

Crisis in Narcotics - Are Existing Federal Penalties Effective?

Mary M. Burnett

Repository Citation

Mary M. Burnett, *Crisis in Narcotics - Are Existing Federal Penalties Effective?*, 10 Wm. & Mary L. Rev. 636 (1969), <https://scholarship.law.wm.edu/wmlr/vol10/iss3/8>

CRISIS IN NARCOTICS—ARE EXISTING FEDERAL PENALTIES EFFECTIVE?

MARY M. BURNETT*

The increasing use of narcotics of all types has been an unfortunate corollary of the growth of our urban areas and the mounting pressures of our complex urban society. Many legislative attempts have been made to solve, or at least to control, this distressing problem. There is considerable doubt, however, as to the fairness and effectiveness of the federal statutes.

Congress has written severe penalty provisions into our federal narcotic drugs, marihuana, and dangerous drug (including LSD) control laws,¹ not so much for the purpose of punishing the offender who possesses, sells, manufactures, or otherwise produces or deals with them in violation of the law, but rather to deter people, be they young

*A.B., Roanoke College; LL.B., Georgetown Law Center; former law clerk to Hon. Burnita Shelton Matthews, U. S. District Court for the District of Columbia; member, District of Columbia Bar.

1. The terms "narcotic drugs," "marihuana," and "dangerous drugs" have different meanings under the federal statutes and each is governed by its own set of laws which creates confusion, disunity, and inequity where the penalty provisions are concerned.

"Narcotic drugs" are the addictive drugs defined in 26 U.S.C. § 4731(a) (1954) and include heroin, cocaine, morphine, and any of the opiate derivatives. See Bowman, *Narcotic Addiction and Criminal Responsibility Under Durham*, 53 GEO. L.J. 1017 (1965), for a discussion of narcotic drugs and the addict.

"Marihuana" is defined in 26 U.S.C. § 4761 (1964). According to Henry L. Giordano, Associate Director, Bureau of Narcotics and Dangerous Drugs, in his article appearing in the Nov., 1968, FBI LAW ENFORCEMENT BULL., entitled *Marihuana—A Calling Card to Narcotic Addiction*, p. 2, 3: "[t]he term 'marihuana' embraces all the fancy and vernacular names you hear—the so-called 'American type,' the so-called 'Mexican type,' 'hashish,' 'bhang,' 'ganja,' 'charas,' 'cannabis,' 'cannabis resins,' 'cannabinol,' 'tetrahydrocannabinol,' 'pot,' 'tea,' or 'weed.'" Marihuana apparently does not produce addiction although its use is habit-forming, resulting in a psychological dependence upon it by the user.

The "dangerous drugs" commonly refer to three classes of non-narcotic drugs which are habit-forming or have a potential for abuse because of their stimulant, depressant, or hallucinogenic effect. The stimulants are the amphetamines or "pep" pills; the depressants are the barbiturates, otherwise known as "goofballs;" while the hallucinogens are the psychedelic drugs such as LSD. See *Amendments to the Federal Food, Drug and Cosmetics Act—H.R. 14096, S. REP. NO. 1609, Cong., 2nd Sess. 2-3 (1968)*, for a detailed explanation of these dangerous drugs.

or old, from participating in any activity connected with their use except for medicinal or research purposes.

Surprising as it may be to those in the legal profession and elsewhere who expound the uniqueness of each individual and his right to be treated accordingly, even when involved with an infraction of the law, there is another reason leading our legislators to sanction imposition of heavy penalties against violators of the drug statutes. It stems from the pronouncements of law enforcement agents that their job of controlling drug traffic will be made easier if broader and more severe penalties exist. These agents feel that while the laws against possession, for example, act as deterrents, more importantly, they are valuable in enforcement work against traffickers. The Government's case is made easier to prove by removing the necessity of proving a sale, or the intention of a sale, where the agents are confident that they have apprehended a trafficker but have no hard proof as to a specific sale. In addition, this sort of sanction, they say, is helpful in furnishing an incentive for a person apprehended for simple possession to cooperate with the police by disclosing the source of his supply.²

Neil L. Chayet, a Boston attorney and Assistant Professor of Legal Medicine at Boston University, pointed out in his article, "Why Massachusetts Must Change Its Drug Abuse Laws,"³ that, while the proponents of a section under the Massachusetts law which makes it a felony to be in the presence of a person, knowing him to have illegal drugs, argue that this makes enforcement of the law much easier, what really happens is that large groups of people may be scooped up with little attention being paid to whether or not those arrested were aware of the fact that they were in the presence of the narcotic. A young person charged under this provision, Chayet says, is virtually forced to plead guilty to the charge, with the promise of probation and a suspended sentence.⁴ Nevertheless the result is a felony conviction, and he carries the stigma of a convicted felon with him for the rest of his life.

Strong disagreement exists among sociologists, psychiatrists, crimi-

2. See the remarks of Fred M. Vinson, Jr., Asst. Atty. Gen., Criminal Division, Department of Justice, *Hearings before Subcomm. on Public Health and Welfare, Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., ser. 90-32, at 12 (1968) [hereinafter cited as *Hearings*].

3. *Herald Traveler Magazine*, May 5, 1968.

4. As discussed in greater detail, *infra*, under the federal narcotic drugs and marijuana statutes there can be no suspension of sentence, probation, or parole given to violators. See 26 U.S.C. § 7237(d) (1932).

nologists, and others as to whether a severe penalty for the conviction of a crime is actually any deterrence to its commission, especially where narcotic violations are concerned. Dr. James L. Goddard, Commissioner of the Food and Drug Administration, in testifying before a House Interstate Subcommittee at hearings conducted in February and March of 1968 on bills proposing to increase the penalties for dangerous drugs, including LSD, stated that there was some evidence in the decline in the usage of the drug LSD which was unrelated to any penalties for its use, but rather was related to the "understanding the young people are now beginning to develop with respect to the implicit dangers of the usage of the drug, itself;"⁵ he stated that:

[My] feeling with respect to deterrence, the effect of the law, is most simply stated by pointing to the present situation with respect to marihuana. If the estimates of usage are anywhere near correct then one has difficulty understanding how the very severe penalties attached to the Marihuana Tax Act have deterred people from the use of the drug.⁶

The members of the medical profession who testified at these same hearings, or whose views were incorporated therein, were, for the most part, of the opinion that making the possession of dangerous drugs a crime would be ineffectual as a deterrent to their use.⁷ Dr. Stanley Y. Yolles, of the National Institute of Mental Health, said that as a physician he had certain reservations respecting the penalty for personal possession. He expressed concern that the law not be implemented to the detriment of the very individuals that the law was trying to protect "by keeping them from seeking medical help when they need it because of a bad trip, et cetera, for fear of self-incrimination."⁸

On the other hand, Donald Miller, Chief Counsel of the Federal Bureau of Narcotics, had said that it is reasonable to assume that the

5. *Hearings, supra* note 2, at 60.

6. *Id.*

7. *Id.* See also comments in these hearings of Dr. William A. Frosch, Asst. Med. Dir., Bellevue Hospital, Psychiatric Division, N.Y. University Medical Center, *id.* at 210; Dr. Jerome H. Jaffe, Asst. Prof. of Psychiatry, the University of Chicago, *id.* at 211; Dr. John Buckman, Asst. Prof. of Psychiatry, University of Virginia, *id.* at 212; Dr. Edward J. Hornick, New York, *id.* at 214; and Dr. Robert B. Davis, Syracuse, New York, *id.* at 214.

8. *Id.* at 182.

fear of the law does deter many persons who might otherwise try marihuana.⁹

Perhaps it is sheer fantasy, or at least wishful thinking, on the part of legislators and their advisors who accept the theory that a stringent penalty, particularly where the drug laws are concerned, really is any deterrent to violation of the statutes. During the twelve years since Congress added the present severe mandatory minimum sentences onto the narcotic drug and marihuana laws, drug use has not decreased but rather has reached alarming proportions.

Hardly a day goes by that the printed page does not carry with it an article or comment on the increased use, especially of marihuana and LSD, by people of high school and college age; and the figures quoted seem to show that about one in every four to six students has had some experience with these drugs.¹⁰ As for the barbituates and amphetamines—the sedatives and stimulants—the older generation has become one of “pill poppers” who are steadily increasing their usage of these dangerous drugs.¹¹

But what, one might ask, have the severe penalties of the drug statutes to do with the student who experiments with marihuana or the parent who pill pops, since these people, for the most part, come from middle or upper middle class backgrounds; they have no intent to commit criminal acts. The answer is simple. While these people may lack any criminal intent to violate the law, the fact remains that they use, and hence must obtain and likewise possess the drugs which they do use, which may well lead them into serious entanglement with the narcotics laws and the accompanying penal sanctions.

Basically the penalty provisions for violation of the federal laws pertaining to narcotic drugs and marihuana provide that where no specific penalty has otherwise been provided—and the violation includes the crime of possession—the punishment for the first offense is to be *not less* than two years nor more than ten; for a second offense, *not less* than five nor more than twenty years; and for a third or subsequent offense *not less* than ten years nor more than forty years. In

9. Symposium Speakers Debate, *The Marihuana Laws—a Cure or a Cage*, AMA NEWS (Apr. 29, 1968) at 6.

10. *Hearings supra* note 2, at 62-64, 88, 89, 111. See also Reice, *But, Mom, Everybody Smokes Pot!* MCCALLS (Sept. 1968), and Cohen, *Students Seek to Legalize Pot*, The Washington Post, Dec. 19, 1968, § A, at 21.

11. See Blum, *Pills That Make You Feel Good*, REDBOOK, (Aug. 1968); Gottschalk, *The Pill Poppers*, Wall Street Journal, Dec. 19, 1968, at 1.

addition the court may impose a fine of not more than \$20,000 with any of these offenses.¹²

In the case of an illegal sale or transfer of narcotic drug or marihuana without the prescribed written order, the court must sentence the offender to imprisonment for *not less* than five years nor more than twenty years for the first offense, to *not less* than ten years nor more than forty for a second or subsequent offense, and a fine of not more than \$20,000 may also be imposed. If the sale or transfer was made to a person under eighteen years of age, or if there has been a conspiracy involved, the penalty to be given is *not less* than ten nor more than forty years with the possible addition of a fine of not more than \$20,000. Where the offense involves an illegal importation of narcotic drugs or marihuana the imprisonment is to be *not less* than five years nor more than twenty years for the first offense, and for a second or subsequent offense, *not less* than ten nor more than forty years. Again in each instance the court may impose a fine of not more than \$20,000.¹³

It should be kept in mind that regardless of the circumstances surrounding the specific case being tried, the court has no choice but to sentence the previously convicted offender to the mandatory minimum sentence spelled out in the statute. Absolutely no latitude exists for exercise of judicial discretion in this respect. In most federal crimes, while the maximum period of time the court may sentence the offender is set forth in the statute, the minimum time the offender must be sentenced is left in the discretion of the court imposing the sentence. However, under the statutes just described, the minimum number of years set forth in the statute is the minimum to be imposed.

Of perhaps greater consequence is the fact that the statute prohibits the court from exercising its usual discretion in suspending the sentence where the case is a deserving one, or of placing the offender on probation if the offense involved is a second or subsequent offense, or is one involving a sale or illegal importation of the drug; moreover the statute specifically prohibits parole.¹⁴ In other words, the minimum

12. 26 U.S.C. § 7237 (1932); 21 U.S.C. § 174, 176(a) (1954).

13. For other penalty provisions connected with narcotic drugs and marihuana see 26 U.S.C. § 7238 (1954) (dealing with opium smoking); 21 U.S.C. § 176(b) (1909) (covering sale of heroin to juveniles); 21 U.S.C. § 183 (1909) (dealing with illegal exportation of drugs); and 21 U.S.C. §§ 184 and 184(a) (1909) (governing seizure and forfeiture of drugs found illegally on vessels).

14. 26 U.S.C. § 7237(d) (1932).

sentence *must* be imposed by the court, and it is the actual period of time the offender *must* remain behind bars.

Customarily, the indictment for a sale or illegal transfer of narcotics, for example, is an automatic three count indictment, charging the defendant simultaneously with violation of both the illegal possession and illegal importation statutes, as well as with the illegal sale;¹⁵ whereas an indictment for illegal possession is usually coupled with a charge of violation of the importation statute.¹⁶ Obviously, in the first instance a first offense conviction carries with it the possibility of a mandatory minimum sentence of twelve years in the event of conviction of a sale involving a *single* capsule of heroin, if the court imposed consecutive sentences in lieu of concurrent sentences.¹⁷ In the case of a first offense conviction of the two-count possession and importation charge, the sentence could be a mandatory minimum of seven years if the sentence is not made to run concurrently. In either case, suspension of sentence, probation, or parole is out of the question.

In the eyes of the sentencing judge it can make no difference that the offender standing before him is the teen-age son of a doctor, lawyer, or banker with a good school record, an excellent college future, and no past history of conflict with the law, or a less fortunate member of society whose mentality and background has lead him to a path of poverty and constant entanglement with the law, or an addict with a heavy narcotic habit, or a hardened parasitic individual who thrives off the weaknesses of his fellow man. Each must remain incarcerated for the same minimum number of years!

As for the penalties connected with the misuse of the so-called dangerous drugs, *i.e.*, the amphetamines, barbiturates, and hallucinogenic

15. The indictment in such case would charge the defendant with violation of 26 U.S.C. § 4704 (1954) (illegal possession); 26 U.S.C. § 4705 (1954) (illegal sale or transfer); and 21 U.S.C. § 174 (1954) (illegal importation).

16. Here the defendant would be charged with violation of 26 U.S.C. § 4744 (1954) (illegal possession of marihuana); and 21 U.S.C. § 176(a) (1954) (illegal importation of marihuana).

17. By "consecutive sentences" is meant successive sentences or each sentence succeeding the other in regular order. By "concurrent sentences" is meant that the sentences run contemporaneously or together with each other. Usually the court orders concurrent sentences but it may order consecutive sentences. In this respect, *see United States v. Daugherty*, 269 U.S. 360 (1926); *United States v. Campisi*, 292 F.2d 811, (2d Cir. 1961), *cert. denied*, 368 U.S. 958 (1962); *Yancy v. United States*, 252 F.2d 554 (1958), *aff'd* 362 U.S. 389 (1960); and *Beacham v. United States*, 218 F.2d 528 (10th Cir. 1955). *But see Borum v. United States*, — F.2d — (U.S. App. D.C. No. 20,270, decided Dec. 21, 1967).

drugs such as LSD, until quite recently possession for personal use was not made an offense. The Drug Abuse Control Amendments Act of 1965¹⁸ provided for increased record keeping and inventory control over these drugs in an attempt to curtail their diversion into illicit channels. However, possession for the purposes of sale or other disposition to another, outside of legitimate channels of trade, was prohibited by the act and made a misdemeanor offense with a penalty of up to one year in prison and/or a fine of not more than \$1,000.

With the increased use of barbituates, amphetamines, and particularly the hallucinogenic LSD, Congress decided to take another look at the penalties imposed under the 1965 Act and as a result enacted a new law which makes possession of LSD for personal use a misdemeanor for a first offense conviction, and for subsequent convictions a felony with imprisonment for not more than three years or a fine of not more than \$10,000 or both. The penalties for illegal sale or unlawful manufacturing or other disposal of the drugs was increased from a misdemeanor to a felony with imprisonment of up to five years and/or a fine of not more than \$10,000.¹⁹ An unlawful sale to a minor carries the penalty for a first offense of a fine not exceeding \$15,000 and/or imprisonment for not more than ten years and for a second and subsequent offense the imprisonment may be up to fifteen years in prison and/or a fine of not more than \$20,000.

The disparity between these penalties and those under the narcotic drugs and marihuana statutes is obvious. Fortunately, the mandatory minimum sentences have not been incorporated into the new law and there is more leniency insofar as suspension of sentence and probation is concerned with the court free to exercise its prerogative to suspend the sentence and place the offender on probation for one year on its own terms where the crime is a first offense possession for personal use. It may even unconditionally discharge the defendant from probation prior to the expiration of the probation period. Such discharge under the statute automatically sets aside the conviction; likewise if during the probation period the convicted person does not vio-

18. 21 U.S.C. §§ 321, 331, 333, 334, 352(n), 360, 360(a) (1964); and 18 U.S.C. § 1114 (1964).

19. H.R. 14096, 90th Cong., 2nd Sess. (1968). The new law amends the penalty provisions presently existing in 21 U.S.C. § 331(q)(3) (1964); and 21 U.S.C. § 333 (1964). Arrests are already being made under the new law. See Comm. Docket No. 32-182, Joe Emmett McDaniel; and Comm. Docket No. 32-218, Kenneth Ray Walton, both in the U.S. District Court, District of Columbia.

late any terms of probation, the sentence is automatically set aside at the end of the probation period.

If severe penalties have failed to deter people from experimenting or using drugs, they certainly have had no apparent effect in deterring those individuals actually addicted to drug use.²⁰ In 1962 the United State Supreme Court, in *Robinson v. California*,²¹ struck down as unconstitutional section 11721 of the California Health and Safety Code which made it a crime for a person to be addicted to the use of narcotics. The Court found that it was cruel and unusual punishment contrary to the eight and fourteenth amendments of the Constitution for the status of being a narcotic addict to be punished through the processes of the criminal law. In comparing the addict with others of society's unfortunates Mr. Justice Stewart, speaking for the majority of the Court in *Robinson*, said:

It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A state might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement or sequestration. But, in light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.²²

In his concurring opinion in the *Robinson* case, Justice Douglas stated that drug addiction is more prevalent in this country than in any other nation of the western world. He said:

It is sometimes referred to as "a contagious disease". . . . But those living in a world of the black and white put the addict in the category of those who could, if they would, forsake their evil ways. The first step toward addiction may be as innocent as a boy's puff on a cigarette in an alleyway. It may come from medical prescriptions. Addiction may even be present at birth. . . . The addict is under compulsions not capable of management

20. A. LINDESMITH, *THE ADDICT AND THE LAW*, 82 (1965).

21. 370 U.S. 660 (1962).

22. *Id.* at 666.

without outside help. . . . Some say the addict has a disease, others say addiction is not a disease but "a symptom of a mental or psychiatric disorder."²³

In any event, the importance of the *Robinson* decision is that the Court recognized the addict's plight and the inhumanity of punishing him for his state of being. The Court did not have before it the addict's predicament in obtaining drugs for his personal use due to his addiction, and the resulting harsh penalties facing him should he be caught.

S. Carter McMorris, who served as counsel for the defendant in *Robinson*, maintains that it is cruel and unusual punishment to treat as a crime any aspect of the addiction syndrome. His contention is that addiction by definition comprises a physical status necessarily dependent on possession of the narcotic, whether by virtue of the withdrawal syndrome and the craving caused by the narcotic's absence or by virtue of the direct effect upon the body of its presence in the blood.²⁴ In effect, Mr. McMorris seems to be saying that not only is punishment of the status of being an addict prohibited by the cruel and unusual punishment provisions of the Constitution, but likewise, and with merit, that it is cruel and unusual punishment to punish severely the person addicted to narcotics who possesses it for his own use, or who, because of his addiction, is forced into a petty sale in order to further his own habit.²⁵ To date the courts have refused to accept this argument.

However, in at least one jurisdiction, the District of Columbia, the United States Court of Appeals has indicated that the time may be coming when the addict will have available to him the defense of insanity based solely on the fact of his addiction at least where the crime involved is a violation of the narcotics statutes.²⁶

Very recently this same court handed down a remarkable and un-

23. *Id.* at 669-72.

24. McMorris, *Can We Punish for the Acts of Addiction*, 54 A.B.A.J. 1081 (1968).

25. A large number of narcotic violations are charged against known addicts when the amount involved in the sale is no more than one to four capsules, having a commercial value of about \$2.50 a capsule.

26. See *Castle v. United States*, 347 F.2d 492 (U.S. App. D.C. 1965), *cert. denied*, 381 U.S. 929, *reh. denied*, 382 U.S. 874; *Gaskins v. United States*, 394 F.2d 933 (U.S. App. D.C. 1967); and *Horton v. United States*, 317 F.2d 595 (U.S. App. D.C. 1963). *But see Green v. United States*, 383 F.2d 199 (U.S. App. D.C. 1967), *cert. denied*, 390 U.S. 961 (1968); *Heard v. United States*, 348 F.2d 43 (U.S. App. D.C. 1965).

doubtedly far-reaching decision in the case of *Watson v. United States*,²⁷ holding that the mandatory minimum ten year imprisonment to which the defendant, a convicted narcotic addict, was sentenced constituted cruel and unusual punishment in violation of the eighth amendment. In this ruling, the court of appeals pointed out that

“[t]en years in prison is at least twice as long as the *maximum* federal sentence for such major felonies as extortion, blackmail, perjury, assault with a dangerous weapon or by beating, arson (not endangering human life), threatening the life of the President and selling a man into slavery.”²⁸

Hopefully, the *Watson* case will have the ultimate affect of outlawing mandatory minimum sentences, at least in the narcotic drugs and marihuana statutes. But there seem to be many obstacles which must be overcome before this can occur. In the meantime experimental users of narcotics, marihuana, and the like, as well as the unfortunate addicts, are subject to being sent to prison for many years with no possibility of release if they are caught with the drugs. Interestingly enough, in *Watson* the court candidly expressed its dilemma, indicating “reluctance at intruding upon the Congressional prerogative by dismantling the narcotic sentencing statutes brick by brick,”²⁹ until a constitutionally acceptable result has been reached.

Indirectly, help may be coming sooner than is realized. The Supreme Court has heard argument in the case of the much-publicized marihuana and LSD user, Dr. Timothy Leary.³⁰ Although Dr. Leary was sentenced for violation of the marihuana statutes to serve consecutive sentences totalling thirty years in prison with a corresponding fine of \$40,000, the unconstitutional aspects of this sentence apparently have not been directly raised in the petition before the Supreme Court. Dr. Leary is now over forty years of age, and if his conviction stands, thirty years in prison could well mean his life would end there.

Leaving to the courts the problem of correcting the severity of the

27. *Watson v. United States*, — F.2d — (U.S. App. D.C. No. 21,186 decided Dec. 13, 1968).

28. *Id.*, p. 17 Slip Opinion.

29. *Id.*, p. 20 Slip Opinion.

30. *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *cert. granted*, 392 U.S. 903 (1968). The main questions presented to the Court in this case deal with the constitutionality of the self-incrimination overtones contained in 26 U.S.C. § 4741 (1964), of the marihuana laws and the almost conclusive presumption in the illegal importation statute, 21 U.S.C. § 176(a) (1954).

penalties mandatorily to be imposed for violation of the federal drug statutes is a lengthy process. A much quicker and more direct path toward elimination of this cruel and inhuman treatment to drug offenders would be for Congress to admit the error of its ways and seek immediate review of these statutes with an eye toward elimination of the mandatory minimum sentences and lifting the present ban on suspension of sentences, probation, and parole, thereby permitting the courts and the prison authorities to exercise their usual discretion in this regard.