



James A. Baker III Institute for Public Policy
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Moving Beyond the “War on Drugs”

Restoring Respect for Our Law, Our Communities, and Ourselves:
Drug Policy and Democracy

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Introduction

The international crisis that began for us on September 11, 2001 has provided us with the opportunity to reevaluate our priorities. We are faced with wars on two fronts, against terrorism and against drugs. One is for our physical survival, and the other seems to be for our spiritual survival. Just as the specter of terrorism has focused attention on the law and democracy, so our reevaluation of the current drug policy might with profit focus on the needs of our law and the needs of our democracy.

The rapidly emerging concept of restorative justice offers a framework that can be helpful in any analysis of our current drug policy. It also gives us a toolkit to use in building a new policy.

I have been the district attorney of Travis County for 25 years. I was in a restaurant in a little town just south of Dallas once, and the waitress said to me, “Excuse me sir, but the man at the table over there wants to know if you're the district attorney of Austin.” What does seem to be eternal about the job is dealing with the expectations that our most visible constituencies have of prosecutors. The police expect us to validate their actions. Crime victims expect us to ease their pain. The media expect us to be perfect, like they would be if they just had subpoena power. I call it subpoena envy.

I had never been a prosecutor when I first ran for the job back in 1976. I enjoyed being a member of the Legislature, but I got tired of refereeing fights between business interests. In the course of my work on the Judiciary Committee, I read that the duty of the prosecutor in Texas is not to convict but “to see that justice is done.” That sounded pretty good to me, simple and clear cut.

The problem is that justice is not defined in the law. At first, I thought it was vengeance and that all I had to do was be tough on crime. So, that's what we were, and still are. We achieved, and continue to have a high conviction rate, and we send dangerous people to prison for as long as we can.

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But I noticed that no matter how tough I was, it didn't make crime victims happy, and it didn't often provide more than momentary respite from their pain. And it didn't stop crime.

Mostly, I got tired of waiting for something terrible to happen before I could do anything, and then doing the same thing over and over and expecting a different result, as Judge Gray says about our drug policy. On the same subject, District Judge Mike Lynch in Austin said recently, "In no other area do we continue a policy that hasn't led to even one victory or success." I think this country owes Judge Gray a deep and profound debt of gratitude for the courage and faith in the good sense of the rest of us that his book represents.

Anyway, I started thinking about the system and how we might improve it. That led to a number of innovations over the years, like the Public Integrity Unit, the Family Justice Division, the Children's Advocacy Center, the Child Protection Team, and others, some of which are now mandated by statute. But none of them changed the system, the basic idea of which is payback, as in, you do it and we'll get you.

Our retributive system asks three questions: 1) Who did it? 2) What law did they break? 3) How can we punish them?

It doesn't ask: 1) What the victim needs. 2) What the community needs. 3) What the harm was.

Our system was handed down from William the Conqueror, who devised it as a means of controlling the population. He removed the dispute from the community by taking ownership of peace itself and making crime a disturbance of the king's peace. To this day, indictments in Texas end with the words, "Against the peace and dignity of the State," with the State the lineal descendant of the king.

The point of the law was upholding the authority of the king. The point was not the victim and not the community.

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Restorative justice, on the other hand, is a concept that has only recently emerged, or reemerged, because it is even more ancient. I became interested in it because it is victim-centered and it requires thinking about crime in terms of the harm done.

Restorative justice asks three different questions: 1) What is the harm? 2) What needs to be done to repair the harm? 3) Who is responsible for the repair?

These questions do three things: 1) Focus attention on the problem, not just the law. 2) Lead to problem-solving. 3) Build in accountability.

This is the key to a grass-roots examination of drug policy. As a bonus, you don't have to be a lawyer to practice restorative justice. Applying then, the principles of restorative justice to the current drug policy, we begin with the question, what is the harm?

First, we have to distinguish between harm caused by the possession of drugs and harm caused to others by persons using drugs. In this context, alcohol provides a useful analogy. The mere possession of alcohol by adults is not generally a crime, but the use of alcohol causes much more harm to others than the use of illegal drugs; it is a factor in over 40 percent of murders and over 50 percent of assaults.

Now let's go back to the policy issue. What is the harm to our law? What is the harm to our communities? What is the harm to us? The harm to our law has been most clearly documented by Judge Gray, who says: "Nothing in the history of the United States of America has eroded the protections of our Bill of Rights nearly as much as our government's War on Drugs."¹

¹ Gray, James P. Why Our Drug Laws Have Failed and What We Can Do About It. Philadelphia: Temple University Press, 2001.

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The King County (Seattle), Washington Bar Association undertook a study of current state and federal drug policies in which the King County Medical Association, the Washington State Bar Association, The Washington State Medical Association, and the Washington State Pharmacy Association participated. Their massive report released in November 2001 titled “Is It Time to End the War on Drugs?” states: “The promotion of public safety is an overriding objective of the criminal law . . . [T]he use of criminal sanctions has failed to achieve the public safety goals of drug policy.”²

I am a prosecutor, and my job is to represent the State of Texas in the felony courts of Travis County in order to perform my duty to see that justice is done. The degree of difficulty of my job is in direct proportion to the dysfunction of the culture, and let me tell you, I could use some more resources. I could use more lawyers to prosecute child abuse cases. I could use more parent education classes so fewer parents would abuse their children. I could use more quality day care and more appropriate after school care, so that children would be nurtured and protected and corrected. I could use more caring neighborhoods, where neighbors, in the words of Lyndon Johnson, know when you're sick and care when you die.

We're talking about legal issues this morning, and the ultimate legal issue is community, because the law depends for its existence on the existence of community. No community, no law. So, continuing to apply the principles of restorative justice, what is the harm to communities of the current drug policy?

There is much concern these days about the decline in our country of what is called social capital, which is defined as social networks and the norms of reciprocity and trustworthiness that arise from them.³ The importance of social capital is enormous. Its presence decreases a host of problems

2 Is It Time to End the War on Drugs? An Examination of Current Law and Practice in Drug Abuse Prevention, Drug Addiction Treatment and the Use of Criminal Sanctions. King County (Seattle, Washington) Bar Association Drug Policy Project, 2001, p. 73.

3 Saguaro Seminar on Civic Engagement in America. John F. Kennedy School of Government, Harvard University.

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from illness to teen pregnancy and it is the key to the crime rate; in short, it is the bulwark of democracy.

The decline in social capital is most pronounced in African-American communities from which the war on drugs has removed much of a generation. Black males stand a 28% chance of incarceration during their lifetime as compared with a 4% chance of incarceration for white males.

Such “war-level casualties of adult males of parenting age” disrupts the web of relations in neighborhoods and damages economic and social structures. The removal of men and women from inner-city neighborhoods represents a loss of wealth to those communities, estimated in Texas to be well over a billion dollars.⁴

From time to time, police in most urban areas conduct drug sweeps, during which large numbers of mostly young, mostly African-American men are arrested. In Austin, we give these operations catchy names, like Operation Crackdown, or Operation Rockout. These mass arrests are conducted by the police in response to complaints by the neighbors in whose front yards the young men and women hang out to deal drugs. The neighbors are mostly people of color, just like most of those who are arrested. These neighbors feel besieged and helpless.

It was after just such a mass arrest that I called a meeting in that area of those neighbors, along with the police officers involved, some prosecutors from my office, probation officers, and others. I told them that they--the neighbors--had done what they were supposed to do: they had complained to the police. And the police had done what they were supposed to do: they put together cases and made arrests. Now those cases were in my office; what did they want me to do with them?

We were sitting in a circle, some 40 or 50 of us, and the first time the discussion went around, the response was something like, “Lock ‘em all up.” There then ensued a dialogue during which both

4 Clear, Todd R. and David R. Karp. The Community Justice Ideal: Preventing Crime and Achieving Justice.

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anger and helplessness were expressed, especially when it was pointed out that the punishment for dealing small amounts of drugs was a maximum of two years.

Then with the realization that these offenders were coming back, the conversation got deeper. It was pointed out that there were too many black people in prison already, and that their families were victims, too. And their children, without supervision, were destined in many cases to the same fate. These neighbors and friends were living the ripple effects of the ‘war on drugs’ not always perceived by policy makers.

Now, let's ask the third harm question. We've talked about harm to the law and harm to our communities; what is the harm of our current drug policy to us as a people?

Many explanations have been offered for the apathy that we see manifested in various ways, including low voter turnout, but the upshot is that democracy is in trouble. That trouble seems to reflect a sense of powerlessness to control the forces that influence our lives. That was what I saw in that meeting and what I have seen and sensed in other gatherings.

That sense of powerlessness and helplessness is dangerous, because it walks hand in hand with fear and it can enshroud itself in fascism. Mostly it is dangerous because it is contrary to our tradition in this country of a muscular people not afraid to determine our own values. There was a time when everyone was responsible for the safety of the community. Some rode out in posses and confronted the offender, and others stayed home and tended the watch fire and comforted the victims, but everybody was involved. Everybody had a stake.

The London Metropolitan Police Department was founded by Sir Robert Peel, who said in 1829: “. . [T]he police are the public, and the public are the police; the police are the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the

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interest of community welfare.”⁵

Self-government takes moral muscles, and building them takes exercise. That's where we have gotten the strength in our history to say no to government and big corporations, the strength to influence the forces that impact our lives. That is the legacy of our forebears and the basis of the institutions of liberty that we must now rebuild.

Now we come to the second question of restorative justice: What needs to be done to repair the harm? Restorative justice uses the function of protection as a way to strengthen the institutions of democracy by restoring civic virtue and civic participation.

Various restorative practices include:

- 1) Reparative boards, such as our Neighborhood Conference Committees in Austin, where neighbors set punishment for juveniles who get in trouble.
- 2) Victim Impact Panels, where one or more crime victim meets with a group of offenders to just tell what it's like.
- 3) Victim-Offender Mediated Dialogue, a program of the Texas Department of Criminal Justice in which victims can meet with their offenders under certain circumstances.
- 4) Sentencing Circles, where the victim, members of the community, the offender, and those in support of each can meet to help determine an appropriate sentence for the offender. We have employed circles in Austin with significant impact.
- 5) Community Impact Panels, where neighbors can talk with offenders, whose release from prison is pending, about their plans for the future, their families, and how their past behavior has affected the neighborhood.

The people in the inner city neighborhood in Austin who were at the meeting I described earlier have formed themselves into our very first Community Impact Panel. They are meeting with drug

5 Kelling, George L. and Catherine M. Coles. Fixing Broken Windows. New York: The Free Press, 1996.

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offenders one at a time before their release from our local state jail, which we call our Community Justice Center. The neighbors offer support for the difficulties that are part of re-entry into the community. They're not feeling helpless anymore.

This kind of public involvement in protection offers a vehicle and a forum for the discussion of drug policy. It represents an empowerment of the public that we haven't seen in awhile. Any honest re-evaluation of our drug policy must proceed from our strength, not our helplessness.

It has been my experience as an elected official for almost thirty years that people respond to principles. That, it seems to me, is the role of the public in a democracy. In that regard, let me quote the set of principles recently recommended by those state professional associations of doctors, lawyers, and pharmacists in Washington State to guide our drug control strategies:⁶

- Any public policy toward drug use should seek to result in no more harm than the use of the drugs themselves.
- Any public policy toward drug use should address the underlying causes and the resulting harms of drug abuse instead of attempting to discourage drug abuse through the use of criminal sanctions.
- The state should regulate the use of drugs in a manner that recognizes a citizen's individual liberties while answering the need to preserve public health, public safety, and public order.
- The state should regulate the use of drugs in a manner that uses scarce public resources as efficiently as possible.

When both doctors and lawyers agree on something, there must be an elephant in the living room.

We are now to the third and final question of restorative justice; who is responsible for this repair?

⁶ Is It Time to End the War on Drugs? An Examination of Current Law and Practice in Drug Abuse Prevention, Drug Addiction Treatment and the Use of Criminal Sanctions. King County (Seattle, Washington) Bar Association Drug Policy Project, 2001, p. 25.

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This one is easy; the short answer is we are, because that's the way it works in a democracy. The public needs forums and opportunities for discussion of these powerful policies that impact our lives. We just need to give the people all of the facts, and let them decide what our drug policy should be. That is democracy, after all.

People know that the role of the law is to affirm our values, and we like to find ways for that to happen. That means opportunities and safe containers for people to sit down and talk.

We have some important choices to make in governing ourselves. We have the wisdom, courage, and integrity to create the strongest democracy that we can be.