

CHAPMAN UNIVERSITY SCHOOL OF LAW

**TRANSCRIPTION OF
2010 CHAPMAN LAW REVIEW SYMPOSIUM:
“DRUG WAR MADNESS: POLICIES,
BORDERS & CORRUPTION”**

**WELCOME DINNER:
“THE DRUG WAR AND ITS SOCIAL
IMPLICATIONS”¹**

THURSDAY, JANUARY 28, 2010

SPEAKER:

MARC MAUER

(AT THE RICHARD NIXON LIBRARY)

¹ This speech was transcribed verbatim from a recording. Members of the Chapman Law Review edited the transcript to enhance reader comprehension. In order to retain the spirit and essence of the speech, the editors made only minor stylistic and grammatical modifications to Mr. Mauer’s statements. A question and answer session that followed Mr. Mauer’s remarks has been omitted for the purposes of this publication.

Dean Timothy Canova:

Thank you everyone for being here tonight. This is such a great venue for a Symposium on the War on Drugs. President Richard Nixon was the first President to actually declare war on drugs, so it's very fitting to be here tonight, and to hear perhaps a critique of the war. Before I introduce Marc Mauer, our keynote speaker, I would like to introduce the Director of the Richard Nixon Presidential Library, Tim Naftali. Mr. Naftali is the first Federal Director of this library. His reputation precedes him with me. I heard about him from several economic historians who said, here in Orange County, if you're near the Nixon Library, you need to meet Tim Naftali. He's noted as an historian of U.S. Diplomatic History during the Cold War, and he's also written a history of counter-terrorism. Without further ado, Tim Naftali. Thank you for having us here.

Tim Naftali:

Thank you Dean Canova. I'm not a lawyer, but I admire lawyers. In my current job, I wish I were a lawyer. This is a remarkable place, not just because of its beauty, but because it really symbolizes the last chapter of Watergate. You probably don't know this, but this was once a private facility, and it was turned over to the Federal Government at the request of the Nixon family and the Nixon Foundation. It was turned over to the Federal Government so that we could bring Richard Nixon's papers to Orange County. Richard Nixon was the first and only President whose papers were seized by the United States Government. Until then, Richard Nixon's presidential papers were private property. Typically, presidents—Republicans, Democrats, or even Whigs alike, though they didn't have to worry so much about this problem—would give the papers to the government and take a tax break. Because of Watergate, Congress and President Ford decided to seize President Nixon's papers and ensure that forever they would stay in the District of Columbia.

Congress, in 2004, amended that law. We're the only library in the United States that is governed by a single law, The Presidential Recordings and Materials Preservation Act. That law was amended so that the materials could come to Orange County, and the deal was that they would come here under the authority of the National Archives and Records Administration. In a few months, about thirty trailer trucks with about 27,000 cubic feet of material will go from College Park, Maryland to this place, about 2,800 miles away, which is an astounding thing. For

those of you at Chapman, you should know that you're about to have a brilliant archive of presidential records. As Dean Canova mentioned, President Nixon initiated the War on Drugs. He initiated a lot of other important initiatives in domestic and foreign policy. You're about to have a record of those initiatives,—the good, the bad, and the ugly—in Orange County for you to research under the auspices of your government. They belong to you. So you are now in a federal facility, although this room happens to be private. So, on behalf of the National Archives, I want to thank you for being here. I want to thank the Dean for setting this up. I want to congratulate those of you who are about to graduate, and I look very much forward to Mr. Chertoff's comments. And it was nice to meet Former DEA Chief Asa Hutchinson. I know we have a debt of gratitude to both of them for their efforts to defend our country. Thank you very much.

Dean Canova:

What a program we have for tomorrow; to have former Homeland Security Secretary Michael Chertoff, and former DEA Chief Asa Hutchinson here is quite an honor. And, of course, our own local Judge Jim Gray, who has been so eloquent and passionate about these issues over the years. I would say he has been very ahead of his time.

I'd like to thank the Symposium Editors, the Editors of the Law Review, Kasey Phillips, Errick Winek, and I apologize for not having everybody's names handy, but this Law Review has worked so hard over this past semester, and over the past year, to make this Symposium a very special, interesting, and timely one.

It's a real privilege for me to introduce Marc Mauer, whom I've known for a number of years. Prior to coming to Chapman University, I was on the faculty at the University of New Mexico. In the Fall of 2000, we had a deadlocked presidential election in Florida, where, of course, we all know there were recounts and it went to the Supreme Court in *Bush v. Gore*. For those of us who were in New Mexico, we woke up with a deadlocked race as well. I believe on election night Al Gore was ahead. We had recounts in New Mexico that went several weeks, and that put George Bush ahead. I believe the story was that a paper clip had obscured part of the number six, making it look like a one. So, instead of a hundred votes for Al Gore, it was 600 votes, and New Mexico went to Al Gore. You really didn't know who was stealing votes from whom. New Mexico didn't get a lot of attention

because there were not enough electoral college votes at stake, but what was troubling was that we also woke up to the reality that New Mexico is one of the eight or nine states that, at the time, had felony disenfranchisement even after completion of sentence. So any person, any citizen of the state, who was convicted of a felony, lost his or her right to vote for the rest of their lives. It was not an insignificant number of citizens. It was more than fifty to sixty thousand, I believe—something like six percent of the voting age population in New Mexico.

Marc Mauer was one of those to whom we turned for expertise on felony disenfranchisement. Students at the University of New Mexico rolled up their sleeves and started working to overturn that law, and it was one of the most inspiring things I've seen yet from law students and from citizens. Starting in January of 2001, and culminating just two months later, the New Mexico House and Senate passed a bill to overturn felony disenfranchisement. A Libertarian Republican Governor named Gary Johnson, who I understand might be running for President next go-round, was trying to decriminalize a lot of drugs in New Mexico. He had a drug reform agenda that floundered in a Democratic-controlled state legislature, but he signed that into law; but, by the end of March, 2001, New Mexico was no longer on the list of states that disenfranchised people after they had completed their term of prison and parole. A lot of the witnesses that we had testify to committees up in the State House were people who had committed non-violent felonies, some of them drug-related, many years before. They had done their time. They were working hard, paying taxes, and they wanted to vote. They were very compelling witnesses, and Marc Mauer's work at The Sentencing Project really exemplifies these types of issues.

The Sentencing Project has been working for fair and effective criminal justice system for years. I know Marc's work focuses a lot on the racial disparities in sentencing in this drug war, and he has written several books and other studies that are ground-breaking in the field, including: *Young Black Men and the Criminal Justice System*, *Americans Behind Bars*, which is a series that analyzes international racist incarcerations, and *Race to Incarcerate*.

He has been a national leader in the field for three decades. As somebody who was on the ground in a small state, looking for help to try to overturn an unjust restriction on Americans exercising their most important Constitutional right and privilege, the right to vote, I repeat that Marc Mauer was somebody to whom many in the State of New Mexico turned for

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help at that moment, and we will always be indebted to Marc because of that. So, without any further ado, I'd like to introduce Marc Mauer.

Marc Mauer:

Well, thanks Tim, for that kind introduction. I've come to appreciate the importance of getting an introduction right over the years. When my book *Race to Incarcerate* was first published, I was giving a talk at one of the bookstores in Washington, and a newsletter went out advertising that Marc Mauer would speak about his new book, *Race to Incinerate*. So we're going to talk about incarceration here tonight, not incineration. I want to get that right.

This is a lovely setting here. I'm not a great scholar of Richard Nixon. I lived through the time. I knew it well. I hadn't explored the history, but in terms of drug policy, it seems to be particularly appropriate for us to be here. My understanding is that President Nixon epitomized all different approaches in the drug war at various times. Early in his administration, there was a move toward expanding treatment as a method of dealing with drug problems. There was a Methadone Program in Washington, D.C. for heroin addicts. There was some political backlash on that, and a year or so later President Nixon declared the War on Drugs. We've been dealing with the consequences of that in many other ways for quite some time now. I assume that the law school thought of doing a symposium on this topic some time ago, but it seems particularly appropriate that in California, the combination of the fiscal crisis and the prison crisis would all come crashing together right about now in terms of where public policy should be going. So your timing could not be better in all these ways.

We're going to be talking about drug policy issues over the next day and a half. What I want to talk about tonight is the issue that I think cuts across what our policy has been doing, what the impact was like, and the really critical issue of the racial dynamics of the drug war. Whether one believes the drug war has been waged because of the racial dynamics, or just has a significant impact, I think it behooves us to look at what that is all about and what the implications are today.

Let me start with the big picture. A few years ago, we celebrated the fiftieth anniversary of the historic *Brown v. Board of Education* decision of 1954. If we went back to 1954, to the day of the *Brown* decision, and looked at our prisons and jails, there were about 100,000 African Americans behind bars. Since

then, we've had a half century of opening up social and economic opportunity for many people who had been denied it before. If we look at the criminal justice system, we have a much broader diversity of leadership than we've ever seen before. We still have a long way to go, but we've made undeniable progress for a half century, and yet, if we look at our prison system, that figure of 100,000 African Americans has grown to 900,000 African Americans behind bars in our prisons and jails. We have a problem here. We have to figure out how to understand where this comes from, what this means, and what it tells us about individuals, societies, and public policy.

Depending on your world view, this is a problem of individual responsibility, or economics, or criminal justice policy, or a host of other dynamics. But one of these many dynamics that has contributed significantly to the explosion of the prison population has been our criminal justice policy, particularly the impact of the war on drugs over the last quarter century. Let me try to lay out what that looks like: If we look at the prison system, broadly speaking, it's undeniable, whether you think this has been a good policy or a bad policy, that the war on drugs has been the most significant contributor to the explosion of the prison population over the last twenty-five years or so.

Just to give a little bit of a contour of what that looks like, the number of drug arrests nationally has tripled since 1985 or so. We currently make about 1.8 million drug arrests each year. Notably, forty percent of those arrests are for marijuana offenses. Of the marijuana offenses, eighty percent are possession offenses. That's a whole different discussion, but it's a good example of how we use law enforcement resources.

If we look at the prison system, and how that's changed as a result of the drug war, the picture is even more dramatic. We go from 1980, when we had 40,000 people in prison or jail for drug offenses, to today, when there are 500,000 people behind bars for drug offenses. We're not talking drug-related burglaries to get money to buy drugs, but drug use and drug sales—half a million people behind bars for a drug offense today. To put some perspective on that, the number of people incarcerated for drug offenses today is greater than the entire prison and jail population, for all offenses, back in 1980. That's the scale of what we're looking at here.

There have been a variety of studies done on this drug offense population by leading scholars and government agencies. I think it's fair to say that the vast majority of people locked up for drug offenses are not the so-called king-pins of the drug trade. I don't mean to suggest that people are in there for smoking pot,

but most of the people behind bars for drug offenses are the lower and middle-level people in the drug trade, typically the street-corner sellers, the couriers, the mules, and the middle-level people. It's harder to catch the king-pins. There are not as many king-pins. So there are enormous numbers of people at the lower levels of the drug trade behind bars. We also know, if you look at the racial dynamics, that about two-thirds of the people behind bars for drug offenses are African American or Latino, which is far out of proportion to the degree that those groups use or sell drugs.

So, the question is, why do we see these very disproportionate racial dynamics arising out of the drug policy? What's going on there? Well, in some respects, we've seen part of this history before in various other wars on drugs that we've had, going back for a century or so now. Think of the history of marijuana policy in this country. Back in the 1930s, the image of the marijuana user was, basically, that it was done in nightclubs in town, the so-called racy parts of town. The image was that it was African Americans and Mexican Americans using marijuana, with a seedy atmosphere around it. This is the whole period of the so-called Reefer Madness and the demonizing of marijuana. Whether or not that was entirely accurate, that's what the public perception was at the time.

Thirty years later, in the 1960s, millions of people who looked like me start using marijuana, and all of a sudden public policy starts to change. We have calls for decriminalization, legalization. We have marijuana being celebrated in popular culture, and, as we look at their experience in the sixties, nothing had changed about the drug itself. It was the perception of the user of the drug that had changed, and societal attitudes changed very quickly along with that. Now, again, this has nothing to do with whether one believes marijuana should be legal, or whether one believes marijuana is a gateway drug. But, how is our policy affected by the way we think about a drug? How we think about policy? To what extent do racial perceptions affect what our policy ends up looking like?

I think it's fair to say that, in many ways, we had a two-tiered war on drugs. We know, from all sorts of government surveys, that drug use and drug abuse cut across lines of race and class, but drug law enforcement is much more likely to take place in minority communities. When middle-class parents in nice suburban neighborhoods find out that their kid has a drug problem they don't normally call up the police and ask them to arrest their son or daughter as a means of dealing with the problem. They call up their friends who know about treatment

programs and insurance and things like that. They get their kids into the best program they can to try to deal with the drug problem. If that program doesn't work, they find another program. They approach it as a family, as a public health issue. It's a classic thing, throwing money at the problem. That's what families with resources generally do in these situations. In the lower-income communities we're talking about, those same resources are not necessarily available, and, instead, we've addressed it with the criminal justice resources—more police, more prosecutors, and more prisons. In many respects, both communities have some similar problems, but, depending on what resources are available, we have very different responses to those problems.

When we look at how it is carried out, the level of law enforcement is very critical in terms of how decisions are made. Drug law enforcement is very different than any other crimes. If we look at things like murder, rape, robbery, serious violent crimes, serious assault crimes, discretion is not particularly an issue for law enforcement. If you get a report about a serious crime, there's no law enforcement agency in the country that wouldn't respond immediately and vigorously. When it comes to enforcing drug laws, though, we have a whole set of choices that can be made about how to respond to that problem. Those choices are made by local mayors, police chiefs, and other officials. If you're the mayor or the police chief, you may decide on a strategy of going after the people who are bringing drugs into the community—the big suppliers that are driving it in, flying it in, whatever they're doing. You could decide on a strategy of sending a message by arresting kids who are smoking a joint, because you think that will be an effective strategy. Or, you could do something in between. Depending on how one makes those kinds of decisions, there will be very different impacts on what our courts look like, what our prisons look like, and also what the racial dynamics of the drug war look like.

By and large, we've seen that most drug law enforcement, or at least a disproportionate amount of it, has been based on color. Many law enforcement people I know would certainly not deny it. What they would often say is that there is a very problematic thing in many communities; there is street-level dealing. It's disruptive to the community. The communities want us to deal with the problem this way, so that's why we're going after that. It seems to me that there's certainly some truth to that argument. Nobody wants a crack house on their corner. Nobody wants people selling drugs in their neighborhood. The problem is that we've got a certain set of issues that are causing disruption

in neighborhoods. What kind of choices do we have for dealing with that? Law enforcement is clearly one set of choices, but we may also have other choices that we should explore.

So, we've got a set of law enforcement practices and policies, and then we come into the court system. What we've seen over the last twenty-five years or so is the advent of mandatory sentencing being adopted very broadly by the federal government and virtually every state legislature. Mandatory sentencing, most frequently, has been applied to drug offenses. They essentially set up a one size fits all way of dealing with offenses, whereby a legislative body leaves the judge no discretion for a particular offense. Many people would argue that it's distorted the traditional function of what judging is all about. It changes power relationships between the judge and the prosecutor, in terms of who has discretion and who has influence over the case.

The most notorious of these mandatory sentencing laws are the federal laws that apply to crack cocaine. The mid-1980s was the beginning of what came to be known as the Crack Epidemic. Crack is a very bad drug. Congress passed, in record time, sentencing policies that provided for a five-year mandatory minimum for possessing as little as five grams of crack cocaine, which is far harsher than the sentences for powder cocaine. If we look at the racial dynamics of how that's played out, eighty percent of the people prosecuted for a crack offense have been African Americans. For powder cocaine, it's been far more likely to be whites or Latinos. This does not mean that Congress intended, in a conscious way, to incarcerate more young black men and women as a result of these crack laws. However, twenty-three years later, the evidence is quite clear that the result has been enormous racial disparities.

It's not only the crack cocaine laws that have had unintended racial consequences. Other policies have been put in place in recent decades. Some of the most common are the school zone drug laws. School zone drug laws, in many states, get at very important problems. We don't want drug dealers selling drugs to our kids at lunch time, right? That's a no-brainer. The way the laws are drafted or enforced, in many jurisdictions, is that if you're caught committing a drug offense within 500 or 1,000 feet of a school zone, you're subject to mandatory or enhanced penalties. In many jurisdictions, these laws are drafted in a very broad way, so that you could conceivably have two consenting adults doing a drug transaction at two o'clock in the morning a couple of blocks from a school, and they could be charged with a school zone drug offense with enhanced penalties attached to that.

Now why does this have a racial effect or a racial dynamic attached to it? Well, school zone drug laws are primarily, and disproportionately, felt in urban areas. The reason is that urban areas are much more densely populated than suburban or rural areas. So any given block in an urban area is much more likely to be within 500 or 1,000 feet of a school zone, and therefore more likely to be subject to one of the penalties. Communities of color are more likely to be in urban areas. So, school zone drug laws, whether intended or not, end up having a very severe racial effect. New Jersey is one state that has been working on this recently. In one recent year, ninety-six percent of the people charged with a school zone drug offense in New Jersey were black or Latino. So, whether intended or not, that's been its outcome.

We've had, again, an undeniable, dramatic effect of the drug war in our criminal justice and prison systems. Some people ask, "Why is this a problem?" They think, while it may be unfortunate that we now have a world record prison population, that it was necessary in order to deal with the drug problem. They think this is the price we have to pay to bring some peace to our communities, and, therefore, this policy has been worthwhile. There are several problems with this kind of analysis, and with the ways in which the drug war has played out. In terms of dealing with problems, sending people to prison has some impact on crime. It's often less than many of its proponents would suggest, but putting some people behind bars clearly does make the community safer.

Drugs are different, because the prison system is less effective when we incarcerate drug offenders. Think about two offenders that we send off to prison. Offender A is a serial rapist who is terrorizing the neighborhood. The police finally catch him. We convict him. We send him to prison for a long period of time. So, in this case, we sent one person to prison and we brought some safety, at least, to that particular neighborhood. Offender B is the kid on the street corner who is selling drugs. The police come by on Saturday night. They do a sweep. They catch him with drugs, bring him to court, and convict him. He's a repeat offender, so they send him off to prison for four years. In this case, although we've sent one person to prison, what have we done about the broad problem on that street corner? How long do you think it's going to take, after he's arrested, for somebody else to take his spot on that street corner to meet the demand for drugs in that neighborhood? I think it's going to take about twenty minutes in most neighborhoods. As long as we've got a demand for it, there are endless numbers of young men and

women, as we've seen over two decades now, who are stepping up to try to meet that demand.

So, in this case, we've used the prison system. It's not clear what effect we've had on substance abuse, but we've also done something else. Let's assume we sent him away for four years. Conservatively speaking, it costs about \$25,000 a year to keep somebody in prison. So, essentially, we've just made a \$100,000 public policy decision. We've said to taxpayers, "we want \$100,000 of your money to lock up one guy who's been selling drugs on a street corner, and we can't guarantee that we had a major impact on drug selling on that corner."

Suppose we had \$100,000 to spend on doing something about the drug problem on this corner. We could send him off to prison for four years. We could also use that money to have a cop standing on the corner to deter drug selling. We could set up more treatment programs. We could have summer jobs for the kids. There are a lot of things we could consider doing if we thought we wanted to have an impact on that street corner. It's not clear, by any means, that sending tens of thousands of kids to jail, spending \$100,000 each time, has been the most constructive way we could deal with those problems.

We also want to recognize that, when we send people off to prison, ninety-five percent of them are coming home some day. It's in our interest, in terms of public safety, that they come home better prepared to live in the community than before they went to prison. Partly, this means that we should send people to prison only when they need to go to prison; we shouldn't send them there if we have other choices. We've also seen, through the impact of the drug war in recent years, that legislative action, in Congress and by state legislatures, has made it even more difficult for people to come back home after a drug offense. There's always been a stigma attached to a person with a felony conviction in terms of employment and other ways of re-settling in a community, but now we have a whole set of additional policies that restrict opportunities for drug offenders in particular.

Depending on the state in which one lives, if you've got a felony drug offense, you can be barred from receiving welfare benefits or food stamps for life. You can be prohibited from living in public housing. If you want to go on to higher education, you can be denied financial aid. As Tim pointed out, you can lose your right to vote for the rest of your life. With the exception of voting, these other prohibitions apply only to drug offenses. So, I could be a three-time armed robber, but if I ever get out of prison, I can apply for food stamps. If I have a single felony drug

conviction, I can be barred for life from getting any kind of public services.

We've got a whole set of policies that have had a dramatic effect on the criminal justice system, a dramatic effect (whether intended or not) on minorities, and that has to be factored into the whole equation for how we think about the impact of the policies and where we want to go.

This is not a pretty picture, but I think it's an accurate one. From my perspective, there is reason to be cautiously optimistic about the prospects for change and for addressing these issues in different ways. In the area of how we address drugs, and whether it's only through punishment, we've seen significant expansion of support for treatment and prevention approaches in recent years. Here in California, you had that vote back in 2000 on Proposition 36, which is controversial in some ways, but it was nonetheless an expression of public support for treatment as an alternative to incarceration. Around the country, we now have about twenty years of experience with drug courts as a means of getting people to treatment rather than incarceration. There are some 2,000 drug courts around the country. Judges like them. Communities like them. They are an expression of support for a different way of doing things, for trying treatment first rather than incarceration.

We're seeing changes at the political level as well. There has been a rise in the notion of prisoner re-entry—the simple idea that, when people come back home from prison, we need to provide supportive services so they can transition home in a successful way. One of the more intriguing changes we've seen is the Second Chance Act, passed by Congress two years ago. The Second Chance Act provides funding for demonstration projects and model programs of prisoner transition, and what was most interesting about it was the political coalition that came together around it. In the House, the legislation was primarily led by members of the Congressional Black Caucus, comprising among the most liberal members of Congress. In the Senate, the chief sponsor was Senator Brownback of Kansas, obviously one of the most conservative people in the Senate. From both sides of the political spectrum came support for a better way of dealing with the problems, a more evidence-based approach, a more rational approach, that doesn't rely on political sound-bites but instead is looking at things that can work, and how we can do things better.

Just this past year, we've seen the undoing of much of the Rockefeller drug laws, the mandatory sentencing laws, which apply in New York. Two states, Iowa and Connecticut, have passed racial impact statements to project, in advance, the

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impact of new sentencing policies on racial minorities, so that we can have that discussion before legislation is enacted rather than after the fact. We see some openings there that are starting to shift the conversation a little bit. The scale of what we're talking about, though, is something that I think we can't overlook. Research from the Justice Department tells us that, if current trends continue, one of every three black males born today can expect to go to prison in his lifetime. One of every six Latino males can expect to go to prison. The numbers for women are lower overall, but the racial disparities are very strong there as well.

If we know that we're looking at one-in-three and one-in-six odds for babies born today, we basically have a fifteen-year period until those babies reach their mid-teen years, when we can predict prison sentences coming up in significant numbers unless we do something constructive and different. There is good news and bad news. The bad news is that those numbers are pretty shocking and pretty devastating. The good news is it tells us that, for the next generation, we've got a fifteen-year window in which to try to do things differently. The challenge is to decide how to provide greater support, encouragement, and opportunity over that fifteen-year period through public policy, and through individual support. I hope we can integrate some of that thinking into our discussions, and thank you very much for having me.

