Santa Clara Law
Santa Clara Law Digital Commons

Faculty Publications | Faculty Scholarship

1-1-2000

The Impact of Drugs Upon Sentencing Policy

Gerald F. Uelmen
Santa Clara University School of Law, guelmen@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Recommended Citation
44 St. Louis U. L.J. 359

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

THE IMPACT OF DRUGS UPON SENTENCING POLICY

GERALD F. UELMEN*

I was recently asked who inspired me to become a criminal defense lawyer. I immediately thought of Sister Emerentia, the nun who taught me in Seventh Grade at St. Alphonsus School in Greendale, Wisconsin. She was my first encounter with tyranny. She was a big believer in group punishment. When someone wrote on her blackboard, "Sister Emerentia is a fascist," she announced the entire class would be detained after school until the culprit stepped forward. Even in Seventh Grade, I recognized that detention should be based on particularized suspicion. There were only two kids in that class who could spell "fascist," and they were the obvious suspects.[1]

I had almost forgotten about Sister Emerentia until several years ago, when I discovered she had actually been appointed to the United States Supreme Court. There she was in the same black habit, announcing that all of the seventh graders at Vernonia School in Oregon who wanted to play football would have to pee in a bottle. She signed the opinion Justice Antonin Scalia, but she didn't fool me.[2]

Then, a year later, I learned that Sister Emerentia had been elected Governor of Georgia. She signed a law declaring that all candidates for public office in the State of Georgia must file a certificate declaring that they have been tested for illegal drugs, and that the result of the test was negative.[3] The Eleventh Circuit Court of Appeals upheld the law, concluding that "the nature of high public office in itself demands the highest levels of honesty, clear sightedness, and clear thinking."[4] There's a lot of truth in that. It's hard to read a Gallup Poll when you are loaded. If we believe politicians can prove they are honest, clear-sighted and clear thinking by peeing in a bottle, then we deserve all the pee we get. Fortunately, in this case, even Justice Scalia agreed

* Professor of Law, Santa Clara University School of Law, and Scholar of the Markkula Center for Applied Ethics, Santa Clara University.

1. Gerald F. Uelmen, *Sister Emerentia has the Last Word: The Supreme Court's Approval of Mass Drug Testing for Students Merits an Epithet on a Classroom Chalkboard,* L.A. TIMES, June 30, 1995, at B9.
2. Vernonia School Dist. v. Acton, 515 U.S. 646 (1995).
3. GA. CODE ANN. § 21-2-140 (1990).
4. Chandler v. Miller, 73 F.3d 1543, 1546 (11th Cir. 1995).

HeinOnline -- 44 St. Louis U. L.J. 359 2000

the law was unconstitutional,[5] and Georgia candidates for public office now need only certify that they have never had an extramarital affair.

For thirty years of hope and frustration, I have labored in the vineyards of academia, searching for a rational explanation for American drug policy.[6] I began my academic career in 1970, the year that Richard Nixon announced we had turned the corner in the war on drugs. I have studied the science of chemistry and pharmacology, the psychology and etiology of addiction, the economics of wholesale and retail distribution, the ethics of the medical profession, and the jurisprudence of criminal punishment. I have reluctantly come to the conclusion that American drug policy does not really have much to do with science, psychology, economics, ethics or jurisprudence. It has more to do with how politicians get elected. It has to do with media hype, plain and simple.[7]

Our national debate on drug policy is dominated by twelve-second sound bites, devoid of thought but loaded with rhetorical zing. The suggestion that judges, legislators and journalists approach this challenge by reading a book or studying a report or attending a conference, and acquainting themselves with some credible factual information is greeted with horror. What, you want us to *think* about this problem? If the word got out that we were *thinking*, we would be labeled as "soft on crime."

It is a useless exercise to seek to engage the shapers of public policy in rational dialogue about drugs. When public opinion polls are so lop-sided in identifying a demon, and the demon has no credible defenders, no elected official in America has any interest in studying the demon when he or she can simply denounce it. The challenge now is to directly engage the public in rational dialogue, and begin a process of withdrawal from their addiction to sound bites. In dealing with media-hype junkies, we must confront the denial that lies at the heart of their disease. That denial is, at its core, a denial of complexity. The fix that is offered by the purveyors of media hype is the seductive fix of simplicity. We must look for issues in which public policy has clearly been skewed by reliance on oversimplified media hype, and let people see that they were deprived of some essential factual information before they made up their minds.

I am convinced there are at least two areas in which this is an achievable agenda: mandatory minimum sentences, and sentence enhancements for recidivists. These are the two areas in which state sentencing policies have been most adversely impacted by media drug hype.

5. Chandler v. Miller, 518 U.S. 1057 (1996).

6. *See* GERALD F. UELMEN & VICTOR HADDOX, DRUG ABUSE AND THE LAW SOURCEBOOK (2d Ed. Rev. 1999).

7. *See* Adam Paul Weisman, *I Was a Drug-Hype Junkie*, THE NEW REPUBLIC, Oct. 6, 1986.

HeinOnline -- 44 St. Louis U. L.J. 360 2000

Many states mandate minimum prison sentences for drug offenders based simply upon the quantity possessed or sold. These laws were based on the faulty assumption that drug dealers were an identifiable group that could be readily distinguished from drug users, and that drug dealers could be deterred by the threat of draconian sentences.[8] A national movement began during the 1970s with what was known as the Rockefeller Drug Laws in New York.[9] Distribution of two ounces *or* possession of four ounces subjected the offender to a mandatory minimum prison sentence of fifteen years. That was supposed to scare drug dealers right off the sidewalks of New York.[10]

A quarter century later, we start the new millennium with two million Americans behind bars, a disproportionate share of them young black men. More than one-third of these prisoners are drug offenders.[11] We could treat most of them for one-third the cost of their imprisonment.

In California, despite the investment of five billion dollars in new prison construction, our prisons are bursting at the seams. More people are sent to prison for drug possession than any other crime. We now have 156,000 Californians incarcerated, and we spend almost as much on building, maintaining and staffing our prisons as we do on our schools.[12] The Correctional Officers Union is the most powerful lobby in Sacramento, and they target for defeat any state legislator who advocates sentencing reform. We truly have a "Prison Industrial Complex" in California, and as a result, our public schools now rank among the worst in the nation. Twenty-five years ago they were the best.

In some states, the burdens of imprisonment costs are inspiring a reassessment of the wisdom of mandatory prison sentences for drug offenders. Since 1993, six states have repealed or reformed their laws.[13] Among those advocating reform is the former State Senator who cosponsored the Rockefeller Drug Law in 1973. John Dunne recently said: "It seemed like a good idea twenty-five years ago, but the sad fact is they haven't worked. They're ineffective, unfair, and extremely costly to taxpayers."[14]

---

8. In the street level marketing of heroin and cocaine, most "dealers" are themselves users who are supporting their own habits. EDWARD M. BRECHER, LICIT AND ILLICIT DRUGS (1972); STEVEN WISOTSKY, BREAKING THE IMPASSE IN THE WAR ON DRUGS (1986).

9. N.Y. PENAL §§ 70.00, 220.21, 220.43 (Consol. 1973).

10. The harsh sentencing provisions of the Rockefeller Drug Law were upheld against constitutional attacks in *People v. Broadie,* 371 N.Y.S.2d 471 (1975) and *People v. Thompson,* 611 N.Y.S.2d 470 (1994).

11. Vincent Schiraldi & Jason Ziedenberg, *Prison Nation,* SAN JOSE MERCURY NEWS, Dec. 31, 1999, at 6B.

12. PETER SCHRAG, PARADISE LOST 95 (1998).

13. Mark Hansen, *Mandatories Going, Going . . . Gone,* ABA JOURNAL, Apr., 1999, at 14.

14. *Id.*

The other example is the more recent movement to enhance prison sentences for recidivists. The California "Three Strikes and You're Out" law is the harshest example, mandating life imprisonment for three-time offenders, and tripling the sentence for second offenders.[15] While ostensibly aimed at violent offenders, the law has most dramatically affected the sentences of those who served a previous sentence for a violent offense, then got rearrested, sometimes twenty-five years later, for a property crime or a drug offense. After five years of vigorous enforcement of this law, we now learn that we have added 4,121 lifers to our prison population, but nineteen percent of them were simple drug offenders, and thirty-two percent committed only property crimes. The proportions are even higher for two-strike offenders, who end up serving three times as much time as they otherwise would. Thirty-one percent of them are drug offenders.[16]

How do we accomplish sentencing reform when politicians are immobilized by the pathological fear of a "soft on crime" label? In states that have the popular initiative, there is a way to go directly to the public with our arguments. And the public, we are discovering, can be persuaded.

Arizona led the way, in 1996. Voters by a two-to-one margin passed the Drug Medicalization, Prevention and Control Act.[17] In addition to permitting medical use of marijuana, the law diverted non-violent drug offenders into drug treatment and education programs rather then incarceration. The Arizona Supreme Court recently reported that the law is "resulting in safer communities and more substance abusing probationers in recovery," has already saved taxpayers over $2.5 million, and is helping more than seventy-five percent of program participants to remain drug-free.[18]

In California, we have been inspired by the Arizona success. We approved a medical marijuana initiative in 1996, but it did not include the broader sentencing reforms of the Arizona measure.[19] During the past three years, I have been deeply involved in the legal fight to implement the availability of medical marijuana despite the efforts of federal authorities to enjoin it.[20] We will be back in front of the voters next November with another Initiative measure, which will mandate that all non-violent drug offenders be sentenced to treatment programs, and will require that the proceeds of drug forfeiture laws be used to finance drug treatment programs. Currently, drug forfeiture

15. CAL. PENAL CODE §§ 667 (West 1982), 1170.12 (West 1994).

16. Ariz. Proposition 200, codified as ARIZ. REV. STAT. § 13-901.01 (1996).

17. Ariz. Proposition 200, codified as A.R.S. § 13-901.01 (1996).

18. The Drug Treatment and Education Fund (D.T.E.F.) Legislative Report, Fiscal Year 1997-98, issued by the Arizona Supreme Court, Administrative Office of the Court, Apr. 20, 1999.

19. Calif. Proposition 215, codified as CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

20. United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109 (9th Cir. 1999).

HeinOnline -- 44 St. Louis U. L.J. 362 2000

proceeds just finance more police hardware to arrest more drug offenders. It will be poetic justice indeed to plow that money into drug treatment programs.

Another reason for optimism in California is the incredible success story of our drug courts. By setting up special courts to maintain continuing supervision over drug offenders, we are making progress in breaking the cycle of shuffling addicts in and out of our jails.[21]

So after thirty years of frustration, I'm starting the new millennium with cautious optimism. The public can be educated, and the public can be persuaded to reform our drug sentencing laws. This is one issue where the people are ahead of the politicians. As for Sister Emerentia, she has announced that she is now a candidate to be President of the United States. Her campaign slogan is "Congress should be kept after school, and Bill Clinton should be spanked."

---

21. Mike Shannon, *Drug Courts in California,* CAL. CORRECTIONAL NEWS, A4.

HeinOnline -- 44 St. Louis U. L.J. 363 2000

HeinOnline -- 44 St. Louis U. L.J. 364 2000