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A RATIONAL DISCUSSION OF CURRENT DRUG LAWS*

*Nicholas deB. Katzenbach***

I do not want to be characterized here as an expert because I think the experts are here as members of the panel. I am really just speaking as a lawyer, as a citizen, and as somebody who is concerned about these problems.

Thirty years ago this month the President's Crime Commission came out with a rather extensive report.¹ I had the honor to chair that. It came at a time of increasing crime, riots, etc., back in the late 1960s. It had as its purpose trying to promote a rational discussion of crime problems that were at that time very much on people's minds. These were highly emotional and politically rewarding public issues to discuss. Well, thirty years later I am still at it. But I have learned that those involved in government and politics respond more comfortably to public views, as perhaps they should, than simply to intellectual pleas. That was true of the Commission's report.

The report had a major effect on professionals in law enforcement and indeed one purpose of the report, one major recommendation, was to increase professionalization of state and local law enforcement and of the judiciary. That, in turn, got the Congress and state legislatures involved, although, of course, the rhetoric with respect to crime continued. One of the report's major points was trying to get people to see the criminal law system as a system, not as a bunch of separate components, but as something that could be put on a flowchart, that you could see from the top — police, arrested, prosecutors, courts, probation officials, prison officials — all put various ways going off to one side.

A goal was to see it in that way, and to realize that you cannot tinker with one part of the system without affecting the other parts

* Nicholas deB. Katzenbach delivered these remarks at a public forum, sponsored by the Waterbury, Connecticut Bar Association and the Voluntary Committee of Lawyers, on June 5, 1997, in Waterbury Connecticut.

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1. See REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

of the system, and that you have to look at it really as a system. It emphasized for that reason the importance of alternative approaches (of weighing costs/benefits, for example) with regard to methods of dealing with crime, juvenile courts, and with the potential of community service — ideas at that time that were new.

Even family problems. I must say the Commission discovered the importance of policy to families before the politicians discovered the importance of family values. Thirty years ago we realized there was a very strong connection between families and crime and I am not talking about families of organized crime.

We talked about the role of the federal government and the state government. We saw the role of the federal government as assisting the states and giving the principal responsibility to the states, with the federal government assisting in technology and things that could be done on a common base. And one of the major things we dealt with was trying to improve statistics on crime to find out what was really going on. We drew those flow charts but the flow charts were not terribly accurate because we did not really have terribly accurate statistics. With respect to crime in general, I think statistical information has greatly improved now through the cooperation of agencies in the states, federal government, and cities.

We did not do a lot on drugs because that was just beginning to be a problem. There was some talk about treatment. I do not think we appreciated at that time the enormous political potential of declaring the War Against Drugs. Now, as I have said, all crime has an emotional appeal and there is a great deal of political appeal in playing the role of the tough enforcer. Successful prosecutors can become governors, senators, even aspiring to the Presidency as Tom Dewey did, and the War on Drugs is an ideal vehicle for political rhetoric.

There are a number of reasons for that. Crime in the streets has increasingly become drug-connected. Drugs attract young people and raise serious family concerns. Every parent has concerns about children and drugs. Drugs mostly come from abroad so it is easy to think of the fault being over there and not here. There is a strong race connection with drugs and that can have a political appeal to some. And it certainly has had an effect, as so many problems in this country have, on our ability to deal with racial problems. It also is an ideal vehicle for the federal government to involve itself in much more directly for the simple reason that it has some international aspects and that almost all drugs have an

interstate connection. And most importantly of all, it is a real problem.

Declaring a War on Drugs is popular for all of those reasons, but it seems to me that the term "war" may be an unfortunate one if we are seeking answers to real problems. From the outset, presidents, drug czars, and federal and state officials have always paid lip service to the need to take a balanced approach, meaning a balance between tough enforcement and other modalities of control such as treatment for addiction. But the balance has mostly been attained with a very heavy hand on the scale tipping it towards getting tough, because that is where the political appeal is. That approach, I believe, has cost a great deal in dollars, a great deal in justice, and even affected adversely a good deal of foreign policy without, at least yet, achieving results comparable to those costs. That is why I think the time has come to consider the problem as rationally and as calmly as is possible to see if we can achieve better results.

When I say something like that, I do not mean to toss the law enforcement out of the window. I do not mean stop interdiction. I simply mean look at those in flow charts, to see whether we are putting the resources in the places that are best. Maybe we are. But a war suggests that its us against them — whether the foreign drug kings, or the street dealers, or the addicts, or whomever — good guys against bad guys. And it assumes the drug problem could be solved if only we could control the supply of drugs. Now obviously that is an overstatement, but I do want to make Pogo's point: we have met the enemy and it is us. Demand is the other side of that problem and if demand increased, I do not think there is any question about the fact that supply will increase to meet that demand.

Let me put it this way. I do not have any problems with enforcement efforts aimed at lessening supply if they are cost-effective. Indeed, I think many are essential to a balanced approach. But I also want to be sure we are putting our funds where we can get the most bang for the buck. Again, wars are to be won. I would be satisfied simply to see some steady progress reducing addiction, accepting that progress will be slow, that it will be expensive, and that it will probably never result in any kind of total victory. But let us go as far as we can, there simply is no magical, simple answer to the problem of drugs.

The predominantly law enforcement approach of the past twenty-five years has had substantial costs in terms of money and,

of equal or maybe greater importance, I think cost to the justice system itself. But first money. Both federal and state jails are overcrowded. New prisons are required to be built at what I regard an alarming rate. We have more people per capita incarcerated in this country than in any other country in the world.² If the objective is to fill the prisons to capacity, then the drug laws' enforcement has been a smashing success. But the result has not significantly reduced drug traffic, and its monetary cost is very substantial, twenty to thirty thousand dollars a year to support each person in jail.³

Unfortunately, relatively few of those convicted — and this is no fault of law enforcement — are the big drug dealers, and almost all of them in the drug economy can be easily replaced in the distribution scheme because of the enormous amounts of money involved. Relatively few are also convicted of crimes of violence. Some are themselves addicts convicted of unlawful possession. Some are not addicts, just young people doing foolish experiments. Most are serving quite long mandatory sentences. I think a rational approach would at least consider some alternatives to long-term incarceration, such as more community service, supervised probation, parole, treatment, and so forth. All, I believe, are cheaper.

Success and failure, and this is important, should really be monitored with the understanding that failures will occur, so we have some idea of what works and some idea of what does not work, and under what circumstances. We should not expect perfection. Just aiming at any kind of cost-effective improvement ought to be politically popular. Treatment, well that is not any kind of magic bullet either. Getting rid of addiction is tough and you can expect frequent failures and relapses. But even a modest rate of success is quite cost-effective. And any reduction in demand is important.

Treatment in prison is relatively cheap. Treatment for addicts who want it, and not all do by any means, seems to me to be a moral imperative. If we create the administrative mechanism necessary to measure success and failure, we can promote a rational, rather than emotional, approach to the drug problem. I include, for example, methadone maintenance and treatment modalities, in part because I think it can become a step toward being drug free.

2. See, Fox Butterfield, *Are American Jails Becoming Shelters from the Storm?*, N.Y. TIMES, July 19, 1992, at D4.

3. See, Rick Skindrud, "Truth in Sentencing" Worth the Cost, WIS. ST. J., June 5, 1997, at 13A.

Education is a difficult subject and one that is delicate because young people are not really scared. Young people think they are going to live forever, that is why they are such good soldiers. They are not scared when they ought to be. And the great problem with education and drugs is to strike a balance that makes sense to young people so that they do not want to experiment merely because it is dangerous, merely because it is illegal. It is difficult to develop education programs and appeals in the schools and elsewhere that strike that balance fairly and effectively.

Frankly, I am more concerned with the non-monetary costs of the drug war to our criminal justice system. There are consequences to the rhetoric of toughness, the political consequences of being soft on crime, racial problems, concepts of fairness, concepts of the punishment fitting the crime, and I think an increasing federalization of criminal law generally, all stemming out of the effort to control drugs.

For example, mandatory sentences, stiff mandatory minimum sentences, I suppose are aimed at deterrence on the one hand and I think politically aimed at judges on the other. They succeed quite well on the latter count, less on the former. Their effect, of course, is to transfer a great deal of power from judges to prosecutors. I think that is a cause for concern. So, too, is the notion that one size fits all, so seldom consistent with common sense. And finally, one obviously unintended result is to release violent felons from overcrowded prisons because they do not have mandatory sentence minimums and are eligible for parole, when nonviolent drug felons are not.

Increasing federal laws has led to making state experimentation more difficult because federal authorities can almost always step in if they want to. I happen to be a conservative as far as federalism is concerned and I still think it makes sense to put responsibility for as many matters as possible with the states. There should be a constraint on the part of the federal government in drug enforcement and a more precise allocation of responsibility. To my mind, the role of the federal government is what years ago the Crime Commission though it was, and that is to provide help, not headlines.

A word on professionalization and specialization. I do not think most federal and state judges consider themselves very expert in drug matters. Not often do they like these cases in their courts. One result of the increased efforts in the war has been to crowd criminal courts of general jurisdiction with drug cases at the expense of other criminal and civil cases. More judges may be the

answer, but I think more specialized judges may well be a better one. That makes possible a more coordinated approach — to go back to my flow chart — of specialists in all aspects who know something about drugs and can communicate and talk with each other. At the moment it is spread all over the place and it would be helpful if the information could be focused in a computer-usable form, so that we would have statistics, we would have information, and we would know much more about what is going on and be able to measure it much more accurately. Specialization permits judges with specialized training and interest to work for the public health with probation, with community organizations, and with others.

As I said at the outset, I do not pretend to have drug expertise, but I do believe a rational approach to the problems of society tends to spur them towards solutions. And most of all I think the best of our political leaders know this, and deserve our support when they search for solutions that may or may not work, rather than programs that greatly appeal to our less-educated instincts. That is why I think what is been going on in the State of Connecticut is useful, what has going on here tonight is useful, being willing to look honestly at the problems. I think the bar association here is to be congratulated for sponsoring this program and the panelists who are experts for participating.