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THE WAR ON DRUGS: A NEW PARADIGM

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OCTOBER 29, 2008

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The War on Drugs: A New Paradigm

This paper was originally presented by Lawrence T. Jablecki, Ph.D., lecturer in the Rice University Department of Sociology, at the October 29, 2008, Baker Institute conference “Houston-Harris County Regional Drug Summit: The Urgency of Now.”

One of the few facts of which I am certain in the context of our discussion of the current drug policies in this country, is that no new arguments are available to employ in support of or in opposition to them. We are locked in an ideological contest between two conflicting, and not mutually exclusive philosophical perspectives, both of which have existed for many centuries. More specifically, the contest of which I speak is between two perspectives. The essence of the first is that a genuinely free society maximizes the rights and freedoms of its citizens, allowing them to think, say, and act as they please as long as they do not harm or injure their fellow citizens. The competing perspective emphasizes the claim that a stable social order cannot be maintained in the absence of the legal enforcement of a rather long list of the shared moral values of its citizens. In short, this contest is what the 18th century Scottish philosopher David Hume called the perpetual struggle between the liberty of the individual and the authority of the state.

I cannot emphasize too much that this is not a war between the armies of good and evil. Much too often, too many defenders on both sides of this conflict, persuaded that truth and justice are on their side, have allowed their zeal to sink to the level of inflammatory attacks on the motivation and personal characteristics of their opponents. Regardless of our moral stance on a cluster of very divisive issues, all of us should heed the sage comments of the philosopher Isaiah Berlin in his 1958 lecture on “Two Concepts of Liberty”: “If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict—and of tragedy—can never be wholly eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition” (1966 printing, p. 54). The critical urgency of our present situation is that the contest to win the minds of our fellow citizens is dressed in the new clothes of our moment in history, which means that we can draw inspiration from the past, but not specific answers and solutions. We are therefore participating in a contest to win the opinions and sensibilities of our fellow citizens and we must be ever mindful that despite frequent changes in the mood of the

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public, the beliefs, values, and opinions of the people in a society that enshrines rights and freedoms in the machinery of government are the ultimate authorization of the policies of that government.

I began my career as a practitioner in criminal justice on February 1, 1979, as an adult probation officer in Brazoria County. Although my academic credentials included a Ph.D. in philosophy from a British university, my knowledge of criminal justice was confined to readings and to teaching a university course on the justification of punishment. Hindsight obliges me to recall my willing participation in a process that sent many young adult offenders, mostly males, to prison from two to ten years for possession of two ounces or more of marijuana. A nonsentimental trip down my lane of memories from February 1, 1979, to December 1, 1985, unleashes some genuine shame and guilt regarding the ease with which I recommended to prosecutors and judges that they impose jail and prison sentences on a large group of almost exclusively nonviolent users of illegal substances and some insignificant “mules” involved in the delivery of drugs. In short, I was one of the players in a very serious game in which the winners destroyed and permanently injured the losers. During this same block of time in my career, I can truthfully credit myself with some real and persistent efforts to assist a large number of substance abusers. Using the large amount of authority delegated to me by the district and county courts, I was supervising felony and misdemeanor probationers, most of whom were males between the ages of 17 and late 30s, and the majority of offenses for which they were granted probation involved alcohol, heroin, cocaine, methamphetamines, and marijuana. The scarcity of quality substance-abuse programs with skilled counselors and a track record of substantial success were major impediments, but much positive assistance was provided by the V.A. hospital and the Cenikor Foundation in Houston, local groups operating under the aegis of the Houston based Palmer Drug Abuse Program, and a few substance-abuse counselors whose training and credentials amounted to more than being an ex-addict. During this time I was also confronted with outbursts of anger from some probationers and I attended the funerals of several who committed suicide or were killed by gunfire or knives during a drug transaction. Being called a worthless and rotten son-of-a-bitch by a young man high on methamphetamines is not a pleasant experience, nor is attending the funerals of young men cut down in the prime of their lives.

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On December 1, 1985, I began my tenure as the director of the Adult Probation Department in Brazoria County. By this time, I was coming to the realization that something was fundamentally wrong, even hypocritical, with a process whose ostensible purpose was to redirect many lives in a positive direction, but which was actually sending numerous nonviolent offenders to jail and prison, effectively destroying their lives, causing havoc in their families, leaving them with the permanent scar of a criminal conviction and all the collateral consequences of being an ex-convict. Every judge trying felony and misdemeanor criminal cases regarding illegal substances in the state of Texas was bound by draconian Penal Code statutes that mocked the ideal of helping a very large group of offenders achieve the status of autonomous moral persons who freely accept their responsibilities as citizens of our communities. I retired on February 1, 2004, and when I look back on my accomplishments of 18 years, I can only hope that the many programs I created, with the support of seven elected judges and the hard work of some dedicated staff have yielded a harvest of positive results in the lives of numerous offenders that outweighs the amount of harm that I was instrumental in inflicting on many lives early in my career. The luxury of time to read and reflect on nearly 30 years of direct interaction with several thousand probationers and prison inmates enables me to feel confident in the following observations and assertions.

I am enormously proud to be an American citizen and would not choose to live in another country. I am, however, unequivocally ashamed of the indisputable fact that during the last 30 years our criminal justice policies, federal and state, have led to our international notoriety as the nation that incarcerates a higher percentage of its population than any other country in the world. The dominant crime control policies are driven by a harsh retributive view of punishment committed to the belief that the only criteria for doing justice are the seriousness of the offense and the criminal history of the defendant. We have been beguiled by addiction to a drug more powerful than all the drugs we profess to abhor: vengeance. This is a bitter pill, but I am persuaded that honesty obliges us to swallow it. Quite often during my career, I was the target of some pejorative remarks, particularly by prosecutors, to the effect that I belonged to the species of liberal weenies who are soft on crime. For many years, however, I have consistently maintained some beliefs most of which my students in prison find acceptable. I do not believe in or hope for the abolition of all prisons. I do not believe that there is a treasure in the heart of all

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criminal offenders waiting to be discovered. A relatively small number are incorrigibly mean and evil. I believe in the hard coinage of punishment for most offenders who murder and commit acts of both potential and actual violence. I believe that some offenders should be incarcerated for life without the possibility of parole. But I also believe that far too many decades-long and life sentences are imposed by our courts,

The declaration of war against drugs has responded to and created some moral panics in our society leading to the still widely held belief that the users of drugs deemed illegal are enemies to be conquered and destroyed. When you fight a war, the mission is to kill and maim your enemies. That is exactly what we have accomplished. There is a wealth of scholarly bickering about the feasibility of determining the actual number of nonviolent drug offenders in our federal, state, and private prisons. I am confident that no informed person can produce evidence to inflict any serious damage on the claims of Michael Tonry in his book *Thinking About Crime: Sense and Sensibility in American Penal Culture*:

“Many thousands of people are serving decades long sentences in federal prisons for non-violent drug crimes. Their misfortune is to have been sentenced in federal courts before avoidance of sentencing guidelines by federal judges and prosecutors became common practice. Hundreds of thousands of people, mostly, but not only of minority and disadvantaged backgrounds have spent much of their young adulthood in prison for drug crimes. Their misfortune is that unwisely, but for young people not uncommonly, and typically as a result of peer influences and teenagers sense of invincibility, they experimented with drug use, got hooked, and got caught—in a time when antidrug policies were unprecedentedly harsh” (pp.10-11).

It would be a major error to claim that the tough law-and-order campaigns of those seeking to gain or retain public office and the effects of well-financed lobbyists urging the construction of more prisons, particularly private prisons, were solely responsible for the realities presented by Tonry. Members of Congress and state legislators would not have been able to craft and pass harsh penalties without the strong support of their constituents. In large measure, the opinions, beliefs, and values of the people favored the decision to go to war against drugs and those who

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use them. Fortunately, the opinions and sensibilities of a fast-growing number of our citizens are moving in the direction of believing that the war of prohibition, eradication, and harsh penalties is costing far too much in terms of human fatalities and consuming far too much of our federal and states fiscal resources. Many and quite vocal groups of dissenters, using the technology of mass communication are focusing on some items for an agenda for change—specifically, the medical use of marijuana, the decriminalization of the possession of small amounts of marijuana, access to clean syringes to reduce the spread of HIV and hepatitis C, providing addicts with pharmaceutical-grade heroin or heroin substitutes such as methadone or buprenorphine, with the goals of improving their health and reducing their criminal activity, and the still-unresolved issue of the wide disparity in the disposition of cases involving crack and powder cocaine.

In this national and highly divisive crisis, it is critically important for all of us, especially elected policy makers in Congress and state legislators, to be reminded that we share a common history in which heretics were burned, the institution of slavery was ordained by the Creator, homosexuals were prosecuted and jailed for lewd and unnatural conduct, and males dominated females because nature has endowed them with emotional and intellectual superiority. All of these chapters in our history, now condemned as violations of basic human rights, were once approved as timeless and immutable truths. No one person is qualified to provide a detailed blueprint with an exit strategy from this ideological conflict or even a list of all of the items that should be on the agenda for change. I will, therefore, conclude with issuing an admittedly radical and heretical, but feasible, challenge to the administrators of our nation's criminal justice machine and make a recommendation to the next president of the United States.

The Uniform Crime Report of 2007, compiled by the FBI, contains the following data. Of the 14,209,385 reported arrests, 1.8 million or 13 percent were for drug abuse violations. 872,721 of those arrests for drug abuse violations, 47.5 percent were for marijuana. Of that number 775,138, (89 percent) were for possession alone; the remaining 97,583 involved the growth, processing, and sale of the drug. Three of every four persons in the group of 872,721 were under the age of 30. It is a given that many thousands in this group had a significant criminal history. It is equally true that many thousands did not. This means that many thousands of young offenders with no criminal history are caught in the very wide net of criminal justice and the majority of them must

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endure a grueling process of adjudication that brands them with a conviction and the status of criminal.

The radical proposal that I believe is realistically feasible would retrain the same professionals who administer our criminal justice systems to create preprosecution agreements that would still send a message of societal disapproval but leave no permanent scars. The specific guts of the proposal are these: all persons arrested for possessing small amounts of any illegal substance, excluding the sale and manufacture, having no criminal history, shall be granted a one time only pre-prosecution agreement not to exceed one year. Within 30 days of accepting this agreement, they shall complete an evaluation by a state-certified substance abuse counselor approved by the local jurisdiction and follow any recommendations of said counselor. Within 30 days of successful completion of this agreement, the local jurisdiction and the state's criminal records division shall destroy and expunge all records of the case, excepting a list of the participants. Any participant who is arrested and convicted of any new criminal offense is subject to prosecution of the original offense. The prosecutors in every local jurisdiction of this country have the explicit or inherent authority to create these programs and they certainly have the discretionary authority to dispose of numerous felony arrests by using this option. I am not embracing the claim that people who violate the criminal laws have any kind of a right that obliges the state to provide a comprehensive menu of services to fix the causes of their illegal conduct. I am claiming that there is a compelling public interest to do so.

In three articles published since November 2000, I have called for the creation of state and federal commissions to rewrite our drug laws in the framework of public health and safety. I was greatly encouraged by the October 12, 2008, op-ed piece in the Houston Chronicle by Lee Brown, "Getting to the Root of Crime." Brown, Houston's former police chief and mayor, and the former director of the White House Office of National Drug Control Policy (the "Drug Czar"), reissued his 1990 plea that the president convene a crime panel to "... facilitate a national discourse and congressional action on crime, violence, racial disparities, and inequities in the criminal justice system." The word "drugs" appears in only one sentence in Brown's article and I cannot presume his agreement with any of the specifics of my recommendation. My recommendations are: no person holding an elected public office is eligible for appointment; the

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members shall include nationally recognized experts in the fields of health care, medicine, pharmacology, drug addiction, criminology, sociology, constitutional law, economics, and law enforcement; and the presidential marching orders include the requirement that all federal drug laws and policies be rewritten in the framework of public health and safety. Another requirement is that the final version of their work contains the recommendation to Congress that all federal inmates in private prisons will be transferred to federal facilities and no federal inmates will be incarcerated in private prisons in the future. Wall Street will be banished from the administration of criminal justice. The collective motto of those companies that reap profits for themselves and their stockholders is, "If we build them, they will be sent." The final condition for appointment is that all members must agree to travel to a pre-selected list of countries that have rewritten their drug laws and policies, to evaluate their impact on public health and safety.

In closing, during his tenure as secretary to the House of Commons, Winston Churchill was moved to remark that the moral fabric of any civilized society can be judged by how it treats its citizens who violate the criminal laws. At this moment in our history, I am persuaded that the moral ground on which we stand is not very high and that the judgments of future historians who evaluate us will be very harsh.