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The Drug War and the Parable of the Bad Samaritan*

Joseph E. Kennedy†

The controversy with the drug war has been with us a long time. They say a goal of good literature is to make the familiar strange. My goal in the next twenty minutes is to help you see familiar facts about the drug war in a strange way, a way that is both new and useful.

I want to start by offering you a parable. I title my talk *The Drug War and the Parable of the Bad Samaritan*. Right now, I think that the earthquake and tsunami victims in Japan are on a lot of people's minds. Let's imagine, knock on wood—I'm from California originally—that there has been a terrible earthquake in California, and there has been a nuclear accident. We don't have to imagine that a lot of people have died. But we do have to imagine that some large portion of a heavily populated area has been rendered uninhabitable, and all of the inhabitants of that area have been evacuated and resettled in other parts of the United States. Different urban areas set up large relocation camps to house them. As these people try to join these already existing urban communities, efforts are made to try and help integrate the newly arrived people into the economy and the social structure of the existing city. Now here is where things go dark. What I want you to assume is that, after they arrive, the police start selectively enforcing traffic laws in these relocation areas. When I say "selective enforcement," I mean they are being ticketed for going one or two miles over the speed limit. I want you to further imagine that they start rewriting the traffic laws in these states so that if you're going more than twenty miles over the speed limit, it's a felony as a first offense, and that these laws are being selectively enforced against the relocated folks.

Now, some points about this parable are probably obvious. In this parable we are the bad Samaritan, because the good Samaritan is supposed to help someone when they've been the victim of crime or circumstance, and this relocated population would certainly be the victim of

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circumstances beyond its control. The good Samaritan would help people in these situations, and I think that is usually what would happen. We're the bad Samaritan of course, because why would we be selectively and punitively prosecuting victims of a natural disaster for traffic violations?

The obvious part of the analogy, which you probably have already seen, is to compare the enforcement of traffic laws to the enforcement of drug laws. Let's think for a moment about the enforcement of traffic laws. Speeding, we know, is against the law. We also know that speeding is dangerous. It involves harm—people die in traffic accidents as a result of speeding. I recently went to traffic court and learned that simple speeding is responsible for a large number of deaths on American roads. That said, we don't take an "eliminationist" approach to speeding. We haven't constructed our legal system to try to eliminate speeding at all costs. We take a suppressive approach to speeding. We take a relatively light hand to it. You don't go to jail for your first offense. You probably don't go to jail for your second offense. There's a graduated system of punishment that ramps up for habitual offenders and creates a greater and greater sense of deterrent. The idea is that we don't want people to lose their jobs or livelihoods as a result of the punishment for speeding offenses, because then the punishment becomes worse than the crime, the cure worse than the disease. Otherwise you have a population of unemployed people who have felony convictions, who probably can't drive, and who probably are never going to be able find gainful employment. So you can probably see where I am headed with this.

There is of course a part of the analogy that I hope you are resisting, which is: "Now wait a minute, why are you comparing the inhabitants of the poor, inner city, African-American neighborhoods on which the war on drugs has focused most heavily to disaster victims?" I have three points to make in this regard. First, understood in context, the residents of the poorest African-American urban communities that have been the primary focus of the war on drugs should be understood as victims of forces beyond their control. The forces beyond their control should be understood as the emergence of a historically unprecedented, concentrated form of jobless poverty in these areas. Second, the war against drugs is unnecessary and counterproductive, in the sense that it exacerbates some of the ill effects of that concentrated form of jobless poverty. Third, the largely unarticulated premise of the war against drugs is that harsh punishment is necessary because there is a complete moral breakdown in these communities. This is a false premise.

Now, I'm trying to shape and steer this around the remarks made by the previous three speakers. It's wonderful, actually, that I have their shoulders to stand on, because they have laid out a lot of the important parts of the problem. So let's start with the first point: that we should really think of folks living in inner city urban areas, or places traditionally referred to as "ghettos," as people being akin to victims of disaster. First of all, these African-Americans are refugees twice over in a sense. They were brought here initially through slavery, which is a type of forced refugee status, but we'll put that aside because that's going back a lot longer. They are also refugees in a second sense, which is that there was an enormous migration of African-Americans beginning right around the time of World War I from rural areas, primarily in the South, to the cities all over the country.¹ A large portion of that migration was to northern cities.² And, it's one of the neglected stories in our canon. You can find stories of immigration all over the American canon. For example, the Italians came, the Irish came, the Poles came, and it's always the story that they came, it was difficult, they struggled, they fought, but they solved problems and worked their way into the American fabric of life. But there's also this story about the African-American migration, which is, in every sense also an immigrant story.³ These folks were living in rural poverty in the South, and no matter how bad your life is, it's always easier to stay where you are. These folks picked themselves up because they started to hear that there were jobs in the cities.⁴ They left all that was familiar to them and they moved.⁵ They moved themselves, and they moved their families, and a lot

1. See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* 8–15 (2010) (describing the decades-long "Great Migration" of black citizens who fled the South with their families for northern and western cities from 1915 to 1970).

2. See *id.* at 260–67 (noting the "flood of colored people from the South" largely to urban centers in the North, as well as in the West).

3. See *id.* at 9 (describing the northern and western cities that African-Americans relocated to during the Great Migration as "alien lands with fast, new ways of speaking and carrying oneself and with hard-to-figure rules and laws"). Wilkerson further notes that, while the African-American migrants of the Great Migration were citizens and "did not cross the turnstiles of customs at Ellis Island," they were not treated as citizens due to the oppressive laws of the Jim Crow regime. *Id.* at 9–10.

4. See *id.* ("They set out for cities they had whispered of among themselves or had seen in a mail-order catalogue."). "The New World held out higher wages but staggering rents that the people had to calculate like a foreign currency." *Id.*

5. See *id.* (stating that "a good portion of all black Americans alive picked up and left the tobacco farms of Virginia, the rice plantations of South Carolina, cotton fields in east Texas and Mississippi, and the villages and backwoods of the remaining southern states").

of them moved to northern cities.⁶ They moved far, far away, and they moved in huge numbers.⁷ In large measure, this was a success story because there were jobs in these cities, and a lot of thriving, working class neighborhoods developed in various cities populated by African-Americans who had been part of this great migration.⁸ Now of course it wasn't without its problems, in the way that no large migration of working class citizens is ever going to be without problems. But it was, in large measure, an untold success story that gets left out of our American canon of immigration success stories. What makes this story even more of a success is that this population migrated with a stigma that no other immigrant population had: the stigma of the former slave.⁹ Not that people liked the Italians, or the Irish, or the Poles when they first started showing up, but they weren't former slaves. African-Americans had a tougher row to hoe, in a very important respect.

So you have this large migration and it is in large measure a success. Here is one way to think about it: I remember one of the first black gang movies to ever have been made, John Singleton's *Boyz in the Hood*.¹⁰ It told the story of gang life in South Central Los Angeles.¹¹ Juxtapose that against another movie, *Devil in a Blue Dress*,¹² based on one of the Easy Rawlins mysteries written by Walter Mosley.¹³ *Devil in a Blue Dress* is also set in South Central Los Angeles, but South Central Los Angeles in

6. *See id.* at 8–15, 260–67 (explaining the generalities of African American mass migration in this period).

7. *See id.* at 9 (“Over the course of six decades, some six million black southerners left the land of their forefathers and fanned out across the country for an uncertain existence in nearly every other corner of America.”).

8. *See id.* at 287–88 (detailing the communities that formed as migrants acquired jobs, congregated in churches, and summoned families and friends to join them).

9. *See id.* at 9–10 (distinguishing the mass migration of African-Americans out of the South from that of immigrants coming to America from other countries, in that the Jim Crow regime affected every aspect of African-American life in the South and was an example of how they were not treated as citizens).

10. *See* BOYZ N THE HOOD (Columbia Pictures 1991) (focusing on three young, black males growing up in South Central Los Angeles and their different approaches to dealing with the pervasive elements of crime, drugs, and violence in their surrounding environment).

11. *See generally id.* and accompanying text.

12. *See* DEVIL IN A BLUE DRESS (TriStar Pictures 1995) (following amateur detective, Easy Rawlins, as a job to find a missing woman takes him through South Central Los Angeles's black community in 1948).

13. *See* WALTER MOSLEY, DEVIL IN A BLUE DRESS, 9–12 (1990) (introducing Mosley's noir protagonist, Easy Rawlins, as a young, black World War II veteran who is compelled to become a detective after being laid-off from his job at a defense plant in Los Angeles in 1948).

1948.¹⁴ In the eighties and nineties, many thought of South Central Los Angeles as a free-fire, gang-banger setting—all these drugs, all these drive-by shootings. If you watch the Easy Rawlins movie, you see South Central as a thriving, vibrant, working class, African-American community.¹⁵ So what happened? What happened was the emergence of concentrated, jobless poverty.¹⁶ All of the words in that phrase are important. We've always had poverty, but usually we have working class poverty.¹⁷ In the past, we have jobbed poverty: areas where people are poor, but most people have jobs.¹⁸ They don't have to have a lot, they can be just scraping by, but most have jobs. If you look into the social science literature what you see is that the emergence of jobless poverty is far worse than jobbed poverty.¹⁹ What you also see is increased socioeconomic segregation within the already existing racial segregation.²⁰ People who have jobs leave the neighborhood, so that the people who are left are the ones without jobs, resulting in concentrated jobless poverty.

Let me provide you with some statistics, to bring these ideas to life. I'm reading from some social science information from an earlier writing of mine.²¹ The first thing is that during this period of time, jobs for working

14. *Id.*

15. DEVIL IN A BLUE DRESS, *supra* note 12.

16. See Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 495–99 (2009) (describing the emergence of jobless poverty in African-American inner city communities in the 1970s).

17. See *id.* at 496 (“[I]nner cities have always featured high levels of poverty, but the current levels of joblessness in some neighborhoods are unprecedented.” (quoting WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR xiii (1996))).

18. See *id.* at 496–97 (recounting the transition from communities of working poor to “widespread, chronic unemployment in American ghettos”).

19. See WILSON, *supra* note 17, at xiii (stating that the consequences of high neighborhood joblessness, such as crime, family dissolution, welfare, and low social organization, are more devastating than consequences of high neighborhood poverty where people are poor, but employed); see also Kennedy, *supra* note 16, at 496 (citing WILSON, at xiii) (noting that “joblessness distinguishes the contemporary urban poverty of inner-city African communities from its previous forms and accounts for the increase in many of the inner cities’ social ills, including crime”).

20. See WILSON, *supra* note 17, at 5–6 (suggesting that a reduction in social, economic, and political resources in many inner-city ghettos has accompanied a sharp rise in social dislocation, characterized by an exodus of both white and black working and middle class families).

21. See Kennedy, *supra* note 16, at 477–80 (arguing that mass incarceration policies have the effect of stigmatizing and socially excluding young black males disproportionately to the rest of society and that criminal justice reform is essential in order to make continued progress in other areas of the movement for civil rights).

class people were tough for everyone. Between 1970 and 1989, real wages for low-skilled workers dropped thirty percent during those twenty years.²² In America, we have this idea of inevitable progress, but wages for low-skilled workers dropped thirty percent, everywhere, not just for African-Americans, during those twenty years.²³ But the effects of this are concentrated on people who don't have anything more than a high school diploma. With respect to primed age men without high school diplomas who worked year-round in eight to ten years that number goes down from two-thirds in the seventies to one-half in the eighties.²⁴

Let's focus on African-Americans now. Here's a quote from a study that looked at African-Americans in the Great Lakes region. Think about this: Between 1979 and 1984, this is a five-year period, half the black workers in durable goods manufacturing in the Great Lakes region lost their jobs.²⁵

We are in a period of high unemployment right now. I want you to think about what it would be like if in your region—your community—half of your race lost work in five years. The proportion of black men who found employment fell from eighty percent in 1930 to fifty-six percent in 1983.²⁶ 1930 was part of the Great Depression. More black men were finding work in 1930 than in 1983. So what you see in the eighties is a calamity that is akin, I think, to a natural disaster, with forces beyond the control of the folks involved.

So you have this drug war that unfolds. Of course when you have all of this unemployment, you are going to have problems. Why? Crime happens more in environments of scarcity than in other environments. You would expect crime to go up. You'd also expect drug use to go up. Drug use is nothing new, as my colleagues have pointed out. We've always had vices and drug use—and guess what? Illegal drug use is far worse among the desperately poor than among the desperately well off. So the vice goes up.

I want to add one thing to what my colleagues have said about the disproportionate nature of our current drug war. I want to compare it to

22. *Id.* at 497 (citing WILSON, *supra* note 17, at 25).

23. *See id.* (“The disappearance of jobs from America’s urban ghettos was part of a more general economic trend.”).

24. *See id.* (“The number of prime-age men without high school diplomas who worked year round in eight out of ten years went from two thirds in the 1970s to half in the 1980s.”).

25. *See id.* at 498 (quoting STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP*, 245 (2d ed. 2000)).

26. *Id.* at 498.

Prohibition, something I've done in one of my earlier articles.²⁷ During Prohibition, do you know what the average sentence was for violating the alcohol laws? It was nineteen months.²⁸ Nineteen months was the average sentence during Prohibition. In 1991, the average prison sentence for a federal drug offense was more than seven years.²⁹ The average prison sentence for a state drug offense was more than six years.³⁰ Here's one big difference between the war against alcohol under Prohibition, and the war against drugs: seventy-eight percent of the people convicted in 1923 for prohibition violations were white.³¹ Seventeen percent were African-American.³² Contrast that against statistics you've heard about the nature of our current drug war. Now, Prohibition wasn't a picnic. You all have heard about Al Capone and the tommy guns. There were violent gangs during Prohibition, there was corruption, and there were even gang wars that involved people being machine gunned down on the street sometimes. But we didn't treat every alcohol offender as if they were Al Capone. Therein lies the most important difference between our earlier drug war against whites and our current drug war against blacks and people of color. These people who sell drugs on a street corner, usually for minimum wage, are all treated as if they are some version of Al Capone. That might be a bit of an overstatement, but it's as well as I can put it in the remaining time that I have.

And so the default conception of folks is that crack-cocaine needs to be prosecuted in this very punitive way. And that is based on two premises. One is that crack is different, and I won't really add anything to what has been said before, but crack is not really different. I will add one little thing. If you really look at the pharmacological literature on crack-cocaine, what you see is that it is more a binge drug than anything else.³³ It's not as likely to create long-term addiction as

27. See generally Joseph E. Kennedy, *Drug Wars in Black and White*, 66 LAW & CONTEMP. PROBS. 153, 181 (2003) (comparing the current drug war to Prohibition and asking whether the "history of disparate severity in our former and current drug wars should entitle African Americans to a presumption that drug wars that disproportionately impact them may be overly punitive").

28. *Id.* at 169.

29. *Id.* at 167.

30. *Id.*

31. See *id.* at 168 (stating that fifty-five percent were native white and twenty-three percent were foreign-born white).

32. *Id.*

33. See *id.* at 178 (citing Craig Reinerman et al., *The Contingent Call of the Pipe: Bingeing and Addiction Among Heavy Cocaine Smokers*, in CRACK IN AMERICA: DEMON

it is to create binges, and if you're interested in this there's some literature that I cite in one of my earlier articles, *Drug Wars in Black and White* that you should take a look at.³⁴ It is really fascinating stuff. But what you see from the pharmacological literature in general is that the chances of addiction depend on setting and context.³⁵ It's a lot easier for a desperately poor person to become addicted than a middle class person who has all sorts of support systems in their life.³⁶ There's nothing magical about crack-cocaine; there's nothing magical about cocaine.

The premise for the drug war, though, is that it is necessary because there's a complete moral breakdown in these African-American communities. So there's kind of a benign justification for the drug war that says, "Well, OK, not their fault, concentrated jobless poverty fine, but what happened? Complete moral breakdown happened." And that is what I call the "fundamentalist approach to punishment," which means that if one guy is selling drugs on the corner for minimum wage, he must go to prison. There must be a mandatory minimum. We have to take this unbending approach, and we can't let anyone pull on our heartstrings because we have to send a message.³⁷

Why do we have to send such a message? Because people assume that there is a complete moral breakdown in these communities. As a result, we have to send the strongest possible message against drug use and against being involved in the drug trade. If that were true, if there was such a complete moral breakdown in these communities, then perhaps there would be some justification in taking such a hyper-punitive approach, an approach that we didn't take during Prohibition.³⁸ But there is no basis that I can find for that premise. As bad as things are in these neighborhoods, and we're talking about the worst neighborhoods in terms of economic circumstances, if you look at the social science work of folks who have gone into these neighborhoods, you find that these folks have mainstream American

DRUGS AND SOCIAL JUSTICE, 77 (Craig Reinerman & Harry G. Levine eds., 1997)) (noting that crack cocaine smokers are more prone to bingeing than those that use cocaine in its powder form, but are not necessarily more prone to addiction).

34. *Id.*

35. *See id.* at 178–79 (“[T]he effects of crack use depend heavily on the circumstances of use.”).

36. *See id.* at 179 (noting that the social and economic conditions of middle class crack smokers, unlike poor crack smokers, may curb addiction).

37. *See Kennedy, supra* note 16, at 506–07 (highlighting the perceived need to “unambiguously condemn offenders”).

38. *See Kennedy, supra* note 27 at 164 (describing lenient criminal prosecutions for alcohol users during Prohibition).

values.³⁹ In fact, what you find is that the poorest people in our society cling the hardest to mainstream American values.⁴⁰

Let me give you an example from the work of Jennifer Hochschild. She did a series of comprehensive studies, and what she found is that African-American families in these neighborhoods believe strongly in education.⁴¹ She writes, “[c]ontrolling for sex and socioeconomic status, African-Americans are no more likely to drop out of school than whites, are more likely to choose an academic than a vocational curriculum, and are more likely to choose a four-year than a two-year college.”⁴² Here is a different study where researchers interviewed poor youth who were in a jobs program; in this study, they asked them, “What’s the key to getting ahead?” Over ninety percent of the youth in public job training programs said that they see education as very important in getting ahead.⁴³ Ninety percent. The next highest response was “hard work.”⁴⁴ Ninety percent say the key to getting ahead is education. Thirty percent say the key to getting ahead is hard work. What comes after that? “Money” and then “family” and then “knowing the right people.”⁴⁵ Fewer than one-third of these folks in these jobs programs thought that race was “very important in bringing success.”⁴⁶ So these are folks in these very poor communities, mostly African-Americans, and you ask them “what’s the key to getting ahead?” “Is it jobs? Is it connections? Is it family ties or race?” “No.” They say that the key is hard work. Education. That’s mainstream. That’s the American dream.

There are obviously problems in these communities, but illegal drug use is the product of moral strain, not moral breakdown. Our penal system should respond differently to moral strain than moral breakdown. If there really is moral breakdown, then maybe there is a reason to have mandatory minimum sentences for the first offence, where you have to literally

39. See Kennedy, *supra* note 16, at 499–505 (establishing that the impoverished African-American community strongly embraces quintessentially American values).

40. See *id.* at 506 (“They believe as much in the American Dream as those who have a better opportunity to experience it.”).

41. See JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* 159–60 (1995) (noting that poor African-Americans have great faith in the power of education to help them transcend their situation).

42. *Id.* at 160.

43. See *id.* at 159–60 (“Over 90 percent of youth in public job training programs see education as very important in ‘getting ahead.’”).

44. *Id.* at 160.

45. *Id.*

46. *Id.*

inculcate values that don't exist. However, if the values are already there, if they're simply being strained, then you should not ruin their futures for a first or even a second offense. If a young African-American male living in a neighborhood of concentrated, jobless poverty takes a minimum wage job selling crack, that doesn't mean that he is Al Capone. The proper approach, if you've got a community that's a victim of moral strain through forces beyond their control is suppression, not elimination. We don't want people selling crack on the corners, but I think the punishment should be closer to how we treat speeding than to how we treat murder, lest we become the bad Samaritan of my opening parable. Thank you.