

## REACTION ESSAY

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# CRIMINOLOGISTS AND PUNITIVE DRUG PROHIBITION: TO SERVE OR TO CHALLENGE?

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Proposals, bills, and laws to reform drug sentencing are proliferating around the country. Two dozen states have reformed their drug laws in recent years, and most have also implemented administrative changes toward the same end (Piper et al., 2003). Virtually every state legislature is contemplating one reform or another in this year's session: diversion of drug possession offenders and others into drug treatment, reduction or elimination of mandatory minimum and other sentences, enhanced judicial discretion, expedited prison release programs, and so on (Butterfield, 2003). The net result appears to be a modest reduction over the past few years in the number of drug law offenders behind bars, and the hope of greater reductions to come.

Motivations behind this trend vary. There is a growing sense of exhaustion with the war on drugs, a feeling that it has not succeeded, and a heightened awareness of the drug war's excesses and injustices in locking up too many people for too long. Most importantly, the severe budget crises confronting most state governments during the past couple of years have created a sense of urgency about reducing prison costs. Democrats have generally pushed harder for drug sentencing reform than Republicans, but many recent reforms could not have been enacted without bipartisan support and the leadership of senior Republican legislators and governors.

I have been deeply involved as an advocate in many of these reforms, working hand in hand with my colleagues at the Drug Policy Alliance as well as with allied individuals and organizations. We draft and campaign for ballot initiatives (to require treatment instead of incarceration, to legalize marijuana for medical purposes, to curtail asset forfeiture abuses), draft and lobby for legislation, mobilize both grassroots and elite support, engage the media, issue reports, litigate in the courts, and generally seek to shape public opinion and legislative action. Our work involves not just reforming drug sentencing laws and supporting alternatives to incarceration but also promoting policies and programs to reduce HIV/AIDS, hepatitis, overdose fatalities, and other dangers associated with illicit drug use. It is a constant process of negotiation that varies greatly

from one state to another, depending on local laws, judicial and prosecutorial practices, popular opinion, the idiosyncrasies of legislative and other leaders, and so on.

### THE LIMITED LANGUAGE OF REFORM

The substance of drug sentencing negotiations inevitably addresses a series of questions that appears to implicate both policy and moral culpability: Who deserves to be diverted to treatment? Only first or second time possession offenders, or anyone with a drug problem who gets arrested for possession? Just those with no other offenses in their past? Or no other nonviolent offenses? Or no other nonviolent offenses within the past three years? Or past five years? What type of drug use qualifies one to be diverted to treatment? How about low-level dealers who sell drugs to support a drug habit? What about those who sell drugs to support another habit or need or desire? Everyone agrees on the need for enhanced penalties for those who sell drugs to minors on school grounds, but what about those who sell drugs to adults within one hundred feet of a school? Or five hundred feet? Or a thousand feet? Or near a day care center? Almost everyone supports enhanced penalties for people who sell drugs while in possession of a gun, but what about people arrested for drug possession who have a gun? Or someone arrested for selling drugs who also happens to keep a registered gun in his home? What about someone who plays a small part in a drug-selling operation? What amount of a drug distinguishes a charge of possession from one of possession with intent to distribute? Do you count only the weight of the pure drug, or also whatever it is cut or mixed with? Should penalties differ for crack and powder cocaine? By how much? These questions, and hundreds more like them, constitute the language of drug sentencing reform today. As reformers trying to reduce the number of drug offenders behind bars, we have no choice but to speak and negotiate in this language.

This language, however, is fundamentally flawed, and the negotiations profoundly inadequate, because neither really speak to nor challenge the essential immorality and horrific human consequences of subjecting particular drugs and the people who produce, sell, buy, and use them to the logic and brutality of punitive prohibitionist policies. The number of people in jail and prison for drug law violations increased from 50,000 in 1980 to almost 500,000 today (King and Mauer, 2002). That total is greater than the total number of people incarcerated for all criminal offenses in western Europe (whose population exceeds that of the United States by roughly 100 million). In addition, among the four and a half million people on probation and parole, tens (and possibly hundreds) of thousands of

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others lose their freedom for “dirty urines” or other petty drug law violations that would not normally result in incarceration (Hughes et al., 2001). And hundreds of thousands of others are incarcerated for engaging in other offenses—prostitution, theft, fraud, and so on—prompted primarily by their dependence on illicit drugs that are so expensive because they are illegal. All told, the drug prohibition system in the United States may account, directly or indirectly, for roughly one-third of the more than two million people behind bars today, as well as roughly a million people under other forms of supervision by the criminal justice system (Glaze, 2003). An extraordinary proportion of these people are African American and Latino: more than 80% of all drug offenders behind bars in many states, far exceeding the proportion of total drug users or sellers who are African American or Latino (Schiraldi et al., 2000).

The restricted language of the status quo can prove overwhelmingly seductive. The media and public tend to speak it uncritically and even unknowingly. It can be catchy, with its talk of kingpins and mules. It well serves the interests of those who benefit from current policies. It even threatens to co-opt those of us who recognize it for the distortion it is, because we are obliged to understand and speak it as part of our tactical analysis and negotiation of reform. But criminologists, one would think, as well as other scholars of crime and law enforcement, have a particular obligation to think and analyze the language, character, and underlying assumptions of drug prohibition more critically and without undue deference to the prohibitionist ideologies and institutions currently in power. No other scholarly discipline is so defined by the state’s legislative, judicial, and regulatory decisions. When the state criminalizes or decriminalizes, the purview of criminology expands or contracts. Yet drug prohibitions—like criminal punishments for gambling, prostitution, and other consensual, nonviolent violations of Biblical injunctions—vary far more over time and place than criminal prohibitions on murder, rape, assault, and theft.

## QUESTIONING PROHIBITION

Keep in mind how the drug laws we now strive to reform became what they are today. During the first decades of the last century, many countries debated what to do about widespread alcohol abuse, but only the United States and a few others opted for criminal prohibition rather than enhanced taxes and other regulatory interventions. The United States played a leadership role throughout much of the twentieth century in criminalizing opiates, cocaine, marijuana, and hallucinogens, adopting such laws before most other countries and proselytizing thereafter in favor of global prohibitions (Nadelmann, 1990). Racial and class prejudices

played a powerful role in the United States in distinguishing which drugs, and drug using populations, became the subject of criminal prohibitions rather than regulatory regimes—and in instigating and shaping more pervasive and punitive criminal sanctions thereafter (Musto, 1987). Many of the drug laws now regarded as excessive were enacted during periods of popular hysteria over particular drugs, with legislators employing and responding to rhetoric that equated drug sellers with murderers and drug users with predatory criminals (Reinarman and Levine, 1997). The laws were also enacted with virtually no consideration of their human, fiscal, or other policy consequences.

Punitive drug prohibition is a uniquely criminogenic system. It criminalizes millions of individuals who engage in no other sorts of crime apart from their drug use. It transforms previously or otherwise legal markets into illicit markets, inviting violence and corruption and tempting many who would not otherwise be drawn to criminal enterprise. It inflates the costs of drugs so much that many users commit income-producing crimes they would not otherwise commit. And, apart from its criminogenic properties, it also dramatically increases the harmful consequences of drug use. The principal defense of this system is that it is necessary to prevent far greater numbers of people from becoming involved with drugs in ways that harm themselves and others. But that defense is hypothetical, not certain. It ignores the substantial evidence that sensible regulations can reduce drug misuse more effectively than punitive prohibitions. And it falters when compared with the extraordinary human costs imposed by punitive prohibitionist policies.

### THE HARM REDUCTION CALCULUS

So even as I and other drug policy reformers speak the language of the status quo as part of our efforts to reform drug sentencing laws, we view our work as part and parcel of a broader campaign to transform the ways that Americans (and others) think and talk about currently illicit drugs, the people who use them, and the policies that govern them. Our optimal drug policy is that which most effectively reduces the cumulative harms of both drug use and drug prohibition (Nadelmann, 1998). We are less concerned with reducing drug use per se, and much more focused on reducing the harms associated with drug use, particularly criminalized drug use: HIV/AIDS, hepatitis, overdose fatalities, abscesses, and other debilitating ills and diseases. Our efforts to make sterile syringes more readily and legally available, and to ease access to methadone, buprenorphine, pharmaceutical heroin and other maintenance alternatives to illicit opiate addiction, and to reduce overdose fatalities through drug user education, easy access to naloxone, and modified police response, and to promote

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comprehensive drug education based on successful sex education models complement our efforts to reform drug sentencing laws. It is all about reducing the cumulative death, disease, crime, and suffering associated with both drug use and drug prohibition (Hunt, 2003; MacCoun and Reuter, 2001)

This policy calculus obviously differs from that of the status quo, with its focus on reducing the total number of illicit drug users (most of whom cause little or no harm to either themselves or others). But we also bring a different moral calculus to bear on drug policy, starting with the basic notion that there is nothing inherently immoral or unethical about consuming psychoactive drugs absent harm to others. We believe that people should not be punished simply for what they put into their bodies. We see no legitimate basis for discriminating between the moderate and responsible alcohol user and the equivalent user of marijuana, cocaine, Ecstasy, methamphetamine, or any other illicit drug. We similarly see no basis for discriminating between an individual who is addicted to alcohol and one who is addicted to an illicit drug. The only legitimate discrimination is between those drug users who do no harm to others and those who do (Husak, 1992; Mill, 1951). Most of us see this as a basic issue of human rights, grounded in a human being's right of sovereignty over one's mind and body, and analogous to principles of nondiscrimination on the basis of race, faith, gender, sexuality, and so on. And we view the legal and popular presumption that people can and should be coerced to refrain from particular drugs (but not others) as the principal reason why U.S. drug control policies have wreaked such havoc on dozens of countries, thousands of communities, millions of lives, and most of the core values of a free society.

The drug policy reform movement's adherence to this principle distinguishes our advocacy from that of many other proponents of sentencing reform. We take seriously the notion that no one should be incarcerated or otherwise punished simply for using a drug or possessing a modest amount for one's own use. We support treatment instead of incarceration for drug law violators not just because treatment typically proves more effective and less expensive in helping people with drug problems get their lives together, but because it is simply wrong to punish someone who has committed no offense other than possessing or using a particular substance. We reject as both bad public policy and unethical the notion that people on parole or probation or in a diversion program should be incarcerated or re-incarcerated simply for a dirty urine. We see abstinence as pivotal to recovery for many, but not all, people with drug problems (Biernacki, 1986; Denning, 2000; Granfield and Cloud, 1999; Marlatt, 1998). We are concerned that many drug "treatment" programs have become little more than coerced abstinence programs, forcing one modality on a great variety

of people and harming many in the process. And we find it ridiculous that hundreds of thousands of people arrested each year on marijuana and other drug possession charges can only avoid a criminal record, incarceration, and other sanctions by participating in a “treatment” program, notwithstanding the fact that their drug use is no more problematic than that of a moderate and responsible consumer of alcohol or pharmaceutical drugs (Substance Abuse and Mental Health Services Administration, 2003). None of this is to deny that some people only succeed in putting a drug problem behind them when they are threatened with incarceration; rather, it is to say that a policy that allows or mandates incarceration solely for failing or refusing to be abstinent from drugs harms far more people than it helps.

### RETHINKING THE DRUG SELLER

Our view of those who produce and sell drugs in violation of the law is more complex. Many libertarians argue that the human right to sell drugs is as fundamental as the right to possess and use them (Friedman and Szasz, 1992). Most drug policy reform advocates, however, shy away from this view, distinguishing both morally and policy-wise between those who profit from selling drugs and those who use drugs. The “addict dealer,” who sells drugs in small amounts primarily or entirely to subsidize her own drug use, falls somewhere in the middle—in part because of a sense that such people are not fully responsible for their behavior, and in part because this is the principal category of drug sellers whom judges, prosecutors, and legislators are willing to consider diverting to treatment instead of incarceration. But the more lenient treatment sometimes afforded “addict dealers” raises legitimate questions as to why other sellers, who may have motivations other than being addicted to drugs, should be treated so much more harshly than someone whose addiction involves drugs.

The rhetorical equation of “drug dealers” with rapists or murderers provided the impetus for enacting mandatory minimum and other criminal penalties consistent with this rhetoric. The Drug Policy Alliance and a growing number of other state and national advocacy organizations are working hard to reform these laws so that those who sell drugs are treated more like other nonviolent offenders. Most of us agree that “kingpins” merit harsher punishment than those who play lesser roles or who operate on a small scale because they are more likely to be involved in a range of criminal activities in protecting and advancing their operations. But there is also a sense that this distinction should not be the most important one in making moral judgments and policy recommendations about the drug law violators behind bars today or in years to come.

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The most important distinction is between those who only violate drug laws and those who commit criminal offenses against others. We tend to look at those who sell drugs illegally not so differently than we look at those who sell drugs and other potentially dangerous commodities legally. Some drug sellers are criminals in many senses of the term, breaking all sorts of laws apart from their drug business and routinely relying on violent and other predatory behavior as part and parcel of their criminal enterprises. Others violate no laws apart from the drug prohibition laws (and associated tax and regulatory laws). Some are criminally aggressive in trying to expand their businesses, whereas others would never think of using violence or cheating a business partner or customer. Some do not hesitate to sell to young people; others would never do so. Some take pride in the quality of the product they sell; others would just as soon sell counterfeit and adulterated drugs. And some will sell any drug that can make them money, whereas others will only sell those drugs, such as marijuana, Ecstasy, and hallucinogens, which pose only modest risks to consumers.

The analogy here is to bartenders, liquor store owners, and others who produce and sell alcoholic beverages. For many Americans, the marijuana “kingpin” who takes pride in producing high-quality marijuana is very much like the producer of high-quality wines and spirits or fine cigars. Our view of methamphetamine producers is generally more jaundiced. We see them as morally equivalent to the cigarette companies, profiting from the production and sale of commodities that many people desire but that pose substantial risks to the health and well-being of many who use them. Ditto for retail sellers of drugs. Just as there are bartenders who watch out for their customers, trying to make sure they do not drink too much and get home safely, so there are sellers of heroin and cocaine who watch out for their customers in the same way. There is a world of difference—both morally and from the perspective of a community’s well-being—between the person who sells good quality drugs to a stable clientele and the fellow who sells drugs on a street corner, recruits and sells to young people, intimidates passersby, routinely relies on violence, and is indifferent to the quality of what he sells (Curtis et al., 2001). The first is morally indistinguishable (legality aside) from the responsible bartender or liquor store operator; the latter is a worthy target of police and prosecutors. And just as we easily distinguish today between the alcohol producers and sellers during Prohibition who sold good quality wine and booze and those who ripped off and endangered customers by selling products adulterated with rubbing alcohol, wood alcohol, and other highly toxic ingredients, so the same distinctions remain important today—morally as well as from the perspectives of public health and public order. Save the toughest penalties

for those people who defraud and endanger their customers, not those who sell exactly what their consumers want.

### CRIMINOLOGY IN THE SERVICE OF REAL REFORM

Perhaps the moral judgments and policy reflections I have offered sound radical to many a reader, but I believe they are consistent with the most basic moral judgments we make about people in our everyday lives when our views are not distorted by willful ignorance and government propaganda grounded in deep-seated ideologies. There has always been a public health component to the rationale for drug prohibition, but that component has been obscured and disparaged by decades of subordination to the criminal justice imperatives, racist origins, and abstinence ideology of the drug war. Indeed, it often seems as if today's drug war protagonists have forgotten entirely that the purpose of drug control policy, ideally, is not to punish per se but rather to protect individuals and society from the potentially harmful consequences of drug use.

So, yes, criminologists perform a useful service when they engage the drug sentencing debates of the day, accepting their assumptions, using their language, and providing the criteria and rationales for politically viable compromises that can help ameliorate the drug war's harsh consequences. But the value of this service is greatly diminished or enhanced by the extent to which the same criminologists keep in mind the need to continually question and assess the basic language and assumptions and rationales of punitive drug prohibition. Too many evaluations of drug courts and other diversion programs accept implicitly the legitimacy of punishing people for nothing more than the inability or refusal to abstain from drugs. Too few studies consider the consequences of ending marijuana prohibition—a striking omission given the fact that so many people are arrested and incarcerated for violating a criminal law that roughly a third of Americans think should be repealed. And too little effort is made to understand the criminogenic consequences of punitive drug prohibition, or the consequences of enforcing abstinence ideologies with criminal laws, or the political interests that are served by persisting with current drug policies, or the ways in which racism has infused the evolution of drug prohibition in the United States from its origins until today. Will government agencies fund such studies? I doubt it. Will those who ask and study such questions be shunned by government officials and agencies with no political interest in the potential answers? Quite possibly. But to fail to ask these and other pivotal questions would represent a fundamental capitulation to the state's role in defining and directing the discipline of criminology. This scholars must not do.

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