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WHEN THE CURE IS WORSE THAN THE DISEASE: AMERICA'S FAILED WAR ON DRUGS

By Peg Solomon

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The first panacea for a mismanaged nation is inflation of the currency; the second is war. Both bring a temporary prosperity; both bring potential ruin. But both are the refuge of political and economic opportunists.

Ernest Hemingway,
Notes of the Next War

The casualties of America's 30-year "war" on drugs are all Americans as well as United States domestic policies. In effect, the United States government has been waging "war" against its own people. First, the Eighth Amendment's ban on excessive bail has been eviscerated with the attitude that a crackdown at any price is worth paying. The protection of reasonable bail has become a mockery with pre-trial seizures, and what protection is left is not for the indigent who cannot afford bail. Second, the Fourth Amendment's ban on unreasonable searches and seizures has lost all meaning with penalties that are out of proportion. Many innocent people are stopped and harassed by the police and although some illegal drugs have legitimate medical uses, genuinely ill people cannot get the drugs that would help them.

Despite these factors, more people are using illegal drugs since the advent of this "war" on drugs. In addition, the incarceration rate has burgeoned, more prisons have been built, more families are single-parent households, and the criminal justice system has become more racist. Because this "war" supports an enormous infrastructure, our nation is spending literally billions of dollars on cures that just do not work. By all accounts, the government's drug policies have greatly exacerbated the problem.

I. WHAT WE KNOW

Our nation has learned many things about drug use before and during the "war" on drugs. They range from the effectiveness of treatment, racial and gender disparities, and the use of marijuana.

A. Treatment has Proven More Effective than Incarceration

We know that drug addiction is not a moral failure, but a problem that requires therapeutic intervention. Addicts are driven by their addiction, not the potential legal consequences that may result from them. In 2000, 81% of the drug arrests were for possession, 19% for manufacture and delivery,¹ and 46.5% involved marijuana.² The recidivism rate for drug crimes is 9 out of 10.³ Hard-core users in the United States are estimated at 3.6 million and represent only 20% of all users.⁴ Most of these people are unemployed and indigent.⁵ Thus, treatment that is available through work programs is unavailable to most of those who need it.

Untreated, addiction bolsters the crime rate and heightens fraudulent use of the welfare system. It also increases the transmission of disease, fosters child abuse and neglect, and contributes greatly to the deterioration of neighborhoods and communities. We know that prohibition creates a black market, which leads to gang violence and increased homicide rates.⁶

Despite the benefits of treatment, the United States has focused more on incarceration. In 1998, 5.9 million American adults were incarcerated,⁷ more than in the gulags of the old Soviet Union.⁸ By the end of 1999, one out of every 143 Americans was incarcerated, most for drug-related crimes.⁹ In contrast, all major Western European incarceration rates were at or below 100 out of every 100,000.¹⁰ The United States incarcerates its citizens at a rate six times that

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of other Western nations.¹¹ In 1999, more than 61% of those incarcerated in the federal system were for drug-related crimes, up from 53% in 1990,¹² and between 1980 and 1999 there was an 84% increase in both state and federal prisons for non-violent offenses.¹³ The American non-violent prison population is greater than the populations of Wyoming and Alaska combined.¹⁴

The cost of the “war” on drugs to our society is \$110 billion a year, most of which goes into the criminal justice system.¹⁵ In 1999, for example, the states spent \$32.5 billion on average on prisons and only \$22.2 billion on cash assistance for the poor.¹⁶ In the years 1984 through 1999, California built 21 new prisons but only one new university.¹⁷ In the years 1987 through 1995, California saw an increase in prison expenditures of 30% and an 18% decrease in expenditures for higher education.¹⁸ More than \$5 billion has been spent on prison construction over the past decade.¹⁹ In 1999 alone, 2,071,686 Americans were incarcerated.²⁰ In that year, it cost \$25,071 to house one prisoner, \$40,504 for one person’s involvement in the judicial and legal system, and \$71,184 per person’s involvement in the judicial, legal and law enforcement systems.²¹ By 1996, with 60% of federal inmates incarcerated for drug offenses,²² the government spent \$2 billion to house them.²³

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On the other hand, treatment is cost-effective when compared to incarceration. Imprisoning a drug offender costs \$25,000 a year; drug rehabilitation costs less than \$5000 a year for outpatient treatment and between \$5000 and \$15,000 a year for inpatient treatment.²⁴ Treatment has been found to be 10 times more cost-effective in reducing cocaine use.²⁵ Every \$1 invested in treatment saves \$7.46 in societal costs.²⁶ A

good example is Arizona’s experience in 1996. In that year, Arizona voters passed an initiative mandating drug treatment instead of prison for non-violent drug offenders.²⁷ After one year, the Arizona Supreme Court concluded that taxpayers saved \$2.6 million in one year, and 77.5% of those on probation for drug offenses tested negative for drug use.²⁸ According to the Arizona Supreme Court, “The Drug Medicalization, Prevention and Control Act of 1996 has allowed the judicial branch to build an effective probation model to treat and supervise substance-abusing offenders... resulting in safer communities and more substance abusing probationers in recovery.”²⁹ With treatment, the selling of illegal drugs decreased by 78%; shoplifting decreased 82%; assaults decreased 78%; all crime together decreased by 64%; those who supported themselves through criminal activity decreased 48%; welfare use decreased 10.7%; and employment rose by 18.7%.³⁰

B. The War on Drugs Is Not Race and Gender-Neutral

Human Rights Watch, a nonprofit, non-governmental organization dedicated to the protection of human rights worldwide, has spoken out regarding the effect of America’s “war” on drugs:

The racially disproportionate nature of the war on drugs is not just devastating to black Americans. It contradicts faith in the principles of justice and equal protection of the laws that should be the bedrock of any constitutional democracy; it exposes and deepens the racial fault lines that continue to weaken the country and belies its promise as a land of equal opportunity; and it undermines faith among all races in the fairness and efficacy of the criminal justice system. Urgent action is needed, at both the state and federal level, to address this crisis for the American nation.³¹

We know that more whites use illegal drugs than any other population.³² Five times as many whites use

drugs as blacks.³³ Yet, the vast majority of those sent to prison for drug offenses are black.³⁴ As of 2000, the population of the United States was 69.1% white, 12.1% black, and 12.5% Hispanic.³⁵ In the same year, 9.7% of the black population was incarcerated compared to only 2.9% of the white population.³⁶ In state courts, blacks convicted for drug offenses are much more likely to receive prison sentences than whites.³⁷ In 2000, 205 out of every 100,000 black females were incarcerated for drug offenses; 3,457 out of 100,000 black males; 60 out of 100,000 Hispanic females.³⁸ Black women are eight times more likely to be incarcerated for drug offenses than white women, and Hispanic women four times more likely than white women.³⁹ As of 2000, one out of three black men ages 20-29 were under correctional supervision or control,⁴⁰ four times the rate in South Africa.⁴¹ In 2000, 1.46 million black males lost the right to vote out of a population of 10.4 million.⁴² Many experts believe that criminal laws, while facially neutral, are enforced in a manner that is massively and pervasively biased. They argue that injustices of the criminal justice system threaten to render 50 years of hard-fought civil rights progress irrelevant.⁴³

In addition to race, gender has been an issue. American women are the fastest growing, least violent segment of the incarcerated population.⁴⁴ According to a 1999 study, 85.1% are imprisoned for non-violent, mostly drug-related crimes.⁴⁵ Between 1985 and 1996, drug arrests for women increased 95% while male drug arrests increased by 55.1%.⁴⁶ By 1999, 72.3 million American minors had a parent incarcerated.⁴⁷

C. Legal Drugs Have Led to More Problems than Marijuana

We know that legal drugs have led to many problems in our society. Why has our government continued with a failed policy that emphasizes the “war” on drugs? Because oratory that is harsh on illegal drugs sounds lofty in Congress and politicians think it attracts votes. This is in spite of the 1999 data which found that for those who had used in the month preceding the poll, 104.1 million used alcohol (46%), 55.6 million used tobacco (24.9%), 10.7

million used marijuana (4.8%), 1.2 million used cocaine (.5%), 265,000 used crack cocaine (.1%), and 130,000 used heroin (.1%).⁴⁸ This failed “war” continues in spite of the fact that alcohol is associated with violent crime significantly more than any illegal drug.⁴⁹ Moreover, deaths from illegal drug use is 100% less frequent than from the use of tobacco, alcohol, caffeine, and legal drug overdoses combined.⁵⁰

When the Dutch legalized marijuana for personal use, use actually declined. Our present laws produce more harm than good with their huge expense and the targeting of inner-city youth.

In addition to legal drug use, one of the biggest issues in the “war” on drugs is marijuana use. In 2000, 46.5% of all drug arrests were for marijuana, the vast majority for simple possession.⁵¹ Seventy-six million Americans have tried marijuana.⁵² Although many judges seem to think that marijuana is a “gateway” drug, 8,345 heroin users began with alcohol and the vast majority of those who use marijuana never use anything else.⁵³ In fact, the Institute of Medicine has concluded that there is no evidence that marijuana is a gateway drug.⁵⁴ It has been established that the primary adverse effect of acute use is a decrease of psychomotor skills,⁵⁵ in other words, driving. The Drug Enforcement Agency (DEA) has stated that marijuana is safer than many foods, that it is one of the safest therapeutically active substances known to man.⁵⁶ It is known that smoking marijuana actually inhibits violent crime,⁵⁷ and there has never been one fatality from an overdose, unlike alcohol or commonly prescribed sleeping pills.⁵⁸

During the United States’ prohibition on alcohol in the 1920s and 1930s, only the selling of alcohol was illegal. Today, both the selling and possession of marijuana is illegal. When the Dutch legalized marijuana for personal use, use actually declined.⁵⁹ Our present laws produce more harm than good with their huge expense and the targeting of inner-city youth. Commissioned by President Nixon in 1972, The National Commission on Marijuana and Drug Abuse came to the conclusion that “Marijuana’s relative potential for

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harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it. This judgment is based on prevalent use patterns, on behavior exhibited by the vast majority of users and on our interpretations of existing medical and scientific data. This position also is consistent with the estimate by law enforcement personnel that the elimination of use is unattainable."⁶⁰

II. OUR CURRENT SITUATION

The attitude towards drug addiction has changed over the past forty years. In 1962, the Supreme Court, in *Robinson v. California*,⁶¹ recognized that addiction was a disease not a crime. President Nixon realized that many of the returning Vietnam veterans needed drug treatment and instituted a drug rehabilitation program that was enormously successful.⁶² In 1972, there were fewer drug arrests and a drastic decline in the crime rate in all major American cities.⁶³ However, in 1973 Nelson Rockefeller used the drug issue—supporting severe penalties for drug users—to get votes.⁶⁴ Rockefeller's position has been used by politicians for three decades, and no president has supported Nixon's position that addiction is a disease.

The "war" has escalated ever since. President Reagan severely cut funds for drug rehabilitation with the result that treatment became available for the wealthy but not for those with middle or low incomes.⁶⁵ In 1985, drug testing of federal employees began, the armed forces got involved in the war on drugs, and \$97 million was spent for new federal prison construction. At this time, government spending allocations for treatment fell drastically.⁶⁶ In 1986, mandatory minimum sentencing was introduced for crack cocaine convictions.⁶⁷ As a result, the average federal sentence rose 11% more for blacks than for whites.⁶⁸ In 1990, even harsher laws were enacted with a 49% rise in the black conviction rate.⁶⁹ As a result of this escalation of the "war" on drugs, the United States operates the biggest prison system in the world with the availability of rehabilitation in prison extremely rare.⁷⁰

The penalties for drug crimes have become excessive. In Illinois, it is possible, with extended sentences,

for an addict to go to prison longer than someone convicted of murder. Possession of a controlled substance is a class one or four felony, depending on amount, which carries 4-15 years and 1-3 years respectively. Possession with intent or delivery, depending on quantity and criminal history, can be a class 3, 2, 1 or X.⁷¹ These carry sentences of 2-5, 3-7, 4-15, and 6-30 years respectively.⁷² In addition, these sentences can be greatly enhanced depending on prior criminal history.⁷³ Yet, child abduction is a class four felony, as is a hate crime. Aggravated battery, unlawful use of a weapon, and involuntary manslaughter are class three felonies; aggravated domestic battery and robbery are class two felonies; criminal sexual assault, residential arson, second degree murder, and providing material support or resources for international terrorism are class one felonies; and aggravated kidnapping, armed robbery and first degree murder are class X felonies.⁷⁴

In Cook County, in 1997, 61.7% of all felonies at the adult criminal court house were drug-related.⁷⁵ Each year, 10,000 drug cases are heard there in night drug courts.⁷⁶ Ninety-nine percent of all youths tried as adults in Cook County are non-white.⁷⁷ Automatic transfers send 15 and 16-year-olds accused of drug-related crimes to adult court, creating one of the most racially disparate outcomes in the country.⁷⁸ Out of 259 transfers to adult court in 2000, one individual was white.⁷⁹ Yet, white 12 to 17-year-olds are at least one-third more likely to have sold drugs than blacks.⁸⁰ A 1998-99 survey of high school seniors showed that whites use cocaine seven to eight times more than blacks.⁸¹

Cook County has one "drug court" which services 4,800 drug cases a year.⁸² In this special court, cases involving possession of less than one gram by second time offenders are heard and given special treatment services.⁸³ The Cook County State's Attorney states on his web site, "that being the State's Attorney does not mean inflating numbers by going after more indictments or more convictions."⁸⁴ Yet, in night court alone, over the past few months, there has been a huge increase in indictments of those cases thrown out by the preliminary hearing judges. It is, after all, an election year.

Many seem to think that, as a casual user, these issues do not affect them. However, the statistics show otherwise. Many also seem to think that the worst

that can happen as a result of a drug arrest is only probation. Yet, probation or not, it is still a felony on one's record that will adversely effect the rest of his or her life.

III. CONCLUSION

There is no question that the drug problem in America is complex with multiple, complicated causes. However, after 30 years of the war on drugs, there is no question that the "war" has not only failed but has worsened the problem.

Drug courts have been instituted across the county with mixed results. On the plus side, the monetary savings are huge⁸⁵ and recidivism is down.⁸⁶ However, the entire concept of drug courts is inherently contradictory because treatment of disease does not belong in the legal system. Simultaneously treating the problem as a crime and a disease is illogical, creating strange outcomes. For example, with the availability of drug rehabilitation basically unavailable for low and middle-income people, most addicts will need to be arrested to get treatment.

We do know, beyond a shadow of a doubt, that treatment not only works but is also the most cost-effective method of decreasing drug crime. Furthermore, drug legalization and/or approval for medical use, especially with marijuana, must be seriously studied. We must get over the rhetoric and moral outrage and use solutions that work, not just ones that make us comfortable.

The emphasis on punishment and incarceration has failed miserably, yet we continue to waste billions of dollars each year on warehousing nonviolent drug offenders who have severe addictions. As Jeff Potts put it in a law review article on the subject of punishment and incarceration: "Take a group of people, strip them of possessions and privacy, expose them to constant threats of violence, overcrowd their cell block, deprive them of meaningful work and the result is an embittered underclass more intent on getting even with society than on contributing to it."⁸⁷ The Academy of Sciences reported in 2001 that their study on the effectiveness of our drug policy revealed that "drug pre-

vention efforts are hampered by a lack of information about their effectiveness."⁸⁸ Additionally, studies reveal that "there is little apparent relationship between severity of sanctions prescribed for drug use and prevalence or frequency of use, and that perceived legal risk explains very little in the variance of individual drug use."⁸⁹

Moreover, every citizen's civil rights have been dangerously curtailed. This has been accepted because people fall prey to the plea of necessity with a perceived crisis. This is being seen today in the government's reaction to last September's terrorist attacks. President Bush recently outlined his drug policy relying heavily on the plea of necessity. In describing his drug policy, the President emphatically linked the drug trade to terrorism. "When people purchase drugs, they put money in the hands of those who want to hurt America, hurt our allies."⁹⁰ President Bush thus justifies his request for \$19.2 billion for his "war" on drugs, an increase of 2%, two-thirds of which will go to enforcement.⁹¹ By using rhetoric about protecting Americans, the government's "war" on Americans escalates.

Our forefathers predicated the Bill of Rights, in particular, the Fourth, Fifth, and Sixth Amendments, on the belief that only a written guarantee of liberty would prevent the government from trampling on the liberties of the people under the banner of necessity. Just as the government has used the plea of necessity in curtailng rights since September 11, so have they done in the "war" on drugs. What Americans must remember and hold to, however, is that it is in times of crisis that we need the protections of the Bill of Rights even more. As Supreme Court Justice Louis D. Brandeis said, "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They know that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the most valued by civilized men."⁹²

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² *Id.*

³ Hon. Sheila M. Murphy, *Drug Courts: An Effective Weapon in the War on Drugs*, Ill. B.J., October 1997, p. 475.

⁴ See generally MICHAEL MASSING, *THE FIX* 12 (1998) (analyzing national drug policies over the past twenty-five years).

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⁶ *Id.*

⁷ THOMAS BONCZAR & LAUREN GLAZE, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES (US Department of Justice, August 1999), p. 1.

⁸ Barry Bearak, *Children in the Streets: The Big Picture*, L.A. TIMES, Feb. 14, 1993 (book review) at 2.

⁹ ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2000 (U.S. Department of Justice, August 2001), p.12.

¹⁰ EL CURRIE, *CRIME AND PUNISHMENT IN AMERICA*, (Henry Holt and Company, Inc. 1998), p. 15; ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2000 (U.S. Department of Justice, August 2001) p. 11, table 15.

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¹² See Beck, *supra* Note 9.

¹³ Ambrosio & Schiraldi, *Executive Summary-February 1997* (The Justice Policy Institute, 1997).

¹⁴ JOHN IRWIN, VINCENT SCHIRALDI, AND JASON ZIEDENBERG, *America's One Million Nonviolent Prisoners* (Washington, DC: Justice Policy Institute, 1999), p.4.

¹⁵ Office of Nat'l Drug Control Policy, *National Drug Control Strategy 14* (1999).

¹⁶ NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS (NASBO), *1999 STATE EXPENDITURE REPORT* (Washington, DC, June 2000), p. 38, 68.

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¹⁹ EXECUTIVE OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2002* (Washington, DC: US Government Printing Office, 2001), p. 134.

²⁰ See Beck, *supra* note 12, at 1-2.

²¹ *Id.*

²² See Massing, *supra* note 4, at 63.

²³ Christopher S. Wren, *Arizona Finds Costly Savings In Treating Drug Offenders*, N.Y. TIMES, Apr. 21, 1999, at A14.

²⁴ OFFICE OF NAT'L DRUG CONTROL POLICY, *NATIONAL DRUG CONTROL STRATEGY 14* (1999), p. 63.

²⁵ D.P. Rydell & S.S. Everingham, *Controlling Cocaine, Pre-*

pared for the Office of National Drug Control Policy and the United States Army (Santa Monica, CA: Drug Policy Research Center, RAND Corporation, 1994).

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²⁷ State of Arizona Supreme Court, *Drug Treatment and Education Fund: Implementation Full Year Report: Fiscal Year 1997-1998*, 1999.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Center for Substance Abuse and Treatment, *National Treatment Improvement Evaluation Study 1997 Highlights*.

³¹ *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUMAN RIGHTS WATCH, June 2000.

³² SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: SUMMARY REPORT 1998* (Substance Abuse and Mental Health Services Administration, 1999), p. 13.

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³⁵ US CENSUS BUREAU, DEPARTMENT OF COMMERCE, *CENSUS 2000 REDISTRICTING DATA (PL. 94-171) Summary File for states, Population by Race and Hispanic or Latino Origin for the United States: 2000* (PHC-T-A) Table 1.

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³⁷ DAVID J. LEVIN, PATRICK A. LANGAN AND JODI M. BROWN, BUREAU OF JUSTICE STATISTICS, *STATE COURT SENTENCING OF CONVICTED FELONS, 1996* (US Department of Justice, February 2000), p.8.

³⁸ See Currie, *supra* note 10.

³⁹ Amnesty International, *Not Part of My Sentence: Violations of the Human Rights of Women in Custody* (Amnesty International, March 1999), p. 19.

⁴⁰ MAUER & HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (The Sentencing Project, 1995).

⁴¹ Craig Haney, Ph.D., and Philip Zimbardo, Ph.D., *The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment*, AM. PSYCHOLOGIST, Vol. 53, No. 7 (July 1998) p. 716.

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⁴⁴ See Irwin, *supra* note 14, at 6-7.

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⁴⁶ See Amnesty International, *supra* note 39, at 26.

⁴⁷ CHRISTOPHER, J. MUMOLA, BUREAU OF JUSTICE STATISTICS, *INCARCERATED PARENTS AND THEIR CHILDREN* (Washington, DC: Department of Justice, August 2000), p. 2.

⁴⁸ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES

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⁶² See Massing *supra* note 4, at 63.

⁶³ *Id.* at 124.

⁶⁴ *Id.* at 126.

⁶⁵ *Id.* at 161.

⁶⁶ *Id.* at 183-84.

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⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

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⁸³ *Id.*

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⁸⁸ *Informing Policy on Illegal Drugs: What We Don't Know Keeps Hurting Us* (Washington, DC: Academy Press, 2001).

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