

Conference on Criminal Justice Policy
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FORMULATING RATIONAL DRUG POLICY IN CALIFORNIA

I was especially pleased that Clark invited me to this conference to present the perspective of criminal defense lawyers. I did not come to celebrate the enactment of the “Victim’s Bill of Rights” in California. In 1982, I was serving as President of California Attorneys for Criminal Justice, and was very active in the campaign against Proposition 8, as well as the legal challenges to its constitutionality. I felt then, and still feel, that most of the provisions regarding victim’s rights were cosmetic, with minimal real impact. Victim’s rights really served as a smokescreen to hide the real agenda, a massive shift of judicial power into the hands of prosecutors. I don’t believe our system of criminal justice was improved by taking away judicial discretion as to punishment and putting it into the hands of prosecutors. While other speakers have attributed the success of Proposition 8 to a legislature dominated by Willie Brown, I question whether it’s really an improvement to have a legislature dominated by the Correctional Officers Association as the most powerful lobby. I would rather have criminal justice policy being dominated by elected officials with

long experience than by prison guards. With respect to the influence of initiative measures, I think California's experience with initiatives has been a mixed bag at best. Peter Schrag, in *Paradise Lost*, does an excellent job of documenting how California has gone to hell in a handbasket during the past twenty-five years, and the chief reason is the domination of our political process by initiative measures.

When conferences of this nature are convened, often the defense bar is treated as part of the problem, rather than part of the solution. When we do offer constructive suggestions, they are viewed with suspicion and distrust. Our real motive, it is assumed, is to turn loose more of our cut-throat clients to victimize the public. What is often forgotten is that the alleged victimizers we represent often started down their path of criminality as victims themselves. In many of the cases that plague our criminal justice system, it's almost impossible to distinguish the victims from the victimizers. Believe me, the criminal defense bar fully shares your goal of breaking the vicious cycle by which victims often become victimizers. I think where we often part company is in our willingness to accept treatment and rehabilitation as an appropriate goal of the criminal justice system. Today, rehabilitation has achieved anathema in the criminal justice system. We have erected over the doors of our bulging prisons the sign that Dante

posted over the gates of hell: abandon all hope, ye who enter here. While we can agree that some offenders are past hope of redemption, criminal defense lawyers find that most of their clients are fully capable of turning their lives around if given a helping hand. The difficulty is sorting out which ones can be salvaged from the refuse that we are consigning to the slag heap. Here in California, we are afflicted with real schizophrenia on this issue. I find real irony in the same electorate at nearly the same time rejecting judicial discretion for juvenile offenders in Proposition 21, then mandating drug treatment instead of jail for drug offenders in Proposition 36. In both cases, on both sides, there was a furious effort to manipulate public opinion with media hype. Media hype often has more to do with the formulation of criminal justice policy than any of the other factors we have discussed today.

For thirty years of hope and frustration, I have labored in the vineyards of academia, searching for a rational explanation for American drug policy. I began my academic career in 1970, the year that Richard Nixon announced we had finally turned the corner in the war on drugs. I have studied the science of chemistry and pharmacology, the psychology and etiology of addiction, the economics of wholesale and retail distribution, the ethics of the medical profession, and the jurisprudence of criminal

punishment. I have reluctantly come to the conclusion that American drug policy doesn't really have much to do with science, psychology, economics, ethics or jurisprudence. It has more to do with how politicians get elected. It has to do with media hype, plain and simple.

The American addiction to media hype is not, of course, limited to drug hype. Our foreign policy, our economic policy, our military policy, our health policy, indeed every aspect of American public policy is impacted by media hype. But in each of these arenas, occasional brief interludes of public lucidity help to keep us on course. In the arena of criminal justice policy, however, and particularly drug policy, we consistently and repetitiously reject the voices of reason, tear up the scientific studies and the findings of commissions and councils, and repeat the same mistakes over and over again and again.

Our national debate on drug policy is dominated by twelve-second sound bites, devoid of thought but loaded with rhetorical zing. A recent Gallup poll reflected that 94% of Americans were convinced that the greatest challenge America faces is not the bankrupt social security system or the unavailability of decent health care for millions of Americans: it is the abuse of drugs. Yet the suggestion that judges, legislators and journalists approach the challenge by reading a book or studying a report or attending a

conference, and acquainting themselves with some credible factual information, is greeted with horror. What, you want us to *think* about this problem? If the word leaked out that we were *thinking*, we would be labeled as “soft on crime.” When is the last time you heard of someone being elected as a judge or legislator on a platform that he or she would be *thoughtful* about crime?

I have concluded it is a useless exercise to seek to engage the shapers of public policy in rational dialogue about drugs. When public opinion polls are so lop-sided in identifying a demon, and the demon has no credible defenders, no elected official in America has any interest in studying the demon when he or she can simply denounce it. The challenge now is to directly engage the public in rational dialogue, and begin a process of withdrawal from their addiction to sound bites. In dealing with media hype junkies, we must confront the denial that lies at the heart of their disease. That denial at its core is a denial of complexity. The fix that is offered by purveyors of media hype is the seductive fix of simplicity. We must look for issues in which public policy has clearly been skewed by reliance on oversimplified media hype, and let people see that they were deprived of some essential factual information before they made up their minds.

I believe there are at least three current issues on which the public is educable, and on which public opinion can be marshaled to support rational changes in drug policy. They are all issues on which we have encountered judicial, executive and legislative intransigence, because media hype has drowned out any rational debate. But there are essential factual premises that are not widely perceived by the public that can still be communicated. I've discovered when they are, they can actually change people's minds. Yes, knowledge can still function as a mind-altering substance.

The three issues on my agenda are (1) needle exchange programs, (2) medical use of marijuana, and (3) mandatory drug treatment programs instead of incarceration.

Let me start with the need for needle exchange programs. Many people can't get past the moralizing, that by distributing clean needles we're encouraging illicit behavior. Media reports on this issue are always dominated by images of addicts shooting up and nodding off in a filthy back alley. The subliminal message is that needle exchange programs will convert our playgrounds into shooting galleries for drug addicts. An analogy is often suggested to passing out condoms to teen-agers. Preaching abstinence to I.V. drug users is futile, however. They are truly addicted, and

they will inject themselves 1,456 times a year regardless of what we say about it.

What I find remarkable about public opinion on this issue is the extent to which fear is so much more persuasive than compassion or logic. People are willing to accept needle exchange programs, not to safeguard the health of I.V. drug users, but to protect their own health. In California, we've demonstrated that 25% of new HIV cases are in needle users, their partners, and their children. Even more alarming, reports of the prevalence of Hepatitis-C among I.V. drug users range as high as 90%. From the simple standpoint of the menace to public health, needle exchange programs are key to containing the spread of catastrophic fatal diseases for which we have no cure.

Despite this fearsome reality, we face continued intransigence of elected officials. We've given up criminal prosecution of needle distributors, because juries refuse to convict them. But government officials continue to harass volunteer programs and bully publicly funded programs. In California, former Governor Pete Wilson twice vetoed legislation to legalize needle exchange programs. When local officials in Santa Clara County set up a county-funded program, they were visited by representatives of former Attorney General Dan Lungren, who delivered a threat of civil

litigation, on the ground that the state had preempted the field and county officials were spending tax resources on an illegal program. The County program was then abandoned. With strong local backing, a bill to permit needle exchange programs in California was finally signed by Governor Gray Davis two years ago. One of the Senators who voted for it was targeted with an attack mailer announcing she “wanted to give free needles to heroin addicts,” with a photo depicting an addict injecting himself.

Comparing the negligible cost of clean needles to the catastrophic cost of every new diagnosis of AIDS or Hepatitis-C makes a very compelling case for needle exchange programs. That case was made by six federally funded studies, but the White House Office of National Drug Control Policy remains an adamant opponent of the programs, and Congress has refused funding for a program in the District of Columbia.

The second issue on which media hype can be overcome is the medical use of marijuana. I vividly remember when the discovery was first reported that marijuana may have legitimate medical uses. Police in Los Angeles were taught that dilated pupils were a symptom of being under the influence of marijuana. A major study at UCLA utilized student volunteers to puff a joint and then have the size of their pupils measured. Volunteers for the study were lined up around the block. The study conclusively

established that marijuana has no effect whatsoever on pupil size. It turned out what caused the pupils of LAPD suspects to dilate was simply fear.

With good reason. But the studies revealed that marijuana did reduce the intraocular pressure related to the disease of glaucoma. The federal government then set up a program to provide government-grown marijuana to glaucoma patients and those afflicted with other serious diseases. It was called the “Compassionate Use Program.” It was shut down in 1992.

Government compassion was the first victim of the AIDS epidemic, when the program was deluged with new applications. Government officials announced the program was “sending the wrong message.” It’s interesting that that’s the same phrase they use in expressing their opposition to needle exchange programs. They “send the wrong message.” They believe the public is too stupid to understand that, like narcotics and cocaine, marijuana may benefit sick people even though it is abused by others.

Growing numbers of ordinary citizens, who have watched loved ones waste away and suffer with AIDS or cancer treatments, have come to question the wisdom of laws that deny medication to sick and dying people when they observe, first hand, the relief that marijuana can afford. That reality, more than any media hype, accounts for the growing public support for medical use of marijuana. That public support has resulted in successful

initiative measures in seven states to permit the medicinal use of marijuana with a physician's recommendation. In California, we adopted Proposition 215 by an overwhelming margin in 1996.

Proposition 215 is a very simple measure. It provides that seriously ill patients have a right to possess and use marijuana for medicinal purposes. As long as they have the oral or written approval or recommendation of a physician, they are immune from prosecution for possessing or cultivating marijuana. The law does not directly address the problem of distribution of marijuana to these patients. Are they to go out to the back alleys and negotiate with illicit drug dealers to procure their medicine?

The answer to that question from federal authorities is a resounding "yes." In *Oakland Cannabis Buyers' Cooperative v. United States*, the U.S. Supreme Court rejected a claim of medical necessity as a defense to marijuana distribution under the Federal Controlled Substances Act. I argued the case before the Supreme Court. Federal authorities recently raided and shut down some of the most respected medical marijuana dispensaries in California, facilities being openly operated with full approval of local authorities to serve the needs of AIDS and cancer patients. Criminal prosecution is unlikely in most of these cases, because federal authorities realize California juries are unlikely to convict. Another example, along

with needle exchange programs, of how jury nullification can affect criminal justice policy.

Shortly after Proposition 215 was enacted, federal authorities announced that any physician who recommended the use of marijuana would face suspension or revocation of his federal permit to prescribe drugs. Needless to say, many physicians became very nervous about putting their names on the recommendation required under the law. A lawsuit was filed against the Drug Enforcement Agency asserting the first amendment right of physicians to freely discuss all treatment alternatives with their patients, and in the case of *Conant v. McCaffery*, a permanent injunction was issued to restrain the DEA from threatening California physicians. The validity of that injunction is currently before the 9th Circuit Court of Appeals, along with a new round of constitutional arguments in the case of the Oakland Cannabis Buyers' Cooperative.

Ultimately, the fate of the medical marijuana movement may rest in the hands of Congress. At least for now, we can anticipate the same knee-jerk response engendered by the Sentencing Commission's recommendation to reduce the disparity between crack cocaine and powdered cocaine. When an initiative measure to approve medical use of marijuana in the District of Columbia was put on the ballot, Congress put a rider on the Budget

Appropriation for the District of Columbia to forbid any expenditure of funds to count the ballots. A successful lawsuit by the ACLU finally released the election results. The measure passed by an 80% margin.

There is much we can do to improve the implementation of Proposition 215. Attorney General Lockyer convened a task force to come up with suggestions, and our chief recommendation was establishment of a statewide registry, to provide a quick means of verification of the legitimacy of a claim of physician authorization by a patient encountered by the police. The chief obstacle to implementing that proposal has been Governor Gray Davis. There is also great confusion about the number of plants a patient can cultivate to meet his medical needs. With a vacuum at the statewide level, each county is establishing its own guidelines, with wide disparity ranging from 99 plants in Del Norte County to 3 plants in Tuolumne County. Just yesterday, I argued a case in the California Supreme Court that may provide some clarity. In *People v. Mower*, a very sick patient who had the requisite physician's approval was subjected to arrest and trial simply because his cultivation exceeded the three plant limit in Tuolumne County.

The third issue on my agenda is the substitution of treatment for incarceration of those convicted of drug possession. In November of 2000, the initiative process finally gave the criminal defense bar something to

cheer about. The enactment of Proposition 36, by an overwhelming margin of 61%, marks a significant turning point in California policy governing drug offenders. The persistent abuse of drugs will henceforth be treated as a medical problem to be treated, rather than a ticket for an endless carousel ride in and out of jails and prisons.

The initiative measure declares the new policy succinctly:

“Community safety and health are promoted, and taxpayer dollars are saved, when nonviolent persons convicted of drug possession or drug use are provided appropriate community based treatment instead of incarceration.”

The math that supports this finding is disarmingly simple. It costs California taxpayers \$26,000 per year to incarcerate a drug offender. We can provide excellent community-based drug treatment at an annual cost of less than \$7,000 per person. California was incarcerating drug offenders at the highest rate in the nation. In 1999, a total of 12,749 Californians were sent to prison for drug possession offenses.

The initiative appropriates \$60 million for a Substance Abuse Treatment Trust Fund for the current fiscal year, then \$120 million for each of the next five fiscal years. The funds can be allocated to treatment programs, as well as reimbursement of probation department and court costs. Thus, lots of political maneuvering is occurring as counties line up for their

slice of the pie. It is already apparent that the pie is not big enough, requiring the legislature to appropriate supplemental funds. There should be more than enough savings in correctional expenses to amply fund drug treatment, but prying it loose will require some real political muscle. Perhaps a future conference should focus upon the influence of the Correctional Officers Union upon criminal justice policy in California.

Each of the three issues I've identified present a different example of the same phenomenon. Intransigent politicians stubbornly cling to irrational prohibitions, because they fear the power of a media label. If they are branded "soft on crime," they fear they will shrink to nothing in the next wash. Yet, when the arguments are patiently explained to the public, without hype, they listen and understand. The public is educable. On these three issues, California can lead the nation to full recovery from our national addiction to media hype, and put us back on the road to rational drug policy.

Several years ago, I collaborated with 38 other law professors on an article entitled "The Jurisprudence of Yogi Berra." Each of us took a famous phrase allegedly uttered by Yogi, and showed its application as a legal principle. I say allegedly because Yogi himself said, "I really didn't say everything I said." If I were to select the one Yogi Berraism that best

sums up our experience in the struggle for rational criminal justice policy in California, it would be this gem:

“You’ve got to be very careful if you don’t know where you’re going, because you might not get there.”