’N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., FINAL REPORT* 11 (2008).

9. HUMAN RIGHTS WATCH, *TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES* 23 (2008), available at <http://www.hrw.org/en/reports/2008/05/04/targeting-blacks>.

10. RYAN S. KING, *THE SENT’G PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA’S CITIES* 15 (2008).

11. See, e.g., Lisa Kaiser, *Justice in Black and White: Three Studies Detail Wisconsin’s Racial Disparities in Drug Cases*, SHEPHERD EXPRESS, May 15, 2008, at 7; Eugene Kane, *Blacks’ Risk of Drug Arrest Is a Grim Reality*, MILWAUKEE J. SENTINEL, May 6, 2008, available at <http://www.jsonline.com/story/index.aspx?id=747235>; Crocker Stephenson,

prompted a swift response by politicians. Milwaukee County Common Council President Willie Hines, decrying unequal treatment in the criminal justice system, discussed the creation of a drug treatment court in Milwaukee as a possible solution.<sup>12</sup> Shortly thereafter, at a joint press conference responding to the May reports, Governor Jim Doyle and Milwaukee County District Attorney John Chisholm endorsed this solution, with Chisholm vowing that Milwaukee would definitely get a drug treatment court within six months.<sup>13</sup>

The sequence demonstrates how drug treatment courts have become the generic policy response of choice to dissatisfaction with the war on drugs.<sup>14</sup> However, as other commentators have argued, the turn to drug courts carries with it sufficient risks and costs that their superiority over traditional law enforcement approaches should not be taken for granted.<sup>15</sup> The general critique of drug treatment courts has been made well elsewhere and need not be repeated here. Rather, my purpose, and original contribution, in this Article is twofold. First, I will focus on one particular area in which drug treatment courts are likely to disappoint expectations, the area (it so happens) that has provided much of the impetus for the implementation of such a court in Milwaukee—that is, the area of racial disparities in the criminal justice system. In purely quantitative terms, drug courts are unlikely to reduce these disparities—indeed, if anything, there is reason to believe that drug courts may exacerbate them. In more qualitative terms, drug courts offer no real response to the group stigmatization that

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*State Leads in Prison Drug Gap: Blacks Get Drug Terms at 42 Times the Rate of Whites, Studies Say*, MILWAUKEE J. SENTINEL, May 6, 2008, available at <http://www.jsonline.com/story/index.aspx?id=747235>; Crocker Stephenson, *State Leads in Prison Drug Gap: Blacks Get Drug Terms at 42 Times the Rate of Whites, Studies Say*, MILWAUKEE J. SENTINEL, May 6, 2008, available at <http://www.jsonline.com/story/index.aspx?id=747093>.

12. Crocker Stephenson, *Race Issue Presented to Council: City's New Justice Group Asked to Tackle Racial Inequality in Drug Arrests*, MILWAUKEE J. SENTINEL, May 7, 2008, available at <http://www.jsonline.com/story/index.aspx?id=748435>.

13. Crocker Stephenson, *Drug Court Near, Chisholm Says: Idea Gets Push From Report on Racial Prison Gap*, MILWAUKEE J. SENTINEL, May 14, 2008, available at <http://www.jsonline.com/story/index.aspx?id=750461>.

14. The perception that drug courts offer a promising solution to racial disparity problems is not limited to Wisconsinites. See, e.g., HUMAN RIGHTS WATCH, *supra* note 9, at 6 (“[S]ome states have begun to take steps in the right direction—establishing drug courts to divert drug offenders from prison into community-based treatment programs . . . .”); THE COVENANT WITH BLACK AMERICA 61 (2006) available at <http://www.covenantwithblackamerica.com> (describing drug treatment courts as component of broader drug reform agenda intended to reduce racial disparities in criminal justice system).

15. See, e.g., Hoffman, *supra* note 2, at 1477 (“By simultaneously treating drug use as a crime and as a disease, without coming to grips with the inherent contradictions of those two approaches, drug courts are not satisfying either the legitimate and compassionate interests of the treatment community or the legitimate and rational interests of the law enforcement community.”).

is associated with racial disparities, or to the related problems in minority communities of diminished trust in the law and capacity to engage in collective problem-solving. Second, I will propose an alternative model for specialized drug courts, one that is built around principles of restorative justice (RJ). An RJ-based model will likely do no worse—and may do better—than the prevailing treatment-based model in reducing quantitative disparities, and seems much better suited to address concerns about stigma, trust, and collective problem-solving. Although RJ has been used principally to address juvenile offenses and low-level property crimes, it can also be adapted for use in drug cases. Indeed—ironically enough—a pioneer in this regard has been Milwaukee’s own Community Conferencing Program. Advocates for racial justice in Milwaukee would do better to expand the CCP than to develop a new drug treatment court. And advocates for racial justice in other cities would do well to consider the Milwaukee program as a model.

The Article proceeds as follows. Part I discusses racial disparities in the war on drugs in more detail, attempting to move beyond the bare numbers and identify both what really drives the disparities and why they are appropriately regarded as an important policy problem. Part II describes the drug treatment court model and explains why it is ill-suited to address the disparity problems identified in Part I. Part III describes basic principles of RJ; considers how they might be deployed in a specialized drug court setting, using the groundbreaking Milwaukee program as a model; and makes the case for an RJ-based approach over a treatment-based approach.

## I. RACIAL DISPARITIES IN THE WAR ON DRUGS: MAGNITUDE AND NATURE OF THE PROBLEM

In this Part, I first consider, and ultimately reject, the possibility that the racial disparities associated with the war on drugs are justified. I attempt then to identify with some specificity the nature of the harms caused by racial disparities.

### A. *Disparities: Warranted or Unwarranted?*

American prison populations have grown explosively over the past four decades,<sup>16</sup> with particularly dramatic consequences for the incarceration rates of black males.<sup>17</sup> By year-end 2005, nearly forty percent of all state and federal

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16. See THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 at 1 (2003) (noting increase in number of prisoners from 216,000 in 1974 to 1,319,000 at year-end 2001).

17. Between 1974 and 2001, the percentage of adult black males who had ever served time in prison increased from 8.7 to 16.6. *Id.* By contrast, the corresponding percentage for

prison inmates were black,<sup>18</sup> although blacks constitute only about twelve percent of the United States population.<sup>19</sup> The war on drugs plays a crucial role in fueling the overall incarceration disparity, as the number of blacks imprisoned for drug offenses is more than twice the number of whites.<sup>20</sup> By contrast, the number of whites imprisoned for property and public-order offenses actually exceeds the number of blacks.<sup>21</sup> Simply put, drug enforcement stands out as the major driver of racial disparity in the American criminal justice system.<sup>22</sup>

To be sure, disparity in itself may or may not be a bad thing: the question must always be whether the disparity is warranted. Racial disparities in punishment for drug crimes may be warranted to the extent that blacks (1) commit a disproportionate share of drug crimes, (2) tend to commit more serious drug crimes, or (3) otherwise present aggravating circumstances that merit harsher treatment. Let's consider each possibility in turn.

The first hypothesis is easily rejected: there is no reason to believe that blacks commit a disproportionate share of drug crimes. Indeed, the available data indicate that the black share of drug crimes is almost exactly equal to the black share of the population at large.<sup>23</sup>

The second hypothesis, that blacks tend to commit *more serious* drug crimes than whites, requires more discussion. As a matter of criminal code definition, drug offense severity is largely a function of three variables: whether the offender was responsible for distribution (as opposed to simple possession), the seriousness of the drug involved in the offense, and the quantity of the drug.<sup>24</sup> It does seem to be the case that blacks are *arrested* at disproportionate

all U.S. adults was only 2.7 in 2001 (up from 1.3% in 1974).

18. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2005 8 (2006).

19. ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. DEP'T OF COMMERCE, CENSUS 2000 BRIEF: OVERVIEW OF RACE AND HISPANIC ORIGIN 3 (2001) (reporting 2000 census data).

20. See HARRISON & BECK, *supra* note 18, at 9 (indicating that blacks imprisoned on drug offenses outnumbered non-Hispanic whites by 133,100 to 64,800 at yearend 2003).

21. *Id.*

22. This is not to say that other areas are free of racial disparities, but, rather, to point out that the drug area stands head and shoulders above others in the proportion of prisoners who are black. Blacks also outnumber non-Hispanic whites among those imprisoned for violent crimes, but only by about thirty percent. *Id.* Black prisoners also far outnumber Hispanic prisoners (562,100 versus 219,200), but by much more consistent percentages across offense types. *Id.*

23. See KING, *supra* note 10, at 16 ("African Americans comprise 12% of the general population and, according to self-report data from the 2003 National Household Survey on Drug Abuse, they also comprise 12% of regular drug users." (citing data collected by the Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services)).

24. See, e.g., MAYRACK, *supra* note 7, at 32 (describing Wisconsin law).

rates for more serious offenses,<sup>25</sup> but that does not necessarily reflect higher rates of *commission* of such offenses. The higher arrest rates may be due instead to such factors as racial profiling or the greater law enforcement presence typically found in urban neighborhoods.<sup>26</sup>

A recent, innovative study in Seattle does indeed suggest that the arrest data for blacks may greatly overstate their involvement in the most serious types of drug offenses.<sup>27</sup> Based on surveys of participants in a needle exchange program and ethnographic observation of two outdoor drug markets,<sup>28</sup> the researchers found that blacks were disproportionately responsible for delivery of two types of serious drugs (crack and powder cocaine), but were actually underrepresented in the distribution of three other serious drugs (meth, heroin, and ecstasy).<sup>29</sup> Overall, researchers found that whites were responsible for a majority of the drug distribution studied (even though blacks constituted a majority of those who were arrested).<sup>30</sup> Indeed, interviews with Seattle police officers revealed an apparent obliviousness to illegal, open-air dealing of heroin and prescription drugs (which is conducted largely by whites), in contrast to a marked law enforcement emphasis on crack distribution (which is conducted largely by blacks).<sup>31</sup>

Sentencing data from other jurisdictions are consistent with the finding that differences in offense severity do not fully explain the racial disparities associated with drug enforcement.<sup>32</sup> For instance, in Wisconsin, data collected by the state Sentencing Commission indicate that, for any given level of offense severity, a black defendant is much more likely to be incarcerated than a white

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25. For instance, one study in Seattle revealed that sixty-four percent of those arrested for drug distribution from January 1999 to April 2001 were black, Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 *CRIMINOLOGY* 105, 121 (2006), even though only 8.4 percent of the city's residents are black, *id.* at 115. Another study in Wisconsin found that, although there are three times as many whites as blacks arrested for drug crimes in the state, MAYRACK, *supra* note 7, at 31, about twice as many blacks are convicted of drug distribution as whites, *id.* at 33.

26. KING, *supra* note 10, at 21, 24-25.

27. Beckett et al., *supra* note 25, at 121.

28. The needle exchange survey has a variety of potential biases, but these biases are believed to some extent to cancel one another out. *Id.* at 111-12.

29. *Id.* at 117.

30. *Id.* at 121.

31. *Id.* at 130.

32. The Seattle study is also consistent with other research indicating that (popular perceptions notwithstanding) "distributors" and "users" are not distinct populations. See HUMAN RIGHTS WATCH, *supra* note 9, at 43 ("[D]rug users typically engage in the activities of transferring, selling, and distributing drugs to friends, acquaintances, or strangers."). In a similar vein, other research indicates that "people typically obtain their drugs from persons of their own race." *Id.* at 44.

defendant convicted of the same type of offense.<sup>33</sup> Thus, blacks convicted of Class G drug felonies (the most common type of drug felony) were more than twice as likely to receive a prison term as whites convicted of the same class of drug offense.<sup>34</sup> Indeed, even in the federal criminal justice system, which between 1987 and 2005 used mandatory sentencing guidelines to constrain judicial discretion more aggressively than any other U.S. jurisdiction,<sup>35</sup> researchers found (based on pre-2005 data) that the “odds of a typical Black drug offender being sentenced to imprisonment are about twenty percent higher than the odds of a typical White offender,”<sup>36</sup> and that the “typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker.”<sup>37</sup> Notably, in reaching these conclusions, researchers held constant the presumptive sentence mandated by the guidelines,<sup>38</sup> which takes into account role in the offense, drug type, drug quantity, and criminal history.<sup>39</sup> If these factors do not fully explain racial disparities in the federal system—which has been uniquely aggressive in its efforts to prevent judges from sentencing based on inappropriate considerations—then it would be quite surprising indeed to learn that offense severity fully accounted for racial disparities in state criminal justice systems.

What then of the third and final hypothesis, that disparities are explained by the presence of other aggravating circumstances besides those typically used to differentiate among offenders in criminal codes? Two sets of considerations stand out as potentially valid justifications for the racial disparities (to the extent they are true): (1) drug trafficking by blacks more frequently causes important social harms in the affected neighborhoods, and (2) black drug offenders more frequently present greater threats to public safety, in light of elevated recidivism rates and/or increased propensity to commit ancillary, non-drug offenses. It turns out that there is some support for these propositions, although it is far from clear that they fully justify the observed racial disparities in punishment.

With respect to the first consideration, aggravated neighborhood effects, much evidence suggests that blacks are more likely than whites to participate in

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33. MAYRACK, *supra* note 7, at 34-40.

34. *Id.* at 38.

35. *See* United States v. Booker, 543 U.S. 220, 246 (2005) (holding that the federal sentencing guidelines must henceforth be treated as advisory instead of mandatory).

36. U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 122 (2004).

37. *Id.* at 123.

38. *See id.* at 120 (describing presumptive sentence model).

39. *See* U.S. SENT’G COMM’N, GUIDELINES MANUAL §§ 2D1.1, 2D2.1, 3B1.1, 3B1.2, 4A1.1 (2006).

open-air drug markets, in contrast (for instance) to the desultory transactions through personal connections that typify drug distribution among suburban whites.<sup>40</sup> It is not implausible that the open-air markets have greater adverse effects on a neighborhood (demoralization, bystander risks) than do more discrete means of distribution, which may potentially explain and justify harsher criminal justice responses.<sup>41</sup> On the other hand, punishment theory does not unambiguously dictate this outcome. For instance, deterrence theory suggests harsher punishment for crimes that are hard to detect,<sup>42</sup> which in this context would mean the suburban drug-dealing. In any event, the Seattle research casts doubt on the importance of means-of-distribution as an explanation for disparities: blacks were overrepresented among arrestees for both indoor and outdoor drug offenses, while arrests were much more frequent in an open-air market in a racially mixed neighborhood than in a predominantly white neighborhood.<sup>43</sup>

The second consideration, enhanced offender dangerousness, also has some plausibility. To the extent that race is correlated with socioeconomic status, we might expect black drug offenders to have weaker social support networks and fewer resources that might help them to avoid future criminal activity.<sup>44</sup> Likewise, these same socioeconomic characteristics may tend to cause drug-dependent blacks to rely more heavily on ancillary criminal activity in order to support their dependency. Additionally, the tendency to rely on open-air distribution of drugs (which itself may be related to a socioeconomic limitation, that is, a lesser degree of access to private spaces for more discrete drug transactions)<sup>45</sup> may also tend to lead to higher levels of ancillary criminality, e.g., the violent crime associated with turf wars over the most desirable outdoor spaces.

Criminal history provides a good indicator of dangerousness,<sup>46</sup> and black drug offenders do indeed tend to have more serious records than whites con-

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40. See KING, *supra* note 10, at 22 (describing research).

41. In this vein, Professor Stuntz argues that it is the violence associated with drug trafficking, and not drug trafficking per se, that explains the massive escalation of punishment associated with the war on drugs. See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2024 (2008) (“Everything about the war on drugs and the politics associated with it makes sense only on the assumption that drugs were not the war’s primary target. Violence was.”).

42. Michael M. O’Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 250 (2004).

43. Beckett et al., *supra* note 25, at 122.

44. See HUMAN RIGHTS WATCH, *supra* note 9, at 48 n.88 (noting that black poverty rate is 25.6%, while white poverty rate is only 10.4%).

45. Beckett et al., *supra* note 25, at 121.

46. See, e.g., U.S. SENT’G COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 10 (2004) (finding statistically significant correlation between criminal history points and recidivism rates of convicted federal defendants).

victed of similar crimes.<sup>47</sup> Yet, criminal history probably cannot fully account for the racial disparities in incarceration, even in conjunction with offense severity. For instance, as noted above, the federal sentencing data point to some residual disparity even after taking into account presumptive guidelines sentences that are based on criminal history and offense severity.<sup>48</sup> Likewise, the Wisconsin data indicate that, within offense categories, many white defendants *with* a prior felony get probation, while many black defendants *without* a prior felony are sent to prison.<sup>49</sup>

Nor can black-white criminal history disparities be regarded as an entirely trustworthy indicator of *relative* recidivism risk and involvement in ancillary criminal activity. The more serious criminal records of black drug defendants are at least in part a byproduct of law enforcement policies and practices that systematically result in higher arrest risks for black drug offenders than white, for instance, the tendency to focus on open-air drug markets and crack.<sup>50</sup>

Finally, in considering whether racial disparities in drug offense incarceration are warranted, one must also bear in mind the network of mandatory minimum sentencing laws that have a disproportionate effect on blacks: to the extent these laws are themselves unwarranted, the resulting disparities should also be regarded as unjustified. The most infamous example is the so-called 100:1 crack-powder ratio in federal sentencing: a given quantity of crack cocaine will result in the same sentence that would be imposed for one hundred times that quantity of powder cocaine.<sup>51</sup> Prior to a marginal softening of the 100:1 ratio in the sentencing guidelines (but not in statutory minimums) in 2007,<sup>52</sup> the average federal sentence for crack (the distribution of which is overwhelmingly associated with blacks) was 119 months, while the average for the powder form of the same drug (the distribution of which is overwhelmingly associated with

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47. For instance, in the federal system, blacks constitute only eighteen percent of drug offenders in criminal history category 1, the least serious category, but represent a progressively larger proportion of offenders at each level as criminal history grows more severe. At category 6, the highest level of criminal history recognized in the federal system, blacks constitute sixty percent of the offenders. (The results were calculated using United States Sentencing Commission statistics from FY2006, which are available on-line at [http://fjsrc.urban.org/analysis/ez/var.cfm?ttype=one\\_variable&agency=USSC&db\\_type=SntcEvnt&saf=OUT](http://fjsrc.urban.org/analysis/ez/var.cfm?ttype=one_variable&agency=USSC&db_type=SntcEvnt&saf=OUT), a site maintained by the Federal Justice Statistics Resource Center.) Likewise, in Wisconsin, at every level of drug offense severity, a higher percentage of black defendants have prior felony convictions and prison terms than white defendants in the same offense category. MAYRACK, *supra* note 7, at 34-40.

48. See *supra* text accompanying notes 36-39.

49. MAYRACK, *supra* note 7, at 34-40.

50. U.S. SENT'G COMM'N, *supra* note 36, at 134.

51. *Id.* at 131-32.

52. Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at <http://www.ussc.gov/PRESS/rel121107.htm>.

whites) was 78 months.<sup>53</sup> In a series of studies, the United States Sentencing Commission has repeatedly concluded that “the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine” and urged Congress to lower sentences for crack.<sup>54</sup>

While particularly important and well-known, the 100:1 ratio in federal sentencing is not the only example of a questionable sentencing law that produces stark racial disparities. Another important example is laws that result in harsher punishment for drug crimes committed in certain protected zones. Connecticut’s “school zone law” is typical: prior to reforms in 2001, drug dealers faced a three-year mandatory minimum sentence for transactions that occurred within 1,500 feet of a school, public housing project, or daycare center.<sup>55</sup> Reforms in 2001 grew out of the realization that the law was having greatly disproportionate effects on the urban poor, and hence on black people.<sup>56</sup> For instance, as an unavoidable result of population density and the concentration of social services in cities, virtually the entire city of New Haven, Connecticut, was considered a school zone.<sup>57</sup> Moreover, the mandatory minimum was applied in ways that did not really focus on the protected class or otherwise make sensible distinctions among offenders: “Arrests at 3:00 a.m., or during school vacation, or involving middle-aged junkies selling drugs to one another were charged the same way as actual sales to schoolchildren.”<sup>58</sup>

While the phenomenon defies precise quantification, it is likely that a substantial portion of the racial disparities in drug incarceration lacks justification. This is not to say that the disparities are *entirely* unwarranted. It is not implausible, for instance, that black drug offenses tend to have a more harmful effect on black neighborhoods than do the relatively less visible white offenses on white neighborhoods, or that black drug offenders tend to present greater recidivism risks than white. On the other hand, it seems reasonably clear that a number of laws and practices that have a disproportionate effect on blacks (e.g., those relating to crack cocaine) are based on exaggerated perceptions of the relative harmfulness of the targeted offenses and the relative dangerousness of the targeted offenders.<sup>59</sup>

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53. U.S. SENT’G COMM’N, *supra* note 36, at 131.

54. *Id.* at 132.

55. Michael Lawlor, *Reforming Mandatory Minimum Sentences in Connecticut*, 15 FED. SENT’G. REP. 10, 10 (2002).

56. *Id.* at 11.

57. *Id.*

58. *Id.*

59. See MAYRACK, *supra* note 7, at 3 (discussing research indicating that criminal justice actors perceive blacks to be “uniquely threatening” and linking “Afrocentric facial features” with longer sentences, even holding offense severity and criminal history constant); Beckett et al., *supra* note 25, at 106 (“[A]n emerging body of research on implicit bias suggests that racial stereotypes shape perceptions of the seriousness or dangerousness of particu-

## B. Disparity: What's the Harm?

Unwarranted racial disparities offend our sense of justice at an intuitive level, but, in order to evaluate potential responses, it is important to be clear about the harms of disparity. I consider these harms under two headings: waste of human capital of black drug offenders and their families, and group stigma.

### 1. Waste of Human Capital

Being arrested, convicted, and incarcerated can have devastating long-term effects on drug offenders and their families. An arrest alone can significantly disrupt family and work life, especially for defendants who are unable to post bail and are thereby forced to endure several days or weeks of pretrial detention. A conviction may carry a host of collateral consequences, ranging from loss of access to publicly subsidized housing, to disqualification from other welfare and education benefits, to crippling disadvantages in the labor market.<sup>60</sup> Incarceration may greatly exacerbate the problems, as any vocational skills that existed previously may atrophy, and the prison environment may adversely affect mental health.<sup>61</sup> Incarceration can also have a devastating effect on the offender's family, which may lose an important source of economic support and childcare assistance during the term of imprisonment, in addition to suffering other financial losses, stigma, and social isolation.<sup>62</sup> All of this may translate into a devastating loss of human capital for the offender and his or her family.<sup>63</sup>

To be sure, for any given offender, the social benefits of arrest, conviction, and/or incarceration may outweigh the costs to the offender and his or her family. In particular, society may benefit from the incapacitation of dangerous offenders with a high risk of recidivism.<sup>64</sup> And, indeed, researchers have found

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lar situations and social problems . . .").

60. DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 33, 69 (2007). Professor Pager's research indicates that the employability effects for blacks are actually greater than they are for whites. *Id.*

61. Christy A. Visher, *Returning Home: Emerging Findings and Policy Lessons About Prisoner Reentry*, 20 FED. SENT. REP. 93, 95 (2007).

62. Meares, *supra* note 5, at 297-99. See also COMM'N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYSTEM, *supra* note 8, at 4 (discussing evidence of adverse psychological effects on children of incarcerated parents).

63. These losses may, in turn, contribute to recidivism risks and greater pressure on social services agencies, and thereby ultimately affect a broader population of people than just the offenders and their families themselves. Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT. REP. 127, 127 (2007).

64. I assume here that incarceration of drug offenders in minority communities is capable of accomplishing little else besides incapacitation. Prison-based rehabilitative programming has always had a poor track record, Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 464 (1997), and seems even less promising now in

evidence that lower crime rates are associated with higher incarceration rates (holding other variables constant).<sup>65</sup> Yet, even assuming that incarcerating marginal offenders will, *on average*, result in lower crime rates, this fact would not preclude the possibility that the costs of incarceration outweigh the benefits as to many specific inmates. Indeed, given (a) the recent, rapid growth of the American prison population to unprecedented highs,<sup>66</sup> and (b) the known fallibility of criminal justice institutions,<sup>67</sup> it would be quite surprising if there were not a substantial number of prisoners whose incarceration produced costs (including the costs of incarceration itself)<sup>68</sup> in excess of the social benefits. As a matter of shorthand, I will refer to these individuals as the “wrongfully incarcerated.”

The racial disparity analysis of the previous Section strongly suggests that these wrongful incarcerations are disproportionately experienced by blacks. Given the extreme overrepresentation of blacks within the incarcerated population, it could hardly be otherwise—particularly given the evidence that this overrepresentation is not wholly warranted by greater offense severity or offender dangerousness. Put differently, since the system errs in favor of harsher criminal justice responses to a greater extent with black offenders than white

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the wake of repeated budget cuts, Michael M. O’Hear, *The Second Chance Act and the Future of Reentry Reform*, 20 FED. SENT. REP. 75, 80 (2007). General deterrence theory likewise has limited empirical support, Robinson & Darley, *supra* at 458-64, and may be especially ineffective in poor communities with high incarceration rates, Jeffrey Fagan & Tracey L. Meares, Punishment, *Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, at text accompanying n.45 (2000), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=223148](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=223148). See also James P. Lynch & William J. Sabol, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 CRIMINOLOGY & PUB. POL’Y 267, 275 (2004) (discussing research indicating that crime reductions associated with increase in incarceration rates seem largely explained by incapacitation effects, with little separate contribution from deterrence). Finally, I assume that retributive interests generally do not demand lengthy prison sentences for drug crimes. Fully developing a defense of this proposition lies beyond the scope of this Article, but rests about the views that, properly understood, retribution theory reserves the most serious punishments for conduct objectively likely or subjectively expected to cause serious physical injury, Michael M. O’Hear, *supra* note 42, at 156-59, and that drug offenses typically do not exhibit these aggravating characteristics.

65. Lynch & Sabol, *supra* note 64, at 274-76. Although this correlation does not necessarily imply a causal relationship, research showing increases in crime rates following court-ordered reductions in prison populations lends support to the causation hypothesis. *Id.* at 275.

66. BONCZAR, *supra* note 16, at 1.

67. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291 (2006) (discussing wrongful conviction data).

68. In Wisconsin, for instance, the average cost of imprisonment is more than \$27,000 per year per offender. See, e.g., COMM’N ON REDUCING RACIAL DISPARITIES IN THE WIS. JUSTICE SYS., *supra* note 8, at 59 (reprinting testimony of former Department of Corrections Secretary Matt Frank).

offenders, we should expect a higher rate of error in the application of those responses to blacks than whites.

Any wrongful incarceration, with its attendant squandering of human potential, should be a cause of concern, but the concentration of wrongful incarceration in communities that are already socially and economically marginalized should be regarded as especially objectionable. Normally, we expect major government programs (and the war on drugs surely qualifies as a major government program) to operate in a manner that is neutral or (as, for instance, in the example of the progressive income tax) favorable to the most disadvantaged groups in society. It requires no special ethical commitment to the poor—although such a commitment plays a rich role in our religious and political traditions<sup>69</sup>—to desire reform of a government program that imposes its costs disproportionately on individuals who are already more likely than most to suffer important disadvantages in life.<sup>70</sup>

## 2. Group Stigma

The previous Section focused on harms experienced directly by offenders and their families. This Section considers a more inchoate set of harms experienced collectively by all members of the black community, without regard to personal or family involvement in drug offenses. These harms are related to a sort of group stigma that arises from marked racial disparities in the criminal justice system. This group stigma may contribute to at least three different types of harm.

First, the racial disparities reinforce mistaken perceptions among whites as to the degree of criminality among blacks.<sup>71</sup> This perception doubtless makes it harder for all members of the black community to obtain good jobs and otherwise advance socially and economically. The perception may also have a self-perpetuating quality, as stereotypes about black criminality likely contribute to racial profiling and other manifestations of racial disparity in the criminal justice system (which in turn reinforce the negative stereotypes).

Second, racial disparities may cause blacks to lose confidence in the fairness and neutrality of the criminal justice system. A growing body of social psychology research links citizen perceptions of biased and disrespectful treat-

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69. See, e.g., Beth Colgan, *The Presidential Politics of Prisoner Reentry Reform*, 20 FED. SENT. REP. 110-11, 113 (2007) (describing poverty reduction as increasingly high priority of evangelical Christians and as traditional focus of Democratic Party).

70. See HUMAN RIGHTS WATCH, *supra* note 9, at 48 n.88 (noting that black poverty rate is 25.6 percent, while white poverty rate is only 10.4 percent).

71. See Beckett et al., *supra* note 25, at 107 (discussing research showing common association between blacks and crime, e.g., over ninety-five percent of respondents in one study pictured a black person when asked to imagine a typical drug dealer).

ment by legal authorities to citizen disrespect of the law and legal system, and ultimately to reduced motivation to obey the law and cooperate with the authorities.<sup>72</sup> Put differently, racial disparities can promote the sense in some inner-city communities that the police are an occupation force and thereby fuel resistance to law enforcement.<sup>73</sup> (Think, for instance, of the anti-snitching movement that has received much attention recently.<sup>74</sup>) For this reason, stepping up the war on drugs in inner-city communities may be a self-defeating anti-crime strategy over the long run.<sup>75</sup>

Finally, the stigma of racial disparity may demoralize the residents of black neighborhoods, contributing to a sense that the neighborhoods are not good places to live and that it is not worthwhile to invest in relationships with other residents (that is, develop social capital). The intuition here suggests that high incarceration rates in a neighborhood will be associated with more negative feelings towards the neighborhood and less voluntary association among residents, even holding crime rates and other variables constant. Empirical research to support this hypothesis is limited, but at least modestly supportive.<sup>76</sup> This line of reasoning, in turn, suggests another perverse consequence of the war on drugs in inner-city communities: disproportionate harshness in the treatment of members of those communities may undermine the capacity of those communities to address crime and other social problems on their own.<sup>77</sup>

To be sure, the latter two sets of harms (reduced criminal justice system legitimacy and neighborhood demoralization) are to some extent counterbalanced by the fact that drug enforcement may be understood as government respon-

72. For a brief summary of this literature, see Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 420-24 (2008).

73. For example, researchers found a correlation on the neighborhood level between incarceration rates and perceptions of legitimacy of the criminal justice system in Tallahassee, Florida. Lynch & Sabol, *supra* note 64, at 285. See also COUNCIL ON CRIME AND JUSTICE, JUSTICE, WHERE ART THOU? 16 (2007) (“[D]isparity between how different races have been treated in the war on drugs undermines the integrity of the criminal justice system, causing people to lose confidence that the system is even-handed and works equally for the benefit of all citizens.”). See also Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1194 (2008) (discussing evidence of “a growing conviction among some communities of color that the police are essentially an invading force, unresponsive to the community’s needs, and thus illegitimate”).

74. For a recent discussion of the effectiveness of the new “stop snitching” norm, see Delgado, *supra* note 73, at 1204-06.

75. See Fagan & Meares, *supra* note 64, at n.102 (discussing development of “cultures of opposition and defiance” in marginalized communities).

76. For a discussion of the relevant research, see Lynch & Sabol, *supra* note 64, at 285-86.

77. High rates of incarceration may also affect community capacity by removing large numbers of men from the community and thereby undermining family formation and maintenance, which may reduce the efficacy of the family as a community-based instrument of social control. For a summary of the relevant research, see *id.* at 280-84.

siveness to law-abiding members of the community, whose quality of life may be profoundly diminished by drug-dealing and related crime. Even if criminal justice responses are not able to accomplish substantial reductions in drug distribution, visible law enforcement activity against drug offenses may still achieve some good by reassuring members of the community that their concerns are deemed worthy of response. Neglect of crime, particularly highly visible crime like that which occurs in open-air drug markets, may do as much to demoralize the community and undermine respect for the law as racial disparities. This suggests a crucial challenge for drug policy: how can government effectively signal its responsiveness to inner-city crime concerns without simultaneously producing incarceration disparities that seem about as destructive and dispiriting as the open-air drug markets themselves? To many, drug treatment courts supply an attractive solution to this seemingly intractable problem. The next Part considers how promising the solution really is.

## II. WHY DRUG TREATMENT COURTS ARE NOT A SOLUTION TO THE PROBLEMS ASSOCIATED WITH RACIAL DISPARITIES

The war on drugs, and particularly the special intensity with which it has been waged against open-air drug dealing and crack cocaine, has fueled a massive and demographically disproportionate increase in the number of black males held in the nation's prisons. The incarceration of some of these inmates likely delivers substantial crime-reduction benefits to the poor, urban neighborhoods from which so many of them come. But the incarceration of others almost certainly results in long-term suffering for the inmates and their families that cannot be justified. There is an urgent need, then, for the criminal justice system to do a better job of separating those drug offenders for whom incapacitation is appropriate from those for whom it is not. Crude mandatory minimum statutes may offer the clearest illustration of the extent to which the system's use of incapacitation more closely resembles a shotgun than a laser beam.

In this context, the drug treatment court ("DTC") has obvious appeal as a pathway out of the system for offenders who can demonstrate their ability to complete a rigorous, prescribed course of therapy. These drug offenders are almost surely among the least dangerous; saving them from conviction and incarceration would thus seem a step in the right direction toward a more appropriately discriminating system.

Yet much evidence now suggests that white drug offenders are more likely to benefit from this "pathway out" than black drug offenders. This means that DTCs are apt to exacerbate, not ameliorate, overall racial disparities. To be sure, *some* black offenders are surely made better off by the institution of an urban drug court. And it is possible that reducing black incarceration rates in absolute terms may justify increases in relative terms. But it is not even clear that a DTC will produce reductions in absolute terms, as net-widening and

DTC sanctioning may result in more incarceration for some classes of black offenders. Moreover, because the relative incarceration rate is not likely to improve much—and may get worse—the institution of a DTC will do little to address the stigma-related harms discussed in the previous Part. In short, it is misguided to think of DTCs as an important component of a racial justice agenda.

In developing these points, this Part first describes the DTC model, then considers the effects of DTCs on incarceration rates and racial disparity harms.

### A. *The DTC Model*

Although DTCs differ substantially from one another in the specifics of their operation, they tend to share certain key features. Thus, DTCs typically have eligibility requirements that exclude defendants who face ancillary non-drug charges or who have prior convictions for violent felonies.<sup>78</sup> Many also exclude those charged with drug distribution (as opposed to simple possession).<sup>79</sup> After arrest, eligible drug defendants may elect to participate in the DTC program in lieu of conventional criminal court processing.<sup>80</sup> This will typically require a defendant to plead guilty in return for either deferred judgment or a sentence of probation.<sup>81</sup> The deferred judgment or probation status is then conditioned on successful participation in a drug treatment program.<sup>82</sup>

The DTC judge plays an unusually active role in supervising the defendant's compliance with the treatment regimen. Defendants are subject to frequent drug testing and court appearances.<sup>83</sup> The judge's role at these court appearances has been described as follows:

The judge seeks to establish a dynamic, personal relationship with each offender directed toward holding the defendant accountable for her actions during the course of treatment to ensure that the defendant stays in treatment whenever possible and appropriate. This aspect of the drug court requires the judge to become confessor, taskmaster, cheerleader, and mentor; in turn exhorting, threatening, encouraging and congratulating the participant for his or her progress, or lack thereof.<sup>84</sup>

Failures (positive drug tests, missed appointments, rearrest) are punished swiftly through a system of graduated sanctions that might include a short jail

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78. Hoffman, *supra* note 2, at 1462.

79. Miller, *supra* note 2, at 1539.

80. Hoffman, *supra* note 2, at 1462.

81. *Id.*

82. *Id.*

83. *Id.*

84. Miller, *supra* note 63, at 128 (citations, quotation marks, and ellipses omitted).

term.<sup>85</sup> Repeated failures will eventually result in revocation of deferred judgment or probation, and imposition of a sentence (often to prison).<sup>86</sup> Successful completion of the treatment program, however, will typically save the defendant from incarceration and often result in dismissal of the underlying charges.<sup>87</sup>

Following the creation of the first DTC in Miami in 1989, the model spread rapidly, with nearly 500 DTCs in existence just one decade later.<sup>88</sup> The number then more than tripled over the next five years to 1,621 DTCs by the end of 2004.<sup>89</sup> DTCs have now been established in all fifty states.<sup>90</sup>

### B. *Effects of DTCs on Incarceration Rates for Black Drug Offenders*

The institution of a DTC is unlikely to result in much reduction in black incarceration rates, either in absolute terms or relative to white incarceration rates. Four key aspects of the DTC help to explain why this is so. First, the DTC is a court-based program that comes into play only after a person is arrested. Thus, the institution of a DTC has no direct effect on police practices (e.g., targeting open-air drug dealing and crack cocaine) that result in disproportionate numbers of blacks entering the criminal justice system. And as long as blacks continue to be dramatically overrepresented at the frontend of the system, it is unlikely that they will be anything but dramatically overrepresented at the back-end, in prison. At the very least, a DTC would have to offer blacks sizeable advantages relative to whites in order to make any appreciable dent in the back-end racial disparities.

Second, DTC eligibility requirements—by disqualifying those who face distribution charges or who have serious criminal histories—tend to screen out the prison-bound; the defendants who actually qualify for the DTC are thus apt to be defendants who would otherwise receive time served or other relatively light sentences. Nationally, of those arrested for drug possession, barely ten percent receive a felony conviction, while the corresponding percentage for drug trafficking is about two-thirds.<sup>91</sup> Likewise, the absence of a prior felony

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85. Hoffman, *supra* note 2, at 1463.

86. *Id.*

87. Bowers, *supra* note 2, at 784.

88. C. WEST HUDDLESTON, III, ET AL., NAT'L DRUG COURT INSTITUTE, PAINTING THE PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 1, Fig. 1 (2005).

89. *Id.*

90. *Id.* at 4.

91. In 2004, there were about 1.5 million possession arrests and 300,000 trafficking arrests. MARC MAUER & RYAN S. KING, THE SENT'G PROJECT, A 25-YEAR QUAGMIRE: THE "WAR ON DRUGS" AND ITS IMPACT ON AMERICAN SOCIETY 6, Tbl. 1 (2007). The same year, there were about 161,000 felony convictions for possession and 202,000 for trafficking.

conviction also substantially reduces prison risk.<sup>92</sup> Given a DTC focus on possessors with little or no criminal history, it is not likely that DTCs will have much of an effect on incarceration rates for any racial group. DTCs are less a diversion from prison than a diversion from other alternatives to prison.

Third, DTCs have a high failure rate. Although graduation rates vary substantially from court to court, they generally range from about one in four to about two in three.<sup>93</sup> Thus, although there are about 70,000 DTC participants at any given time, the annual graduation rate is only about 16,000.<sup>94</sup> Those who fail to graduate eventually have their deferred judgment or probation revoked, resulting in the imposition of a sentence pursuant to conventional processes. High failure rates thus complement selective eligibility requirements in undermining the effectiveness of DTCs as a prison diversion program. Moreover, failure rates are higher for blacks than whites, by thirty or more percentage points in some DTCs.<sup>95</sup> This should not be surprising, as DTC failure is correlated with a variety of socioeconomic disadvantages,<sup>96</sup> and blacks are overrepresented among those who face these important barriers to successful treatment.<sup>97</sup>

Fourth, failure (or even near-failure) may result in greater incarceration than nonparticipation. DTC participants receive no guarantee of more lenient treatment than nonparticipants. Even those who graduate may experience sig-

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MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS 2 (2004).

92. For instance, among felony defendants in large urban jurisdictions who lack a prior felony conviction, only about twenty percent receive a prison sentence. By contrast, about thirty-five percent of those who have one prior felony are sent to prison, as are more than half of those with multiple prior felonies. TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, 3 (2008).

93. See, e.g., SCOTT EHLERS & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, PROPOSITION 36: FIVE YEARS LATER 17 (2006) (discussing rates among California drug courts).

94. HUDDLESTON ET AL., *supra* note 88, at 7.

95. STEVEN BELENKO, NAT'L CENTER ON ADDICTION AND SUBSTANCE ABUSE, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001, UPDATE 27 (2001). See also Bowers, *supra* note 2, at 804-05 (discussing research showing that minorities do worse than whites in DTCs, but noting it is not clear to what extent, if any, this is due to race per se, as opposed to various demographic characteristics associated with race); Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts: Empirical Success. Will South Dakota Follow Suit?*, 52 S.D. L. REV. 288, 311 (2007) (noting that, in Woodward County, Iowa, DTC, "only Caucasians and Asians were more likely to graduate than not").

96. Bowers, *supra* note 2, at 803-04.

97. *Id.* at 804-05. Professor Bowers has suggested an additional disadvantage faced by blacks in a DTC: police practices targeting black neighborhoods and open-air drug dealing and use increase the likelihood that black offenders will be rearrested, which may result in the termination of their DTC participation. *Id.* at 806-07. The same police practices may also mean that black participants are more likely to have a criminal history than white participants, which may also put them at a disadvantage with respect to bail determinations and police monitoring. *Id.* at 805-07.

nificant incarceration along the way as a sanction for treatment missteps. For instance, one study of the Santa Clara drug court found that the average time spent in jail *for those successfully completing the program* was 51 days,<sup>98</sup> while a study of the Baltimore drug court found that participants spent an average of 55 days in jail for noncompliance with program conditions.<sup>99</sup> And the situation is much worse for those fail out of a DTC. For instance, Professor Bowers recently determined that “sentences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants.”<sup>100</sup> As Bowers notes, certain idiosyncratic features of the New York system may contribute to these results,<sup>101</sup> but there are other considerations that would make it unsurprising to see longer sentences for those who fail: in effect, the offender is now being punished for *two* bad acts (or courses of conduct), the underlying crime and the failure to comply with a judge-mandated treatment regimen. Although the offender’s addiction might be seen as a mitigating factor to outsiders, the DTC ideology insists upon personal accountability for overcoming addiction; addicts “therefore deserve *greater* punishment if they fail to exercise control.”<sup>102</sup> Moreover, the reality of harsher sentences for some DTC failures makes even more troubling the racial disparities in failure rates. This suggests that if DTCs have any real effect on racial disparities, the effect is more likely negative than positive.

### C. Effects of DTCs on Wrongful Incarceration

Even if DTCs do not help overall black incarceration rates, it is possible that they nonetheless reduce the rate of wrongful incarceration. Put differently, lack of progress in overall incarceration rates may mask progress in reserving incarceration for those who most require incapacitation. In order to assess this

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98. EHLERS & ZIEDENBERG, *supra* note 93, at 20.

99. Denise C. Gottfredson et al., *Effectiveness of Drug Treatment Courts: Evidence From a Randomized Trial*, 2 CRIMINOLOGY & PUB. POL’Y 171, 183, tbl. 4 (2003).

100. Bowers, *supra* note 2, at 792. This seems consistent with Baltimore data: drug court participants there received harsher treatment for noncompliance with probation conditions (55 days in jail on average) than other defendants randomly assigned to a control group (26.6 days in jail on average). Gottfredson et al., *supra* note 99, at 183. It is also consistent with the results of another recent study of six drug courts across New York State, which found “failures on average received longer sentences than nonparticipants in five of six drug courts.” Michael Rempel et al., *Drugs Courts an Effective Treatment Alternative*, 19 CRIM. JUST. 34, 35 (2004).

101. Bowers, *supra* note 2, at 794 (discussing unusual prevalence of dealers in New York’s drug courts).

102. *Id.* at 788. Moreover, it is not hard to imagine that many DTC judges, who become personally invested in the success of participants, would be more inclined to penalize recalcitrant defendants harshly (to “take it personally”) than would ordinary sentencing judges in the more impersonal setting of the conventional criminal court.

possibility, it is helpful to distinguish among the three major types of drug offenders who are wrongfully incarcerated: (1) casual drug users who (aside from occasional possession and distribution) have minimal involvement in criminal activity (or, for shorthand, the “irregular offenders”); (2) offenders whose criminal activity results from a dependence on drugs that can be successfully addressed in the context of DTC-monitored treatment (the “treatable addicts”); and (3) untreatable addicts who nonetheless could be removed from the community without any appreciable reduction in the frequency or severity of criminal victimization (the “low-level hard cases”).<sup>103</sup> Because the third group—untreatable by definition—is unlikely to be protected from incarceration by the DTC process, any reductions in wrongful incarceration will have to come from the first two groups. Thus, an important question for DTCs is the extent to which they reduce incarceration rates for the first two categories. The number cannot be determined with precision, but there are good reasons to doubt that it is large.

As to the first category, the irregular offenders, there cannot be much reduction in incarceration in most jurisdictions because these offenders are unlikely prison-bound in the absence of a DTC. Light criminal history greatly reduces the risk of prison, especially in simple possession cases. Dealers, even casual ones, face a more substantial prison risk, but most DTCs exclude those facing distribution charges. If the DTC accepts dealers, it has considerably more to offer the irregular offenders. But, depending on the jurisdiction, even the dealers in this category have a decent chance of avoiding substantial prison terms. Their casual involvement in the drug trade likely means responsibility for lower quantities of drugs, as well as a greater likelihood of having stable employment and other positive characteristics that reduce prison risks.

Where a DTC is most likely to make a real dent in the wrongful incarceration of irregular offenders is in jurisdictions in which even low-level drug offenders commonly face draconian mandatory minimum sentences. Consider, for instance, the New York City experience. The City’s DTCs attract a greatly disproportionate number of dealers to possessors (and are unusual in accepting them) because prosecutors there generally charge simple possession as a misdemeanor, which carries a low enough incarceration risk that defendants are rarely inclined to bother with the rigors of the DTC alternative, while dealers

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103. These categories, of course, represent an oversimplification for analytical purposes. One cannot determine exactly what proportion of drug offenders or DTC participants fit most appropriately into each category. For reasons noted later in this Section, it is only the treatable addicts who consistently have good reasons to participate in a DTC, although many DTC programs doubtlessly also include a healthy representation from the irregular offender and low-level hard case categories, depending in part on a variety of jurisdiction-specific considerations (for instance, local sentencing laws and practices, and DTC eligibility restrictions).

typically face felony charges and application of New York's infamous Rockefeller mandatory minimums.<sup>104</sup> The New York data are thus consistent with the common-sense intuition that DTCs are unlikely to make much difference to offender populations that face low incarceration risks to begin with, but may prove quite attractive to offenders when prison risks are high, perhaps most importantly when mandatory minimums loom ominously.

Because mandatory minimums are often structured in a way that produces disproportionate effects on blacks (e.g., by targeting crack or "school zones"), there may indeed be some meaningful racial disparity benefits flowing from a DTC in jurisdictions where mandatory minimums are commonly applied to low-level drug offenders. In such jurisdictions, the DTC functionally becomes a safety valve that releases low-level offenders from the mandatory minimums, especially the irregular offenders who (because they are not dependent to begin with) are the participants most likely to complete the treatment program successfully.<sup>105</sup> But not all jurisdictions are New York. Indeed, the Rockefeller drug laws are infamous precisely because of their unusual harshness. In Wisconsin, for instance, where DTCs are now being planned to address racial disparity problems, drug offenders with light criminal histories do not face mandatory minimums. In such jurisdictions, a DTC generally has little to offer irregular offenders.

Even in the mandatory-minimum jurisdictions, a DTC will not accomplish much unless its eligibility criteria are designed to reach offenders who would otherwise be subject to the minimums. This may require, most notably, the inclusion of those facing distribution charges (which may or may not be politically feasible in any given jurisdiction). Additionally, the DTC will have to avoid "net-widening" effects, that is, an expansion in the number of offenders arrested and charged after the implementation of the DTC 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., treatment instead of prison). For instance, Denver saw its number of drug cases nearly triple in the two years after its DTC was set up.<sup>106</sup> As one Denver DTC judge has put it, "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 would not have bothered with before."<sup>107</sup> If net-widening effects are factored in, it is possible that irregular offenders will be made *worse*

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104. See Bowers, *supra* note 2, at 797.

105. DTCs have little incentive to screen for true addiction, while non-addicted offenders may have strong incentives to exaggerate their dependence in order to gain access to a DTC and the possibility of release from a mandatory minimum. *Id.* at 800-03.

106. Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT'G REP. 172, 174 (2002).

107. *Id.*

off by the implementation of a DTC—that the reduced incarceration for some will be outweighed by disruptions in the lives of a greater number caused by the process of arrest, charging, treatment, and (in at least some cases) failure and incarceration in cases that otherwise would have been ignored.

Consider next the treatable addicts. By definition, these are offenders who will overcome their addiction (and related criminality) within the context of a DTC regimen. It is difficult to estimate the number of these offenders. One potential proxy is the percentage of offenders who successfully complete the DTC process,<sup>108</sup> which varies widely from court to court. For instance, a recent study by the United States Government Accountability Office found completion rates for sixteen different DTCs ranging from twenty-seven percent to sixty-six percent, without any apparent correlation to structural differences in the programs.<sup>109</sup> Most had completion rates between forty and fifty-five percent.<sup>110</sup>

Although the completion rate data may suggest that DTCs are capable of keeping large numbers of treatable black addicts out of prison, there are good reasons to doubt that the potential is as great as it might seem. One problem is that some uncertain percentage of the graduates would not have gone to prison in the conventional system; they may have been successfully diverted from conventional court processing, but they have not been diverted from prison.<sup>111</sup> Another problem is that blacks are underrepresented, sometimes quite dramatically, among program graduates.<sup>112</sup>

This is not to say that DTCs never succeed in diverting black drug offenders from prison into beneficial community-based treatment. But it is to suggest, among other things, that the number of black addicts who fail in DTC is apt to be considerably higher than the number who succeed. Thus, any assessment of the overall impact of DTCs on black drug offenders must pay close attention to DTC effects on the third category of concern, the low-level hard cases.

As described above, this category consists of drug-dependent offenders who are nonetheless not worth incapacitating. Why not? Perhaps they are capable of managing their addictions without engaging in significant ancillary criminal activity. Or perhaps, while regularly engaged in the drug distribution business, they are nonviolent and working at a sufficiently low level as to be easily

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108. DTC studies indicate substantially lower recidivism rates for program graduates than dropouts. U.S. GOV'T ACCOUNTABILITY OFFICE, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 56 (2005).

109. *Id.* at 62.

110. *Id.* at 63.

111. To be sure, as discussed above, many of those not bound for prison will opt against the DTC alternative. But not everyone will do so: some will be adequately motivated by the potential to erase the conviction; some will be ill-informed about the risks and costs of DTC; and some will simply make bad decisions.

112. *See supra* text accompanying notes 94-97.

replaced.<sup>113</sup> In any event, this category likely comprises a large proportion of imprisoned drug offenders. One study estimated that fifty-eight percent of drug offenders in state prisons have no history of violent crime or high-level drug distribution activity.<sup>114</sup> Many, perhaps most, of these offenders are drug-dependent.<sup>115</sup> Some of these offenders could take advantage of a DTC, but most could not, either because they would not meet eligibility criteria or because they would fail to comply successfully with the treatment regimen.

We can reasonably assume, then, the existence of a large population of addicted drug offenders who are neither treatable at present nor worth incapacitating. But to say that they are not presently treatable does not mean they will forever be drug-dependent. By and large, like most addicts, they will age out of their dependence at some point.<sup>116</sup> As a member of this group prepares to move into a more law-abiding and socially productive phase of life, our concern should be how disabling the person's history of prior contacts with the criminal justice system will prove to be. Even more specifically, for present purposes, the question is whether the existence of DTCs will tend to help or harm the life prospects of these offenders, especially those who happen to be black.

And there are at least two important reasons why DTCs are apt to be harmful to many of the low-level hard cases. First, to the extent that DTCs promote net-widening, they likely result in more extensive criminal histories for the hard case offenders. Second, to the extent that these offenders choose to go through the DTC process, they face a substantial risk of receiving more incarceration than they would have through conventional criminal processing. They are apt to receive multiple short jail terms as sanctions for program violations, and then (as described above), once terminated from the program, might see a prison sentence several times longer than what otherwise would have been imposed.<sup>117</sup> To be sure, as we have already established, those offenders whose prison risks are low are generally inclined to opt out of the DTC. But, as Pro-

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113. Despite the common image of the hyper-violent inner-city drug dealer, drug trafficking need not be accompanied by violence. For instance, in one survey of inner-city drug businesses in Milwaukee, more than one-quarter reported no violence at all. JOHN M. HAGEDORN, WIS. POLICY RESEARCH INST., *THE BUSINESS OF DRUG DEALING IN MILWAUKEE I* (1998).

114. MAUER & KING, *supra* note 91, at 13.

115. More than seventy percent of drug offenders held in state prisons used drugs in the month before their arrest, more than forty percent were under the influence at the time of the offense for which they were arrested, and more than one-quarter committed that offense in order to get money for drugs. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, *DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004*, at 5, 6 (2006). More than sixty percent of state-imprisoned drug offenders meet the DSM-IV criteria for drug abuse or dependence. *Id.* at 7.

116. Bowers, *supra* note 2, at 831.

117. See *supra* text accompanying notes 98-102.

fessor Bowers has recently argued, it is the untreatable addicts who are precisely the offenders most likely to make a bad decision in this context.<sup>118</sup> And, given the incarceration risks that follow an ill-advised decision to enter a DTC, the mistake may continue to haunt the untreatable addict long after he or she has become treatable.

In sum, while the DTC may look at first blush like a do-no-harm innovation, actual experience indicates the contrary. There are both winners and losers in a DTC—and the losers (those who would have fared better in the conventional system) may disproportionately be black. It is by no means inconceivable that black drug offenders and their families, as a class, may experience net benefits from the implementation of a DTC, but net benefits are not likely to be large and may depend on jurisdiction-specific considerations (such as whether the DTC commonly functions as a safety-valve protecting low-level offenders from mandatory minimums).

#### D. *Effects of DTCs on Stigma Concerns*

As discussed in Part I, unwarranted racial disparities harm not only black drug offenders and their families, but also, through the operation of various complementary stigma effects, black communities more broadly. Are DTCs likely to do much to address these stigma-related concerns? There are good reasons to think not. As described in Part B, a DTC is unlikely to bring any appreciable change to the stigmatizing reality that black drug offenders are arrested, convicted, and incarcerated at rates far exceeding white drug offenders. To be sure, a new DTC may take a bit of the sting out of these disparities to the extent that the DTC is perceived to be a good-faith effort by the government to mitigate disparities and respond more effectively to crime problems in the inner-city. But, if the hard numbers do not change, the perceptions of good faith are not likely to endure.

Indeed, the problems may be exacerbated by a drug court culture that relies heavily on public shaming rituals. Consider this description of the Las Vegas DTC offered by three criminologists:

[O]ur field observations gave the clear impression that drug court was far more stigmatizing than reintegrative in its orientation toward offenders. This was indicated by a common hostile attitude towards some defendants who had failed to comply with court practices, a degradation of these offenders in a public arena, and only a rather token recognition of the defendants' efforts to successfully complete the program. . . .

. . . The individual defendant, not the act itself, was clearly the focal point of the judge's common "tongue lashings." These comments were usually of the

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118. Bowers, *supra* note 2, at 811-18.

type, "Don't you know what this stuff does to your brain!", "I'm tired of your excuses," and "I'm through with you."<sup>119</sup>

Such Judge Judy moments doubtlessly contribute to the popularity of DTCs among many drug war conservatives, who rightly see in programs like the Las Vegas DTC less a repudiation of the basic drug war ideology ("just say no") than its apotheosis. But if we can imagine this picture of public degradation as one that features a white person on the bench and a largely black population as the recipients of his scorn, it is not hard to imagine an unfortunate reinforcement of negative racial stereotypes.

### III. A BETTER ANSWER: REIMAGINING DRUG COURTS IN RESTORATIVE JUSTICE TERMS

I have identified various reasons to doubt that DTCs are capable of doing much to reduce black incarceration rates. Unfortunately, it seems that many of these same considerations (e.g., persistence of racial disparities at the arrest stage) will undermine the capacity of *any* court-based diversion program to reduce the size of racial disparities in prison populations. This does not mean, however, that courts have no role to play in addressing the *consequences* of racial disparities, particularly the way that disparities undermine the legitimacy of the law and legal authorities in black neighborhoods and diminish the capacity of residents to engage in collective problem-solving.

If the focus shifts from raw numbers to the impact on communities, then specialized drug courts may do some good. Drug courts should be reconceived, not as places for the administration of coerced treatment, but as meeting places for members of the community (including offenders and their families) to engage in constructive dialogue about the effects of drug-related crime on the community and the proper response of the criminal justice system. The drug court then becomes a locus for relationship-building and community empowerment. Indeed, the basic principles and processes I suggest here are nothing new: they are derived from the increasingly well-accepted theory and practice of restorative justice. What is more original is the effort to consider how RJ may be adapted to deal with drug crimes.<sup>120</sup>

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119. Terance D. Miethe et al., *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQ. 522, 536-37 (2000).

120. Professors Erik Luna and Barton Poulson have offered a very helpful, but quite preliminary, treatment of this topic in *Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?*, 37 MCGEORGE L. REV. 787, 814 (2006). A student note has also advocated the use of RJ in drug cases, albeit with little operational detail. Andrew D. Black, Note, *"The War on People": Reframing "The War on Drugs" by Addressing Racism Within American Drug Policy Through Restorative Justice and Community Collaboration*, 46 U. LOUISVILLE L. REV. 177, 196 (2007).

This Part proceeds as follows. Section A sketches RJ principles and processes in a general way. Section B describes how they may be adapted for use in drug cases. Finally, Section C considers the advantages of an RJ-based drug court over a treatment-based drug court.

### A. RJ: Principles and Processes

As a set of normative principles, RJ is typically contrasted with the traditional theories of punishment. RJ differs from retributive justice in that RJ does not recognize the infliction of pain on wrongdoers as a good in and of itself.<sup>121</sup> RJ shares the forward-looking orientation of utilitarian theories, but, in contrast to the more familiar utilitarian justifications for punishment (deterrence, incapacitation, and rehabilitation), emphasizes the healing of victims and communities harmed by crime as a primary objective.<sup>122</sup> Although there is some division among RJ theorists as to the degree of attention that ought to be given to crime reduction as an RJ objective,<sup>123</sup> several studies suggest that participation in an RJ program may reduce the likelihood that an offender will recidivate.<sup>124</sup> Theorists have identified a number of different reasons why RJ may advance the rehabilitative goals of criminal law<sup>125</sup>—although RJ theorists resist association with traditional rehabilitation theory, which is viewed as degrading to offenders to the extent that it casts them as merely passive (perhaps even involuntary) recipients of professional treatment.<sup>126</sup>

As a practice, RJ may take any of a number of different forms.<sup>127</sup> Of greatest interest for present purposes, community conferencing typically centers on a meeting involving the offender, the victim(s) of the offense, support persons (such as parents or friends) for the offender and victim(s), community representatives, and one or two trained facilitators.<sup>128</sup> “The focus of the encounter nearly always involves naming what happened, identifying its impact, and coming to some common understanding, often including reaching agreement as to how any resultant harm w[ill] be repaired.”<sup>129</sup>

121. Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice?*, 48 BRIT. J. CRIMINOLOGY 337, 339 (2008); Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 257 (2005).

122. Umbreit et al., *supra* note 121, at 258-59; Michael M. O’Hear, *Is Restorative Justice Compatible With Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 310-11 (2005).

123. Robinson & Shapland, *supra* note 120, at 339-40.

124. Umbreit et al., *supra* note 121, at 286-88.

125. Robinson & Shapland, *supra* note 121, at 342-46.

126. *Id.* at 339-40.

127. Umbreit et al., *supra* note 121, at 269-70.

128. *Id.* at 269.

129. *Id.*

Although the conference can occur entirely outside of criminal justice processes, it can also be woven into the system. The Milwaukee Community Conferencing Program provides a helpful illustration. Operated by the Milwaukee County District Attorney's Office, the CCP takes cases of nonviolent crime referred by line prosecutors prior to sentencing, and often prior to charging.<sup>130</sup> Before the CCP process can begin, an offender must first admit to wrongdoing and agree to participate.<sup>131</sup> Once the process begins, trained facilitators meet separately with the victim and the offender to prepare them for the conference.<sup>132</sup> The facilitators also seek out community members to participate.<sup>133</sup> Conferences are held in the community, for instance, in the meeting room of a public library.<sup>134</sup> Conference participants usually number between six and twelve, often including an offender, a victim, support people, defense counsel, two to four community members, and two facilitators.<sup>135</sup>

At the conference, CCP participants discuss the offense and its impact on the victim and the community more generally.<sup>136</sup> They next try to reach an agreement as to what the offender will do to repair the harm.<sup>137</sup> Agreements are embodied in writing, and include specific conditions for the offender that must be satisfied by a particular date.<sup>138</sup> "Conditions often include some form of reflection (an essay, painting, or poem), letters of apology to the victim, specific community service, restitution in specific increments, tasks related to job/school, sharing experiences with youth, or [drug or alcohol] counseling/treatment."<sup>139</sup> Successful compliance with the conditions will result in some benefit from the prosecutor: charge dismissal, charge reduction, or recommendation to the judge for a reduced sentence.<sup>140</sup>

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130. David Lerman & Tom Reed, *Reforming Advocacy in Restorative Justice Cases 1* (2007) (unpublished manuscript, on file with the author). The basic features of the Milwaukee CCP are also described in Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85, 101-03 (2006). Gabbay criticizes the CCP and other RJ programs for their lack of transparency and accountability, for instance, in failing to provide useful qualitative data on program performance. *Id.* at 124-25. Wisconsin's Legislative Audit Bureau did conduct an audit of the CCP in 2004 and reported generally positive results, particularly with respect to compliance and recidivism rates of program participants. LEGISLATIVE AUDIT BUREAU, WIS. STATE LEGISLATURE, AN EVALUATION: RESTORATIVE JUSTICE PROGRAMS, MILWAUKEE AND OUTAGAMIE COUNTIES 5-6 (2004).

131. Lerman & Reed, *supra* note 130, at 1.

132. *Id.* at 2.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 9.

140. *Id.* at 2.

An abundant body of research indicates that RJ processes tend to produce higher levels of satisfaction than conventional criminal processes among both victims and offenders.<sup>141</sup> Less formal and intimidating than court proceedings, and more explicitly oriented to showing respect for all parties,<sup>142</sup> RJ programs give participants a greater sense that they are able to tell their stories and are treated fairly.<sup>143</sup> RJ processes are also seen by victims and offenders as doing a better job of holding offenders accountable.<sup>144</sup> Finally, RJ processes result in more frequent apologies by offenders, reduced levels of victim anger, and reduced levels of victim fear.<sup>145</sup>

The research is less consistent on the question of whether RJ results in lower levels of reoffending.<sup>146</sup> Still, there are a number of good reasons to think that properly facilitated conferencing is capable of reducing recidivism in some cases. First, when the offender is confronted with the reality of the harm he or she has caused, the offender may develop stronger feelings of guilt and remorse; RJ may thus play a “conscience-building” role, which may enhance the offender’s motivation to avoid future crime.<sup>147</sup> Second, the conferencing process may help the offender to strengthen existing social support networks (to his or her “support people”) and develop new relationships of support with others at the conference.<sup>148</sup> Third, performing community service and other reparative work may help the offender to develop new skills and an enhanced sense of competence and self-worth.<sup>149</sup> Finally, RJ participation may help an offender to consolidate or reinforce a commitment to desist from future crime.<sup>150</sup>

### B. *Adaptation of RJ for Drug Offenses*

Despite the rapid proliferation of RJ programs nationally and internationally,<sup>151</sup> drug cases have generally been omitted from their coverage.<sup>152</sup> A pioneer

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141. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 177-98.

142. Umbreit et al., *supra* note 121, at 258-59.

143. Poulson, *supra* note 141, at 178, 182.

144. *Id.* at 187.

145. *Id.* at 189, 195, 196.

146. Robinson & Shapland, *supra* note 121, at 346.

147. *Id.* at 343.

148. *Id.* at 345.

149. *Id.* at 344-45.

150. *Id.* at 352-53.

151. Umbreit et al., *supra* note 121, at 261-63.

152. In addition to the CCP, I have found only two other descriptions in the scholarly literature of RJ programs that regularly handle adult drug offenders: Oklahoma’s community sentencing program, *see* Black, *supra* note 119, at 196, and the Midtown Community Court

in this regard, the CCP began taking drug cases in 2004, four years after the initial implementation of the program.<sup>153</sup> The CCP Director decided to add drug cases to the program because of the absence of a DTC or other diversion program in Milwaukee for low-level marijuana distribution cases, which were routinely resulting in felony convictions for young offenders.<sup>154</sup> In all, about forty drug cases have been handled through mid-2008, with most involving felony marijuana distribution charges.<sup>155</sup>

The CCP illustrates how RJ principles can be successfully adapted for drug offenses. The basic processes for drug cases are the same as for other cases in the CCP, although there is no distinct “victim” at the conference.<sup>156</sup> Instead, community members take the lead in discussing the harms caused by drug trafficking.<sup>157</sup> The agreements emerging from drug offense conferences typically include the same sorts of conditions that are found in other CCP cases, such as community service and a reflection paper.<sup>158</sup> The agreements also usually require the offender to undergo drug treatment, although sometimes it is recognized that the offender (despite dealing drugs) is not a user.<sup>159</sup> When treatment is required, the CCP refers the offender to a providing agency with which it has a regular relationship.<sup>160</sup> If the offender fails to comply with treatment, then another conference is called to determine what to do, with second chances usually afforded.<sup>161</sup> Successive failures in treatment may result in termination and conventional felony prosecution.<sup>162</sup> When the agreement is satisfied, the prosecutor will typically reduce the felony charge to a ticket or a misdemeanor.<sup>163</sup>

It is not clear why so few RJ programs have followed the CCP’s lead in taking on drug cases, although part of the explanation must be that DTCs have already occupied the field in many jurisdictions, and RJ advocates have not seen it as helpful or politically prudent to wrestle with the DTC bureaucracy over the management of drug offenders. More fundamentally, though, it seems that RJ advocates do not conceptualize drug cases as lying within the core set

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in New York City, *see* Gabbay, *supra* note 130, at 108.

153. Lerman & Reed, *supra* note 130, at 2.

154. Interview with David Lerman, Director, CCP (Jun. 10, 2008).

155. *Id.*

156. *Id.*

157. *Id.* The CCP has a relationship with a social service agency that has contacts in neighborhoods throughout the city. With the assistance of that agency, the CCP attempts for each conference to find community representatives from the offender’s particular neighborhood.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

of cases that RJ is best-suited to address. Thus, even in Milwaukee, which did not have a DTC, the CCP did not take drug cases in the first four years of its existence, and only began doing so to compensate for the lack of a DTC in the city, not because it seemed a necessary extension of RJ principles.

Aside from an unwillingness to come into conflict with preexisting DTCs, three additional considerations may explain the tendency of RJ programs to disregard drug cases: (1) drug crimes lack clear victims, thus potentially diminishing the meaningfulness of the direct victim-offender encounter that lies at the heart of RJ processes; (2) drug offenders are often seen as too dangerous to participate in RJ processes without compromising the safety of other participants and of the community more broadly; and (3) drug offenders are often seen as suffering from cognitive and volitional defects that may prevent them from participating effectively in conferences or complying with the agreed-to conditions.

Although these considerations may help to explain why drug cases have not been at the top of the RJ agenda, they do not justify their continued neglect. For instance, the CCP illustrates how the “victimless” nature of drug crimes can be addressed by recognizing that whole communities can be victimized by the drug trade.<sup>164</sup> Once the community is recognized as a victim in its own right, then the encounter between the offender and representatives of the community can be seen as a meaningful one: meaningful to the representatives/victims as an opportunity to tell their story and secure accountability, and meaningful to the offender as an opportunity to learn about the effects of his or her offense and take responsibility for it.

What about the concern for drug offender dangerousness? As RJ programs are put into place, there has been a tendency to reserve them for nonviolent offenders, likely reflecting a number of underlying concerns: victims of violent crime may be traumatized by encountering their victimizers at the conference; violent criminals may react violently if anything of a confrontational nature occurs at the conference; community members and others may be too frightened to attend, or participate meaningfully in, conferences with violent criminals; and RJ processes sometimes seem to presuppose pretrial release on the front-end of the criminal process (so that conferences in the community may be attended and reparative work performed) and no sentence of incarceration on the back-end (as the incentive for offender completion of conditions), both of which may be inadvisable for violent criminals. Whatever the validity of these concerns as to violent criminals, however, they should not be uncriti-

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164. A similar approach is also taken by the Midtown Community Court in New York City. See Gabbay, *supra* note 130, at 108 (“The Community Impact Panels are based on the premise that the victim in the type of offenses dealt with by the Midtown Court is the midtown community itself.”).

cally extended to drug offenders. Despite stereotypes of violent drug gangs, few drug offenders have a history of violent crime or high-level drug dealing.<sup>165</sup> Drug offenders with a history of violence can either be excluded from an RJ program, or conferences can be conducted in jail, with reparative conditions emphasizing work that can be done in an incarcerative setting (e.g., writing a reflection and a letter of apology).

Nor should cognitive and volitional concerns be seen as any more fundamental an obstacle to drug-offender participation than violence concerns. To be sure, serious deficits in these areas do present important theoretical and practical difficulties for RJ. Cognitive impairments, for instance, may prevent an offender from fully comprehending the information presented by victims relating to harm, while volitional impairments may mean that an offender is doomed to failure when it comes to complying with reparative conditions. The latter issue may be especially important for addicted offenders who agree to a condition of drug treatment. But—as the CCP has recognized—not all drug offenders are regular users,<sup>166</sup> and not all regular users find it especially difficult to stop.<sup>167</sup> Moreover, the satisfaction of reparative conditions need not necessarily involve fully overcoming an addiction. Although the CCP tends to lay considerable emphasis on drug treatment, there is no reason why a conferencing process might not result in a decision to focus on other, more volitional conditions (e.g., performing community service, pursuing a GED) as sufficient to establish accountability and lay a foundation for long-term progress in overcoming dependency.

### C. Comparison Between CCP and DTC Models

The CCP does not limit itself to drug cases, but it is not hard to imagine a specialized program for drug cases that makes similar use of RJ principles. Such a program might, like the CCP, be run out of a prosecutor's office. In order to sharpen the comparison with the DTC model, though, it may be helpful to imagine what a court-based analog to the CCP would look like. By way of shorthand, we may refer to this model as the drug conferencing court, or DCC.

Cases would enter the DCC as they enter DTCs. We must assume that the same political and bureaucratic dynamics would produce the same sorts of eligibility limitations that typically constrain DTCs (e.g., no offenders with prior records of violent crime). A guilty plea is the offender's price of admission.

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165. Even among the minority of drug offenders sent to prison, who tend to be the worst of the worst, fewer than half have records of violent crime or high-level drug-dealing. MAUER & KING, *supra* note 91, at 13.

166. See *supra* text accompanying note 158.

167. Bowers, *supra* note 2, at 801-02.

Once in the DCC, the offender is referred, not to a treatment provider, but to a conferencing facilitator. Conferencing would occur as it does in the CCP. The agreement emerging from a conference might or might not include a treatment component. Once the terms of the agreement are satisfied (or the conference participants determine that the offender has done all he or she is willing or able to do), the case returns to the DCC judge for sentencing, with the expectation that compliance with the agreement (or, at least, good-faith efforts to comply) will be considered a mitigating factor (or perhaps a basis for dismissal of the charges). Table 1 summarizes key similarities and differences between the DTC and DCC models.<sup>168</sup>

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168. An interesting hybrid model is the Woodbury County Community Drug Court in Iowa, in which panels of three or four community volunteers play the role typically played by a judge in DTCs. Vick & Keating, *supra* note 95, at 296.

TABLE 1: Similarities and Differences Between the DTC and DCC Models

	DTC	DCC
Admission of guilt required for entry into program	Yes	Yes
Exclusion of high-risk offenders	Yes	Yes
Incentive for successful completion of program	Dismissal of underlying charges or reduced sentence	Dismissal of underlying charges or reduced sentence
Determination of conditions for successful completion of program	By judge and treatment professionals	By agreement among conference participants (including offender and lay community members)
Completion of professionally administered drug treatment program necessarily required of all participants?	Yes	No
Determination of consequences of violations of required conditions	By judge; graduated sanctions may include incarceration and termination from program	By agreement among conference participants; graduated sanctions less swift and certain
Venue for determining conditions and responses to violations	Courtroom	Community meeting place
Role of judge	Proactive; frequent interactions with offenders; high investment in treatment success	Reactive to community conferencing process; infrequent interaction with offenders
Role of community members	No institutionalized role	Active participants in making key decisions

What are the advantages of the DCC over the DTC? In fairness, it should be conceded that the DCC is unlikely to make a substantially larger dent in the incarceration rate of black drug offenders. The same basic constraints limit both programs: inability to act directly on racial disparities at the arrest stage, pro-

grammatic exclusion of large categories of drug offenders (e.g., those with disqualifying criminal histories), and disinterest in participating (or participating effectively) in the program among offenders who lack some minimal level of internal motivation to desist from drug use and crime. These difficulties noted, it is possible to imagine the DCC faring at least a little bit better than the DTC in addressing the quantitative aspects of racial disparities. For instance, the customized agreements emerging from conferences may set more realistic expectations for offenders than the one-size-fits-all expectations imposed in the DTC model. And to the extent that conferences effectively draw on the knowledge of members of the communities from which black offenders come, the expectations may be better tailored to the particular strengths and weaknesses of such offenders, which may also reduce failure rates.<sup>169</sup> Likewise, it is possible that DCC judges, with less of a personal investment in the supervision of their offenders than DTC judges, may treat failure less harshly.

Still, the real advantage of the DCC model lies in its ability to address the *qualitative* aspects of the racial disparity problem. First, the DCC, unlike the DTC, welcomes members of the community into the criminal justice process, giving them an institutionalized opportunity to be heard and to make a difference in the way that drug offenders are handled. The social psychology literature identifies such opportunities as powerful determinants of respect for the law and legal actors.<sup>170</sup> The DCC model is thus capable of mitigating the legitimacy problems faced by law enforcement in minority communities and inducing greater levels of obedience to the law and cooperation with the authorities.<sup>171</sup>

Second, the DCC can mitigate demoralization problems and contribute to the social capital of the community, building and strengthening social networks through the cooperative endeavor of conferencing. The conference is an opportunity for members of the community to come together and share experiences and ideas regarding the effects of crime and drugs in the community. Crime,

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169. In a similar vein, Professor Stuntz has recently argued for a return to the more localized control over criminal justice that existed in the Gilded Age, which was a time of much less inequality in punishment than today. See Stuntz, *supra* note 41, at 1974 (“Make criminal justice more locally democratic, and justice will be both more moderate and more egalitarian.”).

170. O’Hear, *supra* note 72, at 420-22.

171. In order to maximize these benefits, one challenge that will have to be overcome is the difficulty of engaging community representatives who are truly representative. This has also been an important challenge for community policing initiatives, which also seek to enhance legitimacy by engaging community members in police decisionmaking. See, e.g., Delgado, *supra* note 73, at 1197 (“Working-class people [in West Seattle] did not have the time or energy to attend evening meetings with the police month after month. . . . The few activists who did have the time and energy to participate in police-citizen meetings were retired, underemployed, or otherwise ill-equipped to represent the others.”).

poverty, and intensive law enforcement in poor urban neighborhoods drive individuals and families into isolation and a state of mutual distrust; the DCC can ameliorate these effects by contributing to the development of empathetic and mutually supportive relationships among community members. Other researchers have observed that conferencing contributes to the social capital of offenders.<sup>172</sup> There is no reason to think it incapable of doing the same for community members (indeed, we might recall that the offenders themselves are members of the community). Moreover, the act of serving as a volunteer community representative may in and of itself contribute to the health of the community by reinforcing prosocial norms.<sup>173</sup>

Is there anything that might be lost by adopting the DCC model over the DTC model? The principal achievement trumpeted by DTC advocates is reduced recidivism among program participants. Quantification is difficult because of the need for appropriate comparison groups, and few DTC programs have been evaluated in a methodologically sound manner. In the few studies using random assignment of similar defendants to DTC and traditional case processing, statistically significant recidivism reductions are consistently (although not universally) found, with percentage-point reductions in recidivism rates ranging from three to sixteen.<sup>174</sup> These are not large numbers, but substantial enough that it might be fair to favor the DTC model over the DCC model if the latter cannot also deliver recidivism reductions.

In this regard, it is notable that DTC advocates attribute their recidivism reductions to the effects of coerced treatment.<sup>175</sup> Although the DCC model may put pressure on many offenders to undertake drug treatment, the pressure is unlikely to be applied in as consistent a fashion as in the DTC model. We might well question, then, whether the DCC model really can perform on a par with the DTC model.

Although the question is an important one, it should not cause us to reject the DCC model out of hand. For one thing, community conferencing has itself been found to reduce recidivism in some studies, and plausible theoretical reasons have been offered as to why this should be so.<sup>176</sup> For another, it is really

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172. Robinson & Shapland, *supra* note 120, at 350.

173. The intuition here is captured in Dan Kahan's theory of reciprocity and collective action. See Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1514 (2002) ("If [individuals in collective-action settings] perceive that others are contributing to the collective good in question [here, resolution of problems associated with the drug trade], then honor, self-respect, honesty, and like dispositions motivate most individuals to contribute to that good as well, even if doing so is personally costly. . . . This simple behavioral dynamic is supported by a wealth of empirical social science data.").

174. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 108, at 46, 48.

175. See, e.g., William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENT. REP. 179, 182-83 (2001).

176. See *supra* text accompanying notes 145-49.

not so clear the extent to which coerced treatment, as opposed to other features of the DTC model, is responsible for the recidivism reductions.<sup>177</sup> To the extent that DTC recidivism reductions are due, for instance, to such considerations as expedited case processing, earlier or more favorable terms for pretrial release, specialization by courtroom personnel, enhanced availability of social services, or more individualized attention to the offender relative to the conventional system, the same features can just as easily be made part of the DCC model. In short, even focusing solely on recidivism concerns, the DCC model may be no less promising than the DTC model.

#### IV. CONCLUSION

No court-based diversion program is likely to make a large dent in the racial disparities that plague our criminal justice system. Major improvements will have to come from legislative reforms (eliminate mandatory minimums, selectively decriminalize drug offenses) and changes in police practices (end racial profiling, reduce relative enforcement intensity against crack and open-air drug offenses). Unfortunately, such reforms do not seem politically viable at present. Court-based diversions may be the best we can do. Although the most popular alternative seems to be the treatment-based drug court, there are good reasons to favor the development of a different sort of drug court—one that is built around the principles and practices associated with restorative justice. An RJ-based drug court would be a more inclusive venue for handling drug cases than a treatment-based court, welcoming and empowering members of the offender's community through the conferencing process.<sup>178</sup> In so doing, the RJ-

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177. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 108, at 44.

178. In this same issue of the *Stanford Law & Policy Review*, Professor Eric Miller makes a proposal that is similar to mine for reasons that resonate with the justifications I offer for the RJ-based drug court. See Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417 (2009). Specifically, Miller proposes the creation of a "drug-dedicated grand jury to determine whether to offer diversion to drug treatment." *Id.* at 452. In so doing, he hopes to empower members of the underclass through "community-level deliberative democracy." *Id.* Although Professor Miller uses a somewhat different terminology than I do, and draws more on the democratic theory literature than on the procedural justice and restorative justice literature on which I rely, we share a commitment to more inclusive, community-based processes than are currently associated with DTCs. His proposed reform focuses on the threshold question of which defendants are diverted from conventional court processing, whereas my proposed reform focused on what happens to defendants once they are diverted. Because the reforms focus on different stages in the diversion process, both could conceivably be adopted by a single jurisdiction, although the marginal benefits of adding a second community-empowering procedure may not justify the incremental transaction costs. A priori, I'm not sure it can be said with confidence which proposal is more promising. Each has its own strengths and weaknesses. For instance, the use of standard grand-jury-selection mechanisms in Professor Miller's proposal may help to address the representativeness issues raised by the use of community volunteers in my proposal. See *supra* note 171.

based court would foster more positive attitudes within minority communities towards the legal system, contributing to more constructive citizen-police interactions and enhancing the sense of obligation among community members to obey the law. The RJ-based court would also promote stronger relationships among community members, building the sort of social capital that permits to communities to address their own problems more effectively. The RJ-based court, in short, may help minority communities to reduce their crime rates without falling back on the strategy of more arrests, more convictions, and more incarceration—strong medicine that sometimes seems worse than the disease it is intended to cure.

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On the other hand, I suspect that the relative informality (e.g., meetings take place outside the courthouse) and the use of trained facilitators associated with community conferencing may promote better, more inclusive discussion of the pertinent issues. The more constrained set of options available to the drug-dedicated grand jury may be an advantage or a disadvantage relative to the DCC's more open-ended consideration of how to respond to drug crime, depending on, for instance, how one prefers to balance the competing values of uniformity and flexibility in decision-making. It may be that the optimal reform would blend aspects of both proposals.

