

Chief Justice Paul Reiber

Speech to the New England Association of Drug Court Professionals, Boston, MA, Sept. 27, 2013

Good morning. Thank you very much. I am pleased to be with you this morning and to add my welcome to this conference.

I must begin by thanking all of our hard working Vermonters for their work, Karen Gennette for her leadership, and add my thanks to all of you as well. Drug courts are an innovation with great potential to improve the criminal justice system. As our newest justice, and a good friend, Judge Geoff Crawford said last weekend after the Governor's announcement, "Most people don't listen to each other most of the time. But there are some times in life when that little window opens, and people listen very carefully. Hospital emergency rooms strike me as one of those times, and the courtroom is another. Many people want to change, and treatment courts, early referral to drug evaluation and similar programs, open a door and give them a chance," he said. "And if a person walks through that door and sees the opportunity, we're all better off."

I understand that half the counties in the United States include at least one operating drug court.<sup>1</sup> Given that the first drug court began in 1989,<sup>2</sup> this is an impressive achievement. But even still, drug courts process only a small fraction of drug offenders, and an even smaller fraction of offenders who have committed serious crimes. Most chronic users who reach court will end up in jail or prison, often for minor crimes.

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<sup>1</sup> Harold Pollack, Eric Sevigny and Peter Reuter, How to Make Drug Courts Work, Washington Post, Apr. 26, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/26/how-to-make-drug-courts-work/>

<sup>2</sup> Id.

Unfortunately, drug use, addiction and associated crime are outstripping our best efforts to address these problems through the drug court model. In my home state, opiate addiction has ravaged communities. The Oxycontin epidemic seems to have tapered off, but heroin use has surged. There is no question that substance abuse continues to have a devastating impact on our communities, or that it is overwhelming the criminal justice system.

Sitting in my office in Montpelier where we, with our friends in the other branches, are working to better understand issues surrounding criminal behavior, incarceration, and detention, I wonder if we are approaching this part of the problem—addiction-related criminal behavior—with common sense. Implicit in our faith in the criminal justice system, as Caryn Devins and Stuart Kauffman have written, is the assumption that “if we attach a civil or criminal penalty to an undesirable behavior, then we should see less of that behavior. . . . This concept is known as deterrence, and since the writings of Jeremy Bentham it has been at the core of criminal justice policy.”<sup>3</sup>

But given the explosion of drug addiction, should we not assign a failure on the part of the system we have employed to address it? Exactly where on the path to addiction related crime does the traditional concept of deterrence apply? As Caryn, who now clerks for me, and Professor Kauffman wrote in their piece last year on one of NPR’s blogs:

[D]rug prohibition law [calls upon]... police to intervene in drug trafficking networks. Increasing police intervention, however, raises the risk of selling drugs and consequently the price. This attracts more drug dealers...and the development of new, dangerous compounds that evade existing laws...and more

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<sup>3</sup> Caryn Devins and Stuart Kauffman, Laws of Unintended Consequence: A Warning to Policy Makers, National Public Radio, June 18, 2012, <http://www.npr.org/blogs/13.7/2012/06/18/155278557/laws-of-unintended-consequence-a-warning-to-policy-makers>.

concentrated forms [of drugs]...for easier concealment and transport. These new societal problems alarm the community and inspire the passage of even harsher laws.<sup>4</sup>

The recent announcement by Attorney General Eric Holder sent a powerful message in support of smarter, evidence-based justice. In his speech before the annual meeting of the American Bar Association in August, he outlined a plan to reduce the federal prison population through several measures, including easing mandatory minimums for some drug offenders and charging reform.<sup>5</sup> Such changes, as suggested, will likely impact the states' criminal justice systems as well.

At its heart, addiction has many causes: poverty, trauma and alienation of support from family and the community for many reasons, including mental illness. This challenge is complex and cannot only be met with the blunt tool of criminalization. Other countries have taken a different approach. Portugal, for example, looks at drug addiction as a public health issue. They began taking this approach in 2001, and the results have been nothing short of astonishing. According to a Cato Institute report by Glenn Greenwald,<sup>6</sup> rates of drug-related disease, mortality and untreated addiction have plummeted, without a rise in drug use.

In the United States, our elected representatives face any similar reform with the daunting task of coalescing political will to change policy. It will be tough to break the spell of “tough on

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<sup>4</sup> Caryn Devins and Stuart Kauffman, Toward a New View of Law and Society: Complexity and Power in the Legal System, January 22, 2013, <http://www.npr.org/blogs/13.7/2013/01/22/169527577/toward-a-new-view-of-law-and-society-complexity-and-power-in-the-legal-system>.

<sup>5</sup> Eric Holder, Attorney General of the United States, Address at the American Bar Association Annual Convention: Smart on Crime: Reforming the Criminal Justice System for the 21st Century (Aug. 12, 2013).

<sup>6</sup> Glenn Greenwald, Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies, CATO Institute (2009).

crime.” But the economics may force this direction anyway. A study by the Center for Economic and Policy Research found that reducing incarceration of non-violent offenders by one half would lower correctional expenditures by nearly seventeen billion dollars per year.<sup>7</sup> Almost all of those savings would go to the bottom line of state governments. And states have begun to implement common sense policies that prioritize safety to users and innocents. Good Samaritan laws, laws promoting safe disposal of used needles, repeal of mandatory minimum sentences, drug courts and parole reform are just a few examples.

As a National Bureau of Economic Research Conference Report titled “Controlling Crime: Strategies and Tradeoffs”<sup>8</sup> suggests, these reforms are the right direction. Rather than addressing the problems of addiction with “tough versus soft” responses, it would be useful to think in terms of what will change the environment that determines the opportunity for behavior. You all understand this very well.

What we have done so far is good, but we must go beyond where we are now. As Professor Harold Pollack, one of the Conference Paper’s authors, advised,

Drug courts can help reduce the human toll of mass incarceration. But to do so, they must embrace a broader mission to take on the tougher cases, stick longer with offenders who have a hard time complying with program requirements, and impose shorter sentences on those who ultimately fail drug court programs. Older offenders [he says for example may] provide one sensible starting point.<sup>9</sup>

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<sup>7</sup> John Schmitt et al, The High Budgetary Cost of Incarceration, Center for Economic and Policy Research, June 2010.

<sup>8</sup> Phillip J. Cook et al, Controlling Crime: Strategies and Tradeoffs, National Bureau of Economic Research (2011).

<sup>9</sup> Pollack et al, supra note 1.

Thank you again for your excellent work. It is inspiring for me to have the opportunity to speak to you on this very difficult issue as you work to rehabilitate lives in these trying times. I know that your work and the efforts of many others will create meaningful change in the lives you touch and in our communities. Thank you.