

THOMAS E. FAIRCHILD LECTURE

THE WAR ON DRUGS

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I was addicted to one drug and it was nicotine. From the time I was fourteen until I was fifty-something, I smoked the damn things. Now, I was under no illusion that I was doing my health any good. They used to call them “coffin nails” even then, but I quit—being a good fellow. And eighteen months—yeah, but hang on there’s more—eighteen months after I quit, they discovered I had cancer of the larynx, which is almost always the result of smoking. When I finished my thirty-three radiation treatments, the oncologist said, “You can go back to drinking now, but put water in it.”

I said, “I can live with that.”

“And you can start talking again,” he said, “but don’t smoke anymore.”

And I said, “When I smoked it didn’t bother me; it’s when I quit I got the goddamned cancer.”

With that disclaimer, I will add that I am probably not the one who should be talking about the war on drugs; I’d almost be a conscientious objector under normal circumstances in the war on drugs. Everyone in this room uses drugs—or has used them in the past or is using them now—because that definition of drugs is pretty wide. Nicotine is one. Alcohol is one. Is there anybody here who has never had alcohol? Or anybody here who doesn’t take aspirin? Anybody here who doesn’t drink coffee, tea, any of those? Those are all drugs, each one of

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1. The text of this piece is an edited transcript of the 2013 Fairchild Lecture. All mistakes or omissions are the author’s own.

them. The concept of calling a war on drugs is a uniquely American thing. We are a war-like people apparently. We have a war on poverty, a war on drugs, and so on.

Another disclaimer: I was born in 1926 in Chicago and I grew up on the south side during the depression at 70th and Woodlawn—a neighborhood that was not exactly in the boondocks or someplace removed from humanity. But if I had wanted to have a marijuana cigarette when I entered high school or finished, I wouldn't have known where to go. There were none available. Narcotics in those days were a different sort of thing. We didn't worry about it much. But by the time my children were in high school, they damn well knew where they could get it, and I will say something more about that later.

Drugs have been with us for a long, long time. Dated about 1700 B.C. in Macedonia, there's a column chiseled in the rock setting out a list of pharmaceuticals and what they're for. So it's been around that long. If you read *The Iliad* and *The Odyssey*, Homer refers to the "Cup of Helen," which was a narcotic form that they used then.

The most effective drug known for relief of pain is morphine. One of the problems with the discussion of the war on drugs is the definition of both war and the definition of drugs, as I've said. We're not fighting *all* drugs. I just said so. But we import, every year, 400 tons of poppy, opium, legally—not illegally, but legally—because we use it. We produce things from it. It's kind of difficult to talk about a war when we have an internal argument about it.

In 1983, a number of people in this room were present during the Seventh Circuit Bar Association meeting, where I was conducting a Socratic dialogue on the subject of the war on drugs. I see some smiles of recognition. I don't know if you've seen these dialogues: I walk down and ask questions of people, and they answer and we move back and forth. It requires differences of opinion, and there were on that panel.

There were fifteen members of the panel, including the prosecutor in the *Noriega*² case. (Does *Noriega* mean anything to you? He was president of Panama. We indicted him and convicted him.) The former drug czar under Nixon was on the panel. There were some defense lawyers, some prosecutors, and some people who were abstractly interested, including two doctors. And, among other people, there was Judge Posner. Judge Posner was a fairly recent addition to the bench, and he was fairly well known on the intellectual circuit. So I got to Posner about a half an hour into the lecture and I said, "Judge Posner do you think we have a war on drugs?"

He said, "I don't know, but if we are at war, we're losing."

2. *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

I said, "Do you have any solution to that?"

And he said, "Yes, they ought to legalize it."

I looked out at the crowd—there were 450 people there; they had already pegged him as a far right nut; and they thought this was the craziest thing. I knew what the answer would be, not because I had asked the question before, but because he's a Libertarian. He thinks the government ought to stay out of people's personal habits. So I said, "Why do you think that, Judge?"

And he said, "Because—why should we spend billions of dollars to keep people from killing themselves? If they have that object in mind, why should we intrude ourselves?" He said, "We do not ban double cheeseburgers, and they kill themselves with that. We tried to ban alcohol, and it didn't work." He said, "So the fact of the matter is, it doesn't work. Why shouldn't we just say 'okay'?"

I asked, "Would you put any limitation on it at all?"

He said, "Certainly: the same as with liquor. Children should not be allowed to have these narcotics." I thought, *Aha. Like they don't smoke cigarettes or don't drink beer when they're underage.* At any rate, that was his position. He is not alone in that position. There are more people who are involved who feel the government ought to stay the hell out of it.

More than that, we have another little problem. The drugs that we're concerned about are the ones that become addictive, that cause your dependency. Dependency is a problem, and your tolerance becomes increasingly obvious early on. More and more and more is required of the drugs for you to reach the same level of high that you had earlier. We have had these mixed discussions for years.

Now think of the date of my birth: it was 1926. The first laws in the United States against drugs were passed in 1914. Before that, there was no law against the use of drugs. They sold heroin in cough syrup, and it said right on the bottle "contains heroin." And heroin, my friends, was introduced to the country by the government—the United States government. Frank McGarr, who was a member of the district court, said one of the great lines of all times: whatever the federal government does, it does more or less badly.

But at any rate, what they were seeking was a cure for what they called "soldier's disease." That is because the soldiers during the Civil War became addicted to what they were getting, which was morphine. Now let me tell you something about morphine: it's a product from the opium poppy. It is the most effective pain killer we have discovered. Short of death, I know of no other drug that will attack pain as rapidly. It's widely used in the medical circuit because it's good. It helps people out. They had no idea what morphine did, but in the days of the Civil War, I call your attention to the fact they were still doing surgery without

anesthesia, and the pain was enormous; it lasted and lasted and lasted. When they could find enough morphine to reduce the pain, they used it freely.

I pause again and back up. The hypodermic needle was invented in 1847 in Europe. It got to the United States in 1853, just in time for the Civil War. And what bothered most of the doctors who were working on patients in those days was the lack of *enough* morphine and *enough* needles to keep people from screaming and dying in absolute, utter agony because their limbs were being sawed off while they sat there and gritted their teeth. The problem was, of course, they had no idea of the addictive quality.

After the war was over, literally hundreds and hundreds of soldiers and sailors were back, and they continued to crave morphine and use it. They'd do anything to get it—and the government supplied it. Then they introduced something to kind of remove morphine; they introduced heroin. Now heroin has no medical use at all. It isn't worth a damn. It did, however, get rid of their dependency on morphine—but it went into a worse thing.

Now, while I was U.S. Attorney, there was a big drive to bring in a different drug that would get you away from heroin, and it's in use now. I want you to know as a historian, I was a little nervous about it. Their track record in this area was not exactly great. I didn't know what the hell that was going to do. I remember, too, that one of things that contributes to the problem we have is the fact that we overemphasize all problems.

In the 1930s, when I was a boy, there was a movie called *Reefer Madness*. Did anybody ever see it or hear of it? I do not recommend it really except as a comic relief program. It predicted the most dire things from the use of marijuana. The response was, of course, that the legislators—state and federal—had to do something about it, and they passed more and more aggressive laws against use of it. And I want you to know they're still at it.

I've been on this court, as you've just heard, since January 3rd of 1975. This past Monday, for the first time, I listened to a case involving khat. It's used in the horn of Africa freely, and I would guess it got here around 1997 and took a while to work its way up. It is chewed by 98 percent of the adult population in places like Somalia. But they came here, and they brought the habit with them. They function quite well, but we put it on our proscribed list. That's not the first time. The Harrison Act—which is the 1914 act that outlawed heroin, the use of heroin, and a whole lot of other things—had put through things, and one of the things they put in erroneously was cocoa, cocoa leaves, and so on. Cocoa leaves have a narcotic affect; so do cigarettes—so, by the way, does coffee, so does tea, so do all of them. But they'd been chewing it for hundreds of

years without any visible harm. The cocoa plants come from Central America and South America and are grown in the high Andes where life is kind of grim, and it's used because it puts you over the tough spots. You can stand the high altitude, the cold weather, and the miserable things. But they've been chewing it for years. When those natives come down from the higher altitudes, they frequently, almost always, stop chewing cocoa leaves, and they don't have any withdrawals, symptoms, or anything else. But, it is on our proscribed list; you can't use it.

I yield to no man in my horror of watching people who are addicted to drugs. I have, in my years of floating around, seen people in withdrawal on jail floors. It is not anything to watch that's pleasant. There has to be a medical solution to the problem. And, that is another area where we have distinct differences of opinion.

I'll give you a couple of other statistics. Nine-tenths of all the poppy production is in Afghanistan. Price is economic incentive—it's 9 percent of Afghanistan's economy. So we try to stop it. What we're doing is raising the price. By the way, there is surplus—and has been for years and years—of the production of cocaine for medical use. Cocaine came here in the 1880s. It has very pleasurable affects they tell me. It's a recreational drug of choice among the wealthy. Crack just speeds up the thing. Smoking crack is cocaine at a higher power. But cocaine, if you remember, was talked about as far back as "I get no kick from cocaine. Mere alcohol doesn't thrill me at all." It was a very popular song over the years. "I Get a Thrill out of You" is the song, by the way, in case you're curious.

My favorite song, however, was during the Gulf Wars. The government discovered the use of another byproduct, and they used it to enhance the ability of people to put up with a tremendous amount of hard work and so on. All the armies used it—the Japanese army, the German army, the American army. It came out under the name of Benzedrine as a commercial product in 1932, and it was in use. It was not highly prescribed, but you could buy it over the counter.

Benzedrine came in different forms. I remember in 1947, one of the great popular songs was "Who Put the Benzedrine in Mrs. Murphy's Ovaltine."

I'll give you a couple of figures so you can get an idea of whether or not we are winning the war. These are statistics on drug-related crimes and where the people are. Nearly half of the inmates in the federal prison were serving time for drug offenses in 2011. Forty-eight percent of the people in there were serving time for that. But the government figured that out fairly late.

When I was U.S. Attorney, the warden of the Cook County Jail was a fellow named Winston Moore, a guy about this high with a head like a cannon ball, and he would drop his shoulders down and run his head

right into the stomach of a recalcitrant prisoner. But he was a man of some sturdy position. I got a phone call from the Justice Department asking whether I knew Winston Moore. Well certainly I knew Winston Moore. I'd been state's attorney for DuPage County. They said, "Could you ask him to do us a favor? We have two professors from the University of South Carolina who would like to interview the prisoners, and he won't let them."

And I said, "Well, for what purpose?"

And they said, "Well, they've been commissioned to find out whether there is a connection between drug use and crime."

And I said, "What are they receiving for this magnificent thing?"

They said, "Two hundred fifty thousand dollars."

Now remember: this is 1970. That has to be about three quarters of a million dollars right now. So I said, "I shall call Winston." I said, "Winston, you could make me a big man at the Department of Justice. You could permit this."

"I don't want any pointy-headed professors here."

And I said, "Winston they're not there to expose the conditions of the Cook County Jail. They are engaged on an academic mission to find out something that will help humanity."

And he said, "Well, what is that?"

I said, "They're trying to find out whether there's a connection between drug use and crime."

There was a small pause, then he said, "How much are they paying them?"

And I said, "Two hundred fifty thousand dollars."

"I'll do it for fifty bucks. But," he said, "since it's you we'll let them come in."

I had kind of a whacky experience when I was state's attorney for DuPage County. To those of you who are not familiar with the Chicago Metropolitan area, DuPage County is immediately west of Cook County, just outside. Part of Chicago, believe it or not, is in DuPage County; the western half of the airport intrudes into the county. It is the wealthiest county in the state of Illinois. It is also the most educated county in the state of Illinois. The average educational level of the adult population is more than twelve years—that's the average. We used to pick jurors with presidents and vice presidents of companies all the way. The Chicago lawyers, by the way, thought we fixed the jury. And I said, "That's who lives here, for cripes sake. Argon National Laboratory is there, Batavia, it lures people of intelligence."

At any rate, their idea about a narcotic pitch to make the headlines was a druggist who was selling paregoric and wasn't keeping track of it. And I had the misfortune of making the first marijuana bust, but it also involved heroin. I didn't know where to find it myself, but some

newspaper reporter—who had recently graduated from the Dill School of Journalism and was trying desperately to earn at an earlier age an award from them—inquired around until he found a twenty-year-old who said he thought he could get some marijuana. So, he set up a purchase and then the reporter asked him whether he could get any heroin. He said he didn't know, but he'd look around. So he finally called and said yes, he found somebody with heroin and that he could buy the heroin. So the reporter set up a meeting where this delivery was to take place and then went to see his editor.

And his editor said, "You better go to the state's attorney and tell him what you're doing. This is illegal possession of evidence." So he came to see me.

So I said, "Okay, I'll go with you." So I went with him and with my chief investigator and made the bust, and of course he had the newspaper story, and he wrote it and so on. And several letters came to the editor saying that I was giving the county a bad name by making this. Why couldn't I just tell him don't do it, get out of town. You know, it's a good place to be. They're in favor of law and order. I start there by telling you that there is a difference.

Have you been paying any attention to the statistics going on now? My state, Illinois, is in the process of legalizing marijuana for medical use. It is, however, the eighteenth state that is doing that. Eight states have legalized it without restriction and two, Colorado and Washington, D.C., have approved it for recreational use. The city of Chicago, about a year ago, decided they would issue only tickets for those who had minimum amounts of marijuana. When I was state's attorney and when I went on the bench, the penalty for giving, loaning or handing to, or selling marijuana at any amount was a minimum of ten years in a penitentiary. So, if a seventeen-year-old boy gave his locker mate in high school a toke, it was a minimum of ten years. It made the legislature look good: they were against crime.

The difficulty is it was ridiculous. It was silly. Most state's attorneys simply ignored it. And a law that is ignored shouldn't be there at all. But I had the horrible position of sentencing somebody to ten years—a twenty-year-old—for ten years. He made three brilliant sales of lousy marijuana. I mean lousy, it was homegrown. You can grow it anyplace. And I gave him ten years and he made me pep up; he talked to me. I'm the judge and I said to him, "This is silly," and he said, "Judge, I know you have to do it; go ahead."

Well, he went to jail. I wrote to the governor and asked him to reduce it. The Governor was Ogilvie; he was a friend of mine and a law enforcement officer, former assistant U.S. Attorney and former sheriff, and he reduced it to five years. Then I called him and said, "You made a mistake. I want it reduced to time served even if it's only two weeks.

This is just ridiculous.” About three weeks after that—no three months after that—the Supreme Court of Illinois finally got around to saying it was a violation of the Illinois Constitution. It was cruel and unusual. It takes a while for those things to sink in. At any rate, he got out. He spent more time in jail than I would have wanted him to spend.

Now I want to read you something from what is one of my favorite books. It’s *The Story of Law*, and it was written some long, long time ago.

It is directly contrary to the truth that law is something imposed by the legislative body upon the people. Acceptance has always been the theory and the fact. No rule of law was ever successful or ever endured unless it received practical general acceptance among the whole body of the people, for the simple reason that the universal human experience has demonstrated that a rule of law not accepted by any considerable portion of the people can never be enforced. The history of law is strewn and will continue to be strewn by just such palpable wrecks of law not enforced and not enforceable.³

The date of the publication of this by this genius was 1922. So nothing has changed since then. The *Chicago Tribune* of April 15th, 2013, said that polls show that 53 percent of the people in the state think that marijuana should be legalized. Nine states have issues pending. Eighteen have already legalized it, as I’ve said. And the fact of the matter is, if there is a war on drugs, we ought to declare that we won and get the hell out of there.

I think, as a matter of practical effect, there are better ways. There must be a medical solution to these problems. We cannot treat people who are addicted and get caught at it as criminals and punish them. What we are doing is raising the prices to make it more and more attractive for people to grow it, more and more profitable for people to produce it, and more and more people are being killed in the process—even those being shot on the streets in a gang war. About 70 percent of the shootings that go on in the city of Chicago now are drug-related. They’re drug gang shootings because the money is so big. What made the liquor prohibition so poorly run was that the amount of money involved was so vast that it wound up tempting people beyond their power to resist—policemen, judges, citizens, everybody got involved because people wanted it. People took up drinking who would never have drunk before. And we wound up with a lot of deaths and leftover organized crime that’s still floating around. I think we’re slow learners, but what we ought to learn

3. JOHN MAXCY ZANE, *THE STORY OF LAW* 271 (1927).

is that medical problems are medical problems, and that legal problems are solved not by passing a law against being sick—but by doing something to make sure that they get well. I admit the difficulty. I admit it costs an enormous amount of money. And I ask you, in a general sense, what is it costing us now? What is it costing us not to do that? Why in the name of God can't we spend that money on something else that is more productive and more realistic, that leads to a realistic conclusion?

So the war on drugs I tell you, if there is one, is lost. And that, my friends, is my message, and tomorrow I can read about what a bum I am, giving the county a bad name.

Thank you very, very much.