COMMENTS

DRUG LAW REVISION—THE NEW JERSEY APPROACH

INTRODUCTION

Governor William T. Cahill recently signed into law a bill[1] substantially amending and revising prior legislation dealing with narcotics and other drugs. Entitled the New Jersey Controlled Dangerous Substances Act, the law constitutes a comprehensive scheme controlling the sale, distribution, possession and use of narcotics and other related substances.

New Jersey has experienced a tremendous increase in arrests for drug offenses.[2] In 1967 there were 5,045 such arrests,[3] while in 1968 this figure rose to 7,896, an increase of 56.5%.[4] The figures in 1969 evidenced an increase of 69.3% over the previous year.[5] While the increased use of marihuana has become apparent, the percentage of arrests for marihuana has remained fairly stable,[6] and cannot be attributed as the cause for the general increase in arrests.

The questionable existence of harmful effects of marihuana use[7] was apparently a factor in the creation of the Act. In addition, New Jersey's most prominent public officials have experienced drug related problems, from arrest to death, within their own families. Even prestigious national figures have been subjected to court appearances as a result of drug offenses by members of their families. Perhaps the more progressive portions of the New Jersey law can be attributed to these factors.

The overwhelming majority of the public has been introduced only to the Act's more liberal contents such as the provisions dealing

---

1 N.J. Senate Bill 851, effective January 17, 1971 as N.J. STAT. ANN. §§ 24:21-1 *et seq.* (R.S. Cum. Supp. 1970), *as amended*, Laws 1971, ch. 3 (R.S. Cum. Supp. 1971).

2 For purposes of this Comment, "drug offenses" shall refer to narcotic as well as non-narcotic substances.

3 UNIFORM CRIME REPORTS, STATE OF NEW JERSEY 1967, at 75 (1968).

4 UNIFORM CRIME REPORTS, STATE OF NEW JERSEY 1968, at 73 (1969).

5 UNIFORM CRIME REPORTS, STATE OF NEW JERSEY 1969, at 70 (1970). The number of arrests for drug offenses was 13,364.

6 In 1968, 36.4% of drug arrests were for marihuana, while in 1969 this figure remained virtually constant at 37.0%. *Compare* note 4 *supra*, at 81 *with* note 5 *supra*, at 71.

7 *See generally* Comment, *Marihuana: The Legislative Cauldron, A Pot Full of Trouble*, 1 SETON HALL L. REV. 41 (1970).

with marihuana penalties. However, as will be illustrated, the law actually increases penalties in numerous areas.

SOME ASPECTS OF THE NEW LAW

In enacting the law, the New Jersey Legislature has attempted to distinguish between the various forms of narcotic and non-narcotic substances and their relative potential for abuse. Controlled dangerous substances are placed in five different Schedules under the Act, according to their relative danger to society.

Schedule I includes those substances having a high potential for abuse and no currently accepted medical use in treatment in the United States.[8] It is illegal for any physician to prescribe or any corporation to manufacture these substances without specific authorization.[9] Drugs grouped under paragraph *c* of this Schedule are not commonly used and hence are rarely seen by police chemists.[10] Narcotic substances

[8] N.J. STAT. ANN. § 24:21-5 (R.S. Cum. Supp. 1970). While most hard drugs, such as heroin, are listed in Schedule I, it is important to note that not all of the substances contained therein are narcotic drugs. For example, marihuana, not classified as a narcotic drug, is listed as an hallucinogenic substance. Examples of other non-narcotic substances in Schedule I are certain amphetamines, lysergic acid diethylamide (LSD), mescaline and peyote.

[9] Address by Mr. William Seligman, Supervisory Chemist for the Newark Police Laboratories, to the Essex County Prosecutor's Office, Newark, New Jersey, January 20, 1971. *See* N.J. STAT. ANN. §§ 24:21-11(b),(c) (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. §§ 24:21-11(b),(c) (R.S. Cum. Supp. 1970).

[10] Address by Mr. William Seligman, note 9 *supra*. N.J. STAT. ANN. § 24:21-5(c) (R.S. Cum. Supp. 1970):

> Any of the following opiates, including their isomers, esters, and ethers, unless specifically excepted, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation:
>
> (1) Acetylmethadol
> (2) Allylprodine
> (3) Alphacetylmethadol
> (4) Alphameprodine
> (5) Alphamethadol
> (6) Benzethidine
> (7) Betacetylmethadol
> (8) Betameprodine
> (9) Betamethadol
> (10) Betaprodine
> (11) Clonitazene
> (12) Dextromoramide
> (13) Dextrorphan
> (14) Diampromide
> (15) Diethylthiambutene
> (16) Dimenoxadol
> (17) Dimepheptanol
> (18) Dimethylthiambutene
> (19) Dioxaphetyl butyrate

in paragraph *d* are opium derivatives.[11] Paragraph *e*, which lists hallucinogens such as LSD and "speed,"[12] represents a major change in the

(20) Dipipanone
(21) Ethylmethylthiambutene
(22) Etonitazene
(23) Etoxeridine
(24) Furethidine
(25) Hydroxypethidine
(26) Ketobemidone
(27) Levomoramide
(28) Levophenacylmorphan
(29) Morpheridine
(30) Noracymethadol
(31) Norlevorphanol
(32) Normethadone
(33) Norpipanone
(34) Phenadoxone
(35) Phenampromide
(36) Phenomorphan
(37) Phenoperidine
(38) Piritramide
(39) Proheptazine
(40) Properidine
(41) Racemoramide
(42) Trimeperidine.

11 N.J. STAT. ANN. § 24:21-5(d) (R.S. Cum. Supp. 1970):

Any of the following narcotic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine
(2) Acetylcodone
(3) Acetyldihydrocodeine
(4) Benzylmorphine
(5) Codeine methylbromide
(6) Codeine-N-Oxide
(7) Cyprenorphine
(8) Desomorphine
(9) Dihydromorphine
(10) Etorphine
(11) Heroin
(12) Hydromorphinol
(13) Methyldesorphine
(14) Methylhydromorphine
(15) Morphine methylbromide
(16) Morphine methylsulfonate
(17) Morphine-N-Oxide
(18) Myrophine
(19) Nicocodeine
(20) Nicomorphine
(21) Normorphine
(22) Phoclodine
(23) Thebacon.

12 N.J. STAT. ANN. § 24:21-5(e) (R.S. Cum. Supp. 1970):

Any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of

law. These substances, previously giving rise primarily to disorderly persons violations, now result in indictable offenses.[13] Consequently, numerous cases will reach the county prosecutor which formerly were disposed of on a municipal level.

Schedule II includes those substances having a high potential for abuse which may lead to severe psychic or physical dependence but which have a currently accepted medical use in treatment in the United States.[14] It is distinguishable from the first Schedule because

---

isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine
(2) 5-methoxy-3,4-methylenedioxy amphetamine
(3) 3,4,5-trimethoxy amphetamine
(4) Bufotenine
(5) Diethyltryptamine
(6) Dimethyltryptamine
(7) 4-methyl-2, 5-dimethoxylamphetamine
(8) Ibogaine
(9) Lysergic acid diethylamide
(10) Marihuana
(11) Mescaline
(12) Peyote
(13) N-ethyl-3-piperidyl benzilate
(14) N-methyl-3-piperidyl benzilate
(15) Psilocybin
(16) Psilocyn
(17) Tetrahydrocannabinols.

[13] N.J. STAT. ANN. § 24:21-19 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-19 (R.S. Cum. Supp. 1970):

> **Prohibited acts A; manufacturing, distributing, or dispensing; penalties.** a. Except as authorized by this act [chapter], it shall be unlawful for any person:
>
> (1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance; or
>
> (2) To create, distribute, or possess or have under his control with intent to distribute, a counterfeit controlled dangerous substance.
>
> b. Any person who violates subsection a. with respect to:
>
> . . . .
>
> (2) Any other controlled dangerous substance classified in schedules I, II, III or IV is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both . . . .

See also N.J. STAT. ANN. § 24:21-20(a)(1) (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-20(a)(1) (R.S. Cum. Supp. 1970):

> **Prohibited acts B; possession, use or being under influence; penalties.** a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act [chapter]. Any person who violates this section with respect to:
>
> (1) A substance classified in schedule I or II which is a narcotic drug and any other controlled dangerous substance classified in schedule I, II, III, or IV is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both . . . .

[14] N.J. STAT. ANN. § 24:21-6 (R.S. Cum. Supp. 1970). Opium, certain opiates, coca leaves and methadone are examples of Schedule II substances.

its substances have some medical application and can legally be prescribed by doctors.[15] Paragraph *d*[16] of this Schedule includes substances known as "precursors,"[17] which previously were not specifically covered by law.

Substances having a potential for abuse less than those in the first two Schedules and having a currently accepted medical use are incorporated in Schedule III if they may lead to moderate or low physical dependence or high psychological dependence.[18] Substances in paragraph *d* of this Schedule are familiarly referred to as "hypnotics."[19]

---

15 Address by Mr. William Seligman, note 9 *supra*.

16 N.J. STAT. ANN. § 24:21-6(d) (R.S. Cum. Supp. 1970):

Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, unless specifically excepted, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine
(2) Anileridine
(3) Bezitramide
(4) Dihydrocodeine
(5) Diphenoxylate
(6) Fentanyl
(7) Isomethadone
(8) Levomethorphan
(9) Levorphanol
(10) Metazocine
(11) Methadone
(12) Methodone—Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane
(13) Moramide—Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid
(14) Pethidine
(15) Pethidine—Intermediate—A, 4-cyano-1-methyl-4-phenylpiperidine
(16) Pethidine—Intermediate—B, ethyl-4-phenylpiperidine-4-carboxylate
(17) Pethidine—Intermediate—C, 1-methyl-4-phenylpiperidine-4-carboxylic acid
(18) Phenazocine
(19) Piminodine
(20) Racemethorphan
(21) Racemorphan.

17 N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1970):

Definitions. As used in this act [chapter]: . . . .

"Immediate precursor" means a substance which the state department of health has found to be and by regulation designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled dangerous substance, the control of which is necessary to prevent, curtail, or limit such manufacture.

18 N.J. STAT. ANN. § 24:21-7 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-7 (R.S. Cum. Supp. 1970). Substances in Schedule III produce a stimulant or depressant effect on the central nervous system. Any material, compound or mixture which contains limited quantities of codeine, opium or morphine is also included thereunder.

19 Address by Mr. William Seligman, note 9 *supra*. N.J. STAT. ANN. § 24:21-7(d) (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-7(d) (R.S. Cum. Supp. 1970):

Any material, compound, mixture, or preparation which contains any quan-

Schedule IV substances have a low potential for abuse which may lead to limited physical or psychological dependence relative to the substances in Schedule III and also have an accepted medical use in treatment.[20] Schedule V[21] is characterized by substances having a low potential for abuse relative to the preceding Schedule. They have currently accepted medical use and have limited physical or psychological dependence liability compared to the substances in Schedule IV.

The State Department of Health is responsible for reviewing and revising the substances currently listed under the five Schedules. As research continues, more will be learned with respect to the relative danger of the various substances and their suitability for use in medical treatment. Also, other substances not listed in any of the Schedules may subsequently receive classification.[22]

The Act represents a substantial departure from previous law which divided drugs basically into two sections. In addition to opiates, narcotic drugs were defined as coca leaves, opium, marihuana and every substance chemically identical with them.[23] The remaining

---

tity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid, except those substances which are specifically listed in other schedules

(2) Chlorhexadol
(3) Glutethimide
(4) Lysergic acid
(5) Lysergic acid amide
(6) Methyprylon
(7) Phencyclidine
(8) Sulfondiethylmethane
(9) Sulfonethylmethane
(10) Sulfonmethane.

20 N.J. STAT. ANN. § 24:21-8 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-8 (R.S. Cum. Supp. 1970). Schedule IV includes any compound, mixture or preparation having a potential for abuse associated with a depressant effect on the central nervous system, such as phenobarbital and chloral hydrate. However, the commissioner may except any such compound, mixture or preparation containing any depressant substance in Schedule IV if it contains one or more active medicinal ingredients not having depressant effects and if the admixtures included therein vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.

21 N.J. STAT. ANN. § 24:21-8.1 (R.S. Cum. Supp. 1971). Schedule V includes any compound, mixture or preparation containing limited quantities of certain narcotic drugs, such as codeine or opium, which also contains one or more non-narcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone.

22 N.J. STAT. ANN. § 24:21-3 (R.S. Cum. Supp. 1970).

23 N.J. STAT. ANN. § 24:18-2 (Supp. 1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970):

Repealer. The following acts and parts of acts are repealed:

R.S. 24:18-1 to 24:18-7, 24:18-9 to 24:18-16, 24:18-18 to 24:18-28, 24:18-30 to

dangerous drugs were classified under a single disorderly persons statute.[24] Important to note is the fact that marihuana, although defined as a narcotic under the previous law, is categorized as an hallucinogen under the Act.[25]

SOME SPECIFIC PROVISIONS

> **24:21-19. Prohibited acts A; manufacturing, distributing, or dispensing; penalties.** a. Except as authorized by this act [chapter], it shall be unlawful for any person:
>
> (1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance; or
>
> (2) To create, distribute, or possess or have under his control with intent to distribute, a counterfeit controlled dangerous substance.
>
> b. Any person who violates subsection a. with respect to:
>
> (1) A substance classified in schedules I or II which is a narcotic drug is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 12 years, a fine of not more than $25,000.00, or both; or
>
> (2) Any other controlled dangerous substance classified in schedules I, II, III or IV is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both; or
>
> (3) A substance classified in schedule V is guilty of a misdemeanor and shall be punished by imprisonment for not more than 1 year, a fine of not more than $5,000.00, or both.

One of the most significant features of this Act is the attempt by the New Jersey Legislature to mandate more stringent criminal penalties for persons actively engaged in the illegal sale or distribution

---

24:18-48 (constituting the remaining sections in chapter 18 of Title 24 of the Revised Statutes not previously repealed); P.L. 1953, chapter 190 (C. 24:18-24.1, 24:18-24.2); P.L. 1951, chapter 57 (C. 24:18-38.1 to 24:18-38.3); P.L. 1966, chapter 314, sections 1-3 (C. 24:6C-1 to 24:6C-3); N.J.S. 2A:170-8.

24 N.J. STAT. ANN. § 2A:170-77.8 (Supp. 1970), *as amended,* N.J. STAT. ANN. § 2A:170-77.8 (R.S. Cum. Supp. 1970).

25 N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1970):

> **Definitions.** As used in this act [chapter]: . . . .
>
> "Marihuana" means all parts of the plant cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

See N.J. STAT. ANN. § 24:21-5(e) (R.S. Cum. Supp. 1970), *quoted* note 12 *supra.*

of dangerous substances, or those having possession with intent to distribute. Generally, the penalties provided under this statute depend upon the moral culpability of the offender. Thus, persons convicted of manufacturing,[26] distributing, dispensing or possessing with intent to distribute narcotic drugs in Schedules I or II are guilty of a high misdemeanor and are subject to a maximum term of imprisonment for twelve years or a fine of up to $25,000, or both. Since marihuana is not a narcotic drug under the Act, offenders are not subject to this rather severe penalty. A violation concerning any other controlled dangerous substance in Schedules I, II, III or IV involves a maximum penalty of five years imprisonment or a fine of $15,000, or both. A person convicted of manufacturing, distributing, dispensing or possessing with intent to distribute substances in Schedule V subjects himself to a maximum penalty of one year imprisonment or a fine of $5,000, or both.

This section is distinguishable from the previous law which did not differentiate manufacturing, distributing, dispensing[27] or possessing with intent to distribute drugs, from mere possession.[28] In addition, the

---

[26] The Act now specifically prohibits the growing of a marihuana plant. In N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1970), the definition of *manufacture* includes the production of a controlled substance. The definition of *production* under the above section includes the planting or growing of a controlled substance, *e.g.*, marihuana. Noteworthy is that a violation for growing a marihuana plant (manufacture) under N.J. STAT. ANN. § 24:21-19 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-19 (R.S. Cum. Supp. 1970), would be a high misdemeanor. Such a violation, unlike the mere possession of marihuana, involves no quantitative requirements concerning grams. Thus a person possessing a marihuana plant might only be adjudged a disorderly person while the person who grew the plant would be guilty of a high misdemeanor.

[27] The Act does not specifically mention *sale*. However, it would be included under the following definitions in N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1970):

> **Definitions.** As used in this act [chapter]: . . . .
>
> "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled dangerous substance, whether or not there is an agency relationship.
>
> "Dispense" means to deliver a controlled dangerous substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery. "Dispenser" means a practitioner who dispenses.
>
> "Distribute" means to deliver other than by administering or dispensing a controlled dangerous substance. "Distributor" means a person who distributes.

[28] N.J. STAT. ANN. § 24:18-4 (Supp. 1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970), provided:

> It shall be unlawful for any person to manufacture, possess, have under his control, sell, purchase, prescribe, administer, dispense, or compound any narcotic drug, or any preparation containing a narcotic drug, except as authorized by this chapter.

penalty is now directly related to the type of drug involved. Prior law only distinguished narcotic from non-narcotic drugs, the latter being a violation of the disorderly persons act.[29]

> **24:21-20. Prohibited acts B; possession, use or being under influence; penalties.** a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act [chapter]. Any person who violates this section with respect to:
>
> (1) A substance classified in schedule I or II which is a narcotic drug and any other controlled dangerous substance classified in schedule I, II, III, or IV is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both, except as provided in subsection a. (3) below;
>
> (2) Any controlled dangerous substance classified in schedule V is guilty of a misdemeanor and shall be punished by imprisonment of not more than 1 year, a fine of not more than $5,000.00, or both; or . . . .

The Act draws a sharp distinction between the mere possession of dangerous substances and possession with intent to manufacture, distribute or dispense. The latter violation subjects offenders to the same penalties prescribed under the law for those found guilty of manufacturing, distributing or dispensing dangerous substances.[30] However, unlawful possession of substances in Schedules I, II, III and IV without the wrongful intent to manufacture, distribute or dispense constitutes a high misdemeanor but subjects the offender only to a maximum term of five years imprisonment or a maximum fine of $15,000, or both. The mere possession of substances in Schedule V constitutes a misdemeanor carrying a maximum penalty of one year imprisonment or a fine of up to $5,000, or both.

These provisions effect a major change in the penalties concerning possession of certain drugs. Prior law provided that possession of non-narcotic drugs was a violation of the disorderly persons act. Under the new law,[31] possession of LSD, for example, which was a disorderly

---

29 *See* N.J. STAT. ANN. § 2A:170-77.9 (Supp. 1970), *as amended*, N.J. STAT. ANN. § 2A:170-77.9 (R.S. Cum. Supp. 1970).

30 *See* N.J. STAT. ANN. § 24:21-19 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-19 (R.S. Cum. Supp. 1970).

31 Note that the prohibited acts of possession, use or influence involve different penalties according to the type of substance involved. Therefore, a sentencing judge would have to correctly classify the substance in its corresponding Schedule.

persons violation, is now a high misdemeanor. Considering the nature of the drug and its potential for abuse, the latter penalty is certainly more realistic.

> (3) Possession of more than 25 grams of marihuana, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both; provided, however, that any person who violates this section with respect to 25 grams or less of marihuana, or 5 grams or less of hashish is a disorderly person.

By far the most controversial provision of the Act concerns the drastically reduced penalties exacted for possession of 25 grams or less of marihuana or five grams or less of hashish. Such possession is classified as a disorderly persons offense carrying a maximum penalty of six months imprisonment or a fine of $500, or both.[32] But an offender adjudged guilty of possessing an amount exceeding 25 grams of marihuana or five grams of hashish is subject to a maximum penalty of five years imprisonment, a fine of $15,000, or both. This provision manifests a legislative intent to revise the previous law as it related to marihuana offenses.[33] Under N.J. STAT. ANN. § 24:18-2(a)(iii) (Supp. 1970), possession of any quantity of marihuana, including one seed capable of germination, constituted a high misdemeanor, and first offenders could be imprisoned anywhere from two to fifteen years and fined an amount not in excess of $2,000.[34]

---

32 N.J. STAT. ANN. § 2A:169-4 (Supp. 1970).

33 Under the old law, possession of both marihuana and heroin constituted a violation of only one statute. *See* State v. Butler, 112 N.J. Super. 305, 271 A.2d 17 (App. Div. 1970). The same situation would not exist under the Act as there are two separate subsections of section 20 relating to possession of heroin and marihuana, respectively.

34 N.J. STAT. ANN. § 24:18-47(c)(1) (1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970). In State v. Ward, 57 N.J. 75, 270 A.2d 1 (1970), an eighteen year old youth convicted of possessing an amount of marihuana valued at $2.50 was sentenced to a state prison term of two to three years and fined $100. On appeal, the court found that the statute by which defendant was sentenced was qualified by N.J. STAT. ANN. § 2A:168-1 (Supp. 1970), dealing generally with the power of a court to suspend sentences for first offenders "[w]hen it shall appear that the best interests of the public as well as of the defendant will be subserved thereby." *Id.* at 80-81, 270 A.2d at 4. Since the defendant was a first offender, the trial court had the discretion to suspend his sentence. After reviewing his probation report and the record, the court decided that a two to three year unsuspended sentence for a first offender, whose possession was incidental to his own use, was far too severe.

The supreme court granted certification primarily to establish guidelines for sentencing first offenders adjudged guilty of possession of marihuana for their own use. The court held "that generally a suspended sentence with an appropriate term of probation is sufficient penalty for a person who is convicted for the first time of possessing marihuana for his own use." *Id.* at 82, 270 A.2d at 5. Further suggested was that "where

> b. Any person who uses or who is under the influence of any controlled dangerous substance, as defined in this act, for a purpose other than the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat sick and injured human beings, is a disorderly person.
>
> In a prosecution under this subsection, it shall not be necessary for the state to prove that the accused did use or was under the influence of any specific narcotic drug or drugs, but it shall be sufficient for a conviction under this subsection for the state to prove that the accused did use or was under the influence of some controlled dangerous substance or counterfeit controlled dangerous substance as defined in this act, by proving that the accused did manifest physical and physiological symptoms or reactions caused by the use of any controlled dangerous substance.

This provision deals with those persons found guilty of using or being under the influence of a controlled dangerous substance. Offenses under this subsection fall within the purview of the disorderly persons statute. In a proceeding under this provision, it is not necessary for the state to prove that the defendant used or was under the influence of any *specific* controlled substance; all the state is required to prove is that the defendant used or was under the influence of *some* dangerous substance. To carry its burden, the state must establish that the accused

---

appropriate under the facts of a case, the offender might be dealt with as a 'user' under the disorderly persons statute . . . rather than as a 'possessor' under the criminal act . . . in order that the conviction will not result in a criminal record." *Id.* at 83, 270 A.2d at 5. The opinion recognized that the New Jersey Controlled Dangerous Substances Act, enacted subsequent to the oral argument, would repeal the statute under which defendant was tried, but added that the repealer therein did not abate past or pending prosecutions. The closing language of the court is unique:

> We *expect* that any sentences imposed within the 90 day interim [from the date of enactment until it takes effect on January 17, 1971] *will be in conformance with this opinion.*

Id. at 84, 270 A.2d at 6 (emphasis added). It is apparent that *Ward* intended to correct what the court believed to be a deficiency in the Act by affording some measure of judicial relief for those awaiting prosecution. What effect the decision will have when read in conjunction with the new law is purely speculative. As will be discussed, the Act provides for conditional discharge for certain first offenders with a specified period of supervisory treatment. *See* N.J. STAT. ANN. § 24:21-27 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-27 (R.S. Cum. Supp. 1970). The language in *Ward* is suggestive of a judicial mandate by the supreme court to trial judges to suspend sentences for possession of marihuana by a first offender. This is apparent though not couched in such explicit terms. However, the above reference to the new law indicates that the Legislature has endowed the trial judge with a degree of discretion which the supreme court might judicially remove in future cases. Whether such action can be termed judicial legislation is also speculative. Of obvious import is the lack of a suspended sentence provision in the Act and the substitution of a probationary period and supervisory treatment in its place. Since *Ward* impliedly mandates the former, it will be interesting to see how the New Jersey Supreme Court will interpret the Act's provisions.

manifested physical and physiological reactions caused by the use of *any* controlled substance.

The law in its previous form consisted of two separate statutes covering use and influence. N.J. STAT. ANN. § 2A:170-8 (Supp. 1970) made it unlawful to use or be under the influence of a narcotic drug, whereas N.J. STAT. ANN. § 2A:170-77.8 (Supp. 1970) made it unlawful to use or be under the influence of a prescription legend drug without a valid prescription. Under both statutes and as continued with the Act, a violation thereof is characterized as a disorderly persons offense. However, there is a distinction regarding forfeiture of driving privileges.

> c. In addition to the general penalty prescribed for a disorderly person's offense pursuant to N.J.S. 2A:169-4, every person adjudged a disorderly person for a violation of this subsection shall, at the discretion of the sentencing judge, forthwith forfeit his right to operate a motor vehicle over the highways of this state for a period of not more than 2 years from the date of his conviction and until such privilege shall be restored to him by the director of motor vehicles upon application to and after certification by a physician to the director that such person is not a drug dependent person within the meaning of this act. The court before whom any person is convicted of a violation of this section shall cause a report of such conviction to be filed with the director of motor vehicles.

In addition to the general penalties exacted for disorderly person offenses, the Act provides that every offender so adjudged shall, at the court's discretion, forfeit his driving privileges for a maximum two year period. The privilege may be restored to him by the Director of Motor Vehicles only after a physician has certified that the offender is not drug dependent.

This suspension applies to both *use* and *influence* of any controlled dangerous substance. Previously, a mandatory forfeiture of driving privileges for one year pertained to narcotic offenses only.[35] Although seemingly more severe due to its application to *all* controlled substances, any rigidity is diminished by the fact that revocation is now made discretionary with the bench.[36]

Of interest to New Jersey physicians is the requirement that a

[35] N.J. STAT. ANN. § 2A:170-8 (Supp. 1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970). *See* note 23 *supra*.

[36] A problem might arise if a sentencing judge made no reference to the driving privilege. Would this silence be construed as recommending forfeiture or not? To avoid this, the sentencing judge should state the nature of his discretion and the period of the forfeiture if he decides that forfeiture is necessary.

revokee have a doctor certify, in writing, that he is not drug dependent, a condition precedent to the restoration of driving privileges. A conceivable issue connected to such a certification would be the civil liability of a doctor for the negligent acts of one whom he has certified as not being drug dependent, when such acts are occasioned by the operation of a vehicle by such person while under the influence.

> **24:21-21. Prohibited acts C; records and order forms of registered manufacturers and distributors; penalties.** a. It shall be unlawful for any person:
>
> . . . .
>
> (6) Knowingly to keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled dangerous substances in violation of this act for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this act.
>
> b. Any person who violates this section shall be subject to a fine of not more than $25,000.00; provided, that if the violation is prosecuted by an accusation or indictment which alleges that the violation was committed knowingly or intentionally, and the trier of fact specifically finds that the violation was committed knowingly or intentionally, such person is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 3 years, or by a fine of not more than $25,000.00, or both.

Another pertinent provision concerns the knowing maintenance of a place resorted to by persons using controlled dangerous substances or which is used for the keeping or selling of the same. A violation of this provision carries a maximum penalty of three years imprisonment or a fine of $25,000, or both. It is important to note that the maintenance of the property must be *knowing*, or else no penalties attach. The Legislature apparently recognized the fact that lessors are typically unaware of the occurrences on their premises.

> **24:21-22. Prohibited acts D; fraud or misrepresentation by registered manufacturers or distributors; penalties.** a. It shall be unlawful for *any* person knowingly or intentionally:
>
> . . . .
>
> (3) To acquire or obtain possession of a controlled dangerous substance by misrepresentation, fraud, forgery, deception or subterfuge;
>
> . . . .
>
> b. Any person who violates this section shall be punished by imprisonment for not more than 3 years, or by a fine of not more than $30,000.00, or both. (emphasis added).

Though the title indicates that this section only concerns

violations by manufacturers or distributors, the language employed could cause this particular provision to be given a general application. Conceivably, an individual can be indicted under this section where he obtains controlled substances through the use of a forged prescription. The penalty imposed by this section is more severe than that which existed under old law.[37] The maximum punishment is imprisonment for three years, a $30,000 fine, or both; the previous penalty was six months imprisonment, a $500 fine, or both. It is to be noted that the old statute has not been repealed by the Act.[38] Instead, it has been relegated to the status of a catchall provision for substances not presently included under any of the Schedules.

> **24:21-24. Attempt, endeavor and conspiracy.** a. Any person who attempts, endeavors or conspires to commit any offense defined in this act is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the endeavor of conspiracy. . . .

The conspiracy charge involved with narcotics and other drug related offenses is usually the result of undercover investigations. For example, an agent may not be sold drugs by the person who first approaches him. Instead, that person will arrange the sale between the actual seller and the agent, his purpose being to obtain some of the illicit drugs from either the buyer or seller if he is a drug user or, in many instances, to obtain part of the profit. Formerly, such an offender would be charged with a violation of one of two provisions, depending upon the drug involved. If it was a narcotic drug, the statute employed would impart a penalty for a high misdemeanor.[39] In the case of a prescription legend drug the subject would be charged as a principal, and the penalty would come under the disorderly persons act.[40] Noteworthy, however, is that the previous conspiracy statute has not been

---

37 N.J. STAT. ANN. § 2A:170-77.15 (Supp. 1970), provides:

> Any person, who shall obtain, or attempt to obtain, possession of, or procure, or attempt to procure, the administration of, in any form, any depressant or stimulant drug, as defined pursuant to law, or any other prescription legend drug, which is not a narcotic drug within the meaning of chapter 18 of Title 24 of the Revised Statutes, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address, is a disorderly person.

See also N.J. STAT. ANN. § 24:18-39 (Supp. 1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970).

38 N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970). *See* note 23 *supra*.

39 *See* N.J. STAT. ANN. § 2A:98-1 (1970).

40 *See* N.J. STAT. ANN. § 2A:170-77.9 (Supp. 1970), *as amended*, N.J. STAT. ANN. § 2A:170-77.9 (R.S. Cum. Supp. 1970).

revised or repealed by the Act.[41] It is therefore possible for two people to commit the same offense and, depending upon which statute they are charged under, be subjected to different penalties.

> **24:21-26. Distribution to persons under age 18.** a. Any person who is at least 18 years of age who violates subsection 19a. (1) by distributing a substance listed in schedules I or II which is a narcotic drug to a person 17 years of age or younger who is at least 3 years his junior is punishable by a term of imprisonment of up to twice that authorized by subsection 19b. (1), (2) or (3) or by the fine authorized by subsection 19b. (1), or by both.
>
> b. Any person who is at least 18 years of age who violates subsection 19a. (1) by distributing any other controlled dangerous substance listed in schedules I, II, III, IV or V to a person 17 years of age or younger who is at least 3 years his junior is punishable by a term of imprisonment up to twice that authorized by subsections 19b. (2) or (3), or by the fine authorized by subsections 19(b). (2) or (3), or both.

Basically, this section provides that anyone 18 years or over who distributes a controlled dangerous substance to a person 17 years or younger and who is at least three years his junior is punishable by up to double the imprisonment or fine provided for the substantive offense, or both. Again, it should be noted that this section does not apply to mere possession of marihuana. Instead, it is aimed at the pusher who preys on youth.

Under New Jersey's previous statute,[42] which this Act repeals, any person over 21 years of age who sold, administered or dispensed any narcotic drug to any person under the age of 18 years was guilty of a high misdemeanor, punishable by a fine of not less than $2,000 or more than $10,000 and by imprisonment for not less than two years to a maximum of life. Marihuana was included under this statute on the basis of its previous classification as a narcotic drug. However, no prescription legend drugs were included.

Notwithstanding the above provisions, a drug addict 18 years of age or older who uses a child under that age to carry, sell, prepare or offer for sale marihuana is, regardless of the difference between their ages, guilty of a high misdemeanor.[43] If such an offender is a non-addict, he is guilty of a high misdemeanor and punishable by "imprisonment for not more than 30 years except upon the affirmative

---

41 N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970). *See* note 23 *supra*.

42 N.J. STAT. ANN. § 24:18-47 (1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970).

43 N.J. STAT. ANN. § 2A:96-5 (1969).

recommendation of the jury of life imprisonment in which case the punishment shall be imprisonment for life."[44]

24:21-27. Conditional discharge for certain first offenses; expunging of records. a. Whenever any person who has not previously been convicted of any offense under the provisions of this act or, subsequent to the effective date of this act [chapter], under any law of the United States, this state or of any other state, relating to narcotic drugs, marihuana, or stimulant, depressant, or hallucinogenic drugs, is charged with or convicted of any offense under subsections 20a. (1), (2) and (3), and b., the court, upon notice to the prosecutor and subject to subsection c., may on motion of the defendant or the court:

(1) Suspend further proceedings and with the consent of such person after reference to the Controlled Dangerous Substances Registry Act of 1970, place him under supervisory treatment upon such reasonable terms and conditions as it may require; or

(2) After plea of guilt or finding of guilt, and without entering a judgment of conviction, and with the consent of such person after proper reference to the controlled dangerous substances registry as established and defined in the Controlled Dangerous Substances Registry Act of 1970, place him on supervisory treatment upon such reasonable terms and conditions as it may require, or as otherwise provided by law.

b. In no event shall the court require as a term or condition of supervisory treatment under this section, referral to any residential treatment facility for a period exceeding the maximum period of confinement prescribed by law for the offense for which the individual has been charged or convicted, nor shall any term of supervisory treatment imposed under this subsection exceed a period of 3 years. Upon violation of a term or condition of supervisory treatment the court may enter a judgment of conviction and proceed as otherwise provided, or where there has been no plea of guilt or finding of guilt, resume proceedings. Upon fulfillment of the terms and conditions of supervisory treatment the court shall terminate the supervisory treatment and dismiss the proceedings against him. Termination of supervisory treatment and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly persons offense but shall be reported by the clerk of the court pursuant to the Controlled Dangerous Substances Registry Act. Termination of supervisory treatment and dismissal under this section may occur only once with respect to any person. Imposition of supervisory treatment under this section shall not be deemed a conviction for the pur-

44 N.J. STAT. ANN. § 2A:96-5.1 (1969).

poses of determining whether a second or subsequent offense has occurred under section 29 of this act or any law of this state.

c. Proceedings under this section shall not be available to any defendant unless the court in its discretion concludes that:

(1) The defendant's continued presence in the community, or in a civil treatment center or program, will not pose a danger to the community; or

(2) That the terms and conditions of supervisory treatment will be adequate to protect the public and will benefit the defendant by serving to correct any dependence on or use of controlled substances which he may manifest.

Perhaps the section most typifying legislative insight into the drug dilemma is this section dealing with the conditional discharge for certain first offenses. It applies to any offender not previously convicted under any state or federal law relating to narcotic drugs, marihuana, stimulants, depressants or hallucinogenic substances. In essence, it provides that if anyone is charged with or convicted of mere possession, use or being under the influence of *any* controlled dangerous substance, the court may suspend further proceedings or, after a plea or finding of guilt, place such person under supervisory treatment for a maximum three year period, but residential treatment shall not exceed the maximum period prescribed for the offense. Upon fulfillment of the conditions of supervisory treatment the court shall, without an adjudication of guilt, terminate such treatment and dismiss the proceedings. However, this dismissal may occur only once with respect to any person. Imposition of supervisory treament, though it may follow a finding of guilt, is not a conviction for purposes of determining whether a second or subsequent offense has occurred under section 29 of the Act.

One important qualification does exist which is capable of denying an offender the benefits of this section. The judicial conclusion that the defendant's presence in the community or civil treatment program will not endanger the community or that the conditions of treatment adequately protect the public and benefit the defendant is made a condition precedent.

The motive behind this section was to markedly enhance the effectiveness of a court when dealing with first offenders. As exemplified in *State v. Ward*,[45] it is within a judge's discretion to suspend a sentence with an appropriate term of probation. The true import of this section is to discharge certain first offenders without entering a judgment of

[45] 57 N.J. 75, 270 A.2d 1 (1970).

conviction, while providing treatment and rehabilitation for correcting any dependence on or use of dangerous substances.

> **24:21-28. Expunging of records of young offenders placed on probation.** After a period of not less than 6 months, which shall begin to run immediately upon the expiration of a term of probation imposed upon any person under this act, such person, who at the time of the offense was 21 years of age or younger, may apply to the court for an order to expunge from all official records, except from those records maintained under the controlled dangerous substance registry, as established and defined in the Controlled Dangerous Substances Registry Act of 1970, all recordations of his arrest, trial and conviction pursuant to this section. If the court determines, after a hearing and after reference to the controlled dangerous substances registry, that such person during the period of such probation and during the period of time prior to his application to the court under this section has not been guilty of any serious or repeated violation of the conditions of such probation, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied prior to such arrest and trial. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest or trial in response to any inquire made of him for any purpose.

This section affords far greater relief than was heretofore available. Previously, the only remedy available to an offender was an expungement of the record of conviction, and that only after the lapse of a ten year period.[46] The new section expunges all official records, including all recordations of arrest, trial and conviction, thereby restoring a person to the status he enjoyed prior to his arrest. However, these opportunities apply only to persons who were 21 years of age or younger at the time of the offense. A person over that age is forced to submit to the more stringent and less rehabilitative nature of the old law. This latter drawback is not in keeping with the overall mature approach of the Act.

> **24:21-29. Second or subsequent offenses.** a. Any person convicted of any offense under this act, if the offense is a second or subsequent offense, shall be punished by a term of imprisonment of up to twice that otherwise authorized, by up to twice the fine otherwise authorized, or by both; provided, however, that this section shall not apply to section 20a. (2) and (3) and b. offenses.
>
> b. For purposes of this section, an offense shall be considered

[46] *See* N.J. STAT. ANN. § 2A:164-28 (1970).

> a second or subsequent offense, if, prior to the commission of the offense, the offender has at any time been convicted of an offense or offenses under this act or under any law of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

One of the more rigid aspects of the Act is the provision covering second or subsequent offenders. Under its terms any person convicted of a second or subsequent offense for violating the Controlled Dangerous Substances Act is subject to a double penalty. Important to note is that this section does not apply to mere possession of marihuana, hashish, or any Schedule V substance, or to use or being under the influence of any controlled substance. This is true even though the violations for these offenses may be high misdemeanors in certain instances. However, a second offense for dispensing or possession with intent to dispense marihuana would subject such a violator to the double penalty provision.

Under New Jersey's prior law,[47] subsequent violations pertaining to narcotic drugs, including marihuana, subjected the violator to a maximum penalty of a $5,000 fine and imprisonment for 25 years for a second offense, and a maximum penalty of a $5,000 fine and imprisonment for life for a third or subsequent offense. Although marihuana was classified under this section, many drugs now included in the double penalty statute were not.[48]

> **24:21-35. Nuisances and forfeitures.** a. The maintenance of any building, conveyance or premises whatever which is resorted to by persons for the unlawful manufacture, distribution, dispensing, administration or use of controlled dangerous substances shall constitute the keeping of a common nuisance.
>
> . . . .

This section pertains to *any* controlled dangerous substance. Prior to its enactment, one statute relating to narcotic drugs[49] and a second general habitual nuisance statute[50] constituted the law. Illegal drugs, other than those of a narcotic nature or origin, used on the premises were not covered under the narcotic drug nuisance statute.

> **24:21-39. Reports by practitioners of drug dependent persons.**

47 N.J. STAT. ANN. § 24:18-47 (Supp. 1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970).

48 For example, LSD and "speed" were not included under the previous law. However, the double penalty provision would be applicable under the Act.

49 N.J. STAT. ANN. § 24:18-37 (1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970).

50 N.J. STAT. ANN. §§ 2A:130-1 *et seq.* (1970).

> Every practitioner, within 24 hours after determining that a person is a drug dependent person by reason of the use of a controlled dangerous substance for purposes other than the treatment of sickness or injury prescribed and administered as authorized by law, shall report such determination verbally or by mail to the commissioner of the state department of health. Such a report by a physician shall be confidential and shall not be admissible in any criminal proceeding. The commissioner, in his discretion, may also treat any other reports submitted under this section as confidential if he determines that it is in the best interest of the drug dependent person and the public health and welfare. A practitioner who fails to make a report required by this section is a disorderly person.

This section makes a report by a physician mandatory and differs considerably from its predecessor.[51] Under the latter, a practitioner was required to report only narcotic drug violations. However, the Act now extends this to all controlled dangerous substances, including amphetamines and barbiturates. Previously, reports were to be made to the Superintendent of State Police and there was no provision for confidentiality or admissibility in a criminal proceeding. Judging from the variations between the two statutes, it is apparent that the emphasis has shifted toward an awareness of the need for rehabilitation rather than prosecution of a drug dependent person.

AMENDED STATUTES

Prior to the enactment of the new law, N.J. STAT. ANN. §§ 2A:170-77.8 and 77.9 (Supp. 1970) made sale, dispensing, possession, use or under the influence of a non-narcotic drug a disorderly persons violation. The Controlled Dangerous Substances Act has amended these statutes so as to make sale, dispensing, possession, use or under the influence of a prescription drug, which is *not* a stimulant, depressant or narcotic drug nor a drug currently classified under the Act, a violation of the disorderly persons act.[52] In effect, these two statutes are relegated to the status of catchall sections.

---

51 N.J. STAT. ANN. §§ 24:18-24.1, 24.2 (1970), *as amended*, N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970).

52 N.J. STAT. ANN. § 2A:170-77.8 (R.S. Cum. Supp. 1970):

Unlawful possession of prescription legend drugs.

Except as hereinafter provided, any person who uses or is under the influence of, or who possesses or has under his control, in any form, any prescription legend drug which is not a narcotic, depressant or stimulant drug or controlled dangerous substance within the meaning of existing law, unless obtained from, or on

GUIDELINES FOR COMMON VIOLATIONS

The following list is intended as an aid in identifying some common drug violations, the applicable statute under the Act, and the penalties prescribed therein. To facilitate a more thorough understanding of the guidelines it should be recognized that the maximum penalty for a high misdemeanor, except for distributing of a narcotic drug, is imprisonment for five years or a fine of $15,000, or both. Where there is distributing of a narcotic drug under Schedules I and II, the maximum penalty is imprisonment for twelve years or a fine of $25,000, or both. The maximum misdemeanor penalty is one year imprisonment or a fine of $5,000, or both. The maximum penalty imposed for any disorderly persons violation is six months imprisonment or a fine of $500, or both. Furthermore, the penalty for mere possession of a non-narcotic substance, other than those found in Schedule V, is uniform.

DRUG	VIOLATION	SECTION	PENALTY
Amphetamine[53]	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor
Barbituric Acid	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor
Hashish	Possession (over 5 grams)	20(a)(3)	High Misdemeanor
	Possession (5 grams or under)	20(a)(3)	Disorderly Person
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor
Heroin	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(1)	High Misdemeanor
LSD	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor

a valid prescription of, a duly licensed physician . . . is a disorderly person . . . .

N.J. STAT. ANN. § 2A:170-77.9 (R.S. Cum. Supp. 1970):

Unlawful sale of prescription legend drugs.

Except as hereinafter provided, any person who sells, dispenses or gives away, in any form, any prescription legend drug which is not a narcotic, depressant or stimulant drug or controlled dangerous substance within the meaning of existing law, is a disorderly person.

[53] Although amphetamines may be found in Schedules I, II and III, because of their non-narcotic classification the applicable statutes and penalties are the same.

DRUG	VIOLATION	SECTION	PENALTY
Marihuana	Possession (over 25 grams)	20(a)(3)	High Misdemeanor
	Possession (25 grams or under)	20(a)(3)	Disorderly Person
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor
Mescaline	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor
Methadone	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor
Methamphetamine	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor
Opium (I, II, III)	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(1 or 2)	High Misdemeanor
Opium (V)[54]	Possession	20(a)(2)	Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(3)	Misdemeanor
Peyote	Possession	20(a)(1)	High Misdemeanor
	Use or Influence	20(b)	Disorderly Person
	Distributing	19(b)(2)	High Misdemeanor

[54] Opium may be found in Schedules I, II, III and V. However, the applicable statutes and penalties are the same for the first three Schedules only. *See* note 11 *supra* for Schedule I opium. Schedule II opium places no quantitative limitation. Schedule III provides:

> f. Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:
>
> (1) Not more than 1.80 grams of codeine or any of its salts per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.
>
> . . . .
>
> (7) Not more than 500 milligrams of opium or any of its salts per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

Opium is not included in Schedule IV. Schedule V provides:

> c. Any compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, which also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:
>
> . . . .
>
> (5) Not more than 100 milligrams of opium or any of its salts per 100 milliliters or per 100 grams.

SOME FORESEEABLE PROBLEMS

With such a sweeping change in the area of drug laws as occasioned by the New Jersey Controlled Dangerous Substances Act, many problems inevitably arise. Some of them will be explored and, where feasible, solutions proposed.

A problem that existed even prior to the effective date of the Act concerned the handling of pending proceedings, including those arising between the date of enactment and the date the law took effect.[55] The Legislature approached this problem with N.J. STAT. ANN. § 24:21-40 (R.S. Cum. Supp. 1970), which provided that any violation occurring prior to the effective date of the Act was not affected or abated by the repealer section.[56] In addition, all pending proceedings on such date were to be continued and brought to final determination according to the prior law. In spite of this attempt, serious problems have arisen occasioning deep sentiment by the judiciary, obviously distressed with the unfairness of the situation. Such discontent was exemplified by the *Ward* decision,[57] where the supreme court apparently aimed at taking up some legislative slack. It was possible that someone arrested for possessing a small quantity of marihuana on January 16, 1971, could be found guilty of a high misdemeanor and sentenced to a maximum 15 years imprisonment. However, had the offense occurred the following day such person would only have committed a disorderly persons violation and hence risk a maximum six month term. It appears that in the best interest of all parties the courts could have viewed the specific offense involved. If the Act had not made any substantial changes regarding the particular offense, the courts could have proceeded under the old law. If, however, as in the case of possessing small amounts of marihuana, prior law was significantly altered, rudimentary fairness would suggest taking advantage of the terms of the new statute.[58] On the other hand, where the penalty was markedly increased, as in the case of LSD, the prior law would have to be applied as invocation of the Act might be subject to constitutional objections.[59]

---

55 The New Jersey Controlled Dangerous Substances Act was enacted October 19, 1970, amended January 15, 1971, effective January 17, 1971.

56 N.J. STAT. ANN. § 24:21-45 (R.S. Cum. Supp. 1970). *See* note 23 *supra.*

57 *See* note 34 *supra.*

58 Another example is the license forfeiture provision which was *mandatory* under prior law. Reluctance to report a conviction during this period to the Director of Motor Vehicles, to effect the forfeiture, is understandable in light of the *discretionary* nature of the new law. *See* N.J. STAT. ANN. § 24:21-20(c) (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-20(c) (R.S. Cum. Supp. 1970).

59 The Constitution of the United States contains a prohibition against the enact-

Another potential problem area is the narcotic registration requirement under N.J. STAT. ANN. §§ 2A:169A-1 *et seq.* (1953). In effect, this statute requires any person convicted of a narcotic drug offense to register[60] and carry an identification card.[61] Prior to the Act, marihuana was classified as a narcotic drug, a status it has relinquished.[62] Therefore, many marihuana offenders were compelled to comply with these provisions. Since future violators will not be so required, the obvious question is what position former offenders occupy. Are they still required to register and carry identification or are they excused because of the change of the marihuana classification?

A wide range of difficulties result from the inherent impracticalities with the Act's weight requirements. A hypothetical best illustrates this law enforcement impediment. Assuming a person was arrested before the Act for possession of three envelopes of marihuana, a chemist would randomly select one envelope for analysis.[63] The Act renders this procedure legally inexpedient. The chemist is now constrained to analyze the contents of each envelope. Consider an arrest for possession of one envelope of marihuana and the subsequent seizure of three additional envelopes in the rear of the patrol car.[64] Problems materialize should the police combine the contents of the single envelope with those constructively possessed, but subsequently held inadmissible at the arrestee's trial. Since weight is determinative of the ultimate charge, the police are precluded from holding someone for possession of one envelope where its contents have been hopelessly commingled. Failure to segregate the respective substances forfeits any possibility of establishing the weight of the marihuana in the lone envelope or determining if any marihuana was indeed present. The situation is unchanged though the arresting officers testify to identifying the contents of the envelope as marihuana or a chemical analysis proves marihuana particles were found among the contents of the four envelopes.

In order to obviate problems of this nature, specimens found in

---

ment of ex post facto laws which the Supreme Court has defined to include statutes which increase the punishment for a crime already committed. *See* 16 AM. JUR. 2D *Constitutional Law* § 402 (1964).

60 N.J. STAT. ANN. § 2A:169A-2 (1953).

61 N.J. STAT. ANN. § 2A:169A-4 (1953).

62 N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1971), *amending* N.J. STAT. ANN. § 24:21-2 (R.S. Cum. Supp. 1970). *See* note 23 *supra*. *See also* N.J. STAT. ANN. § 24:21-5(e) (R.S. Cum. Supp. 1970) (quoted note 12 *supra*).

63 Address by Mr. William Seligman, note 9 *supra*.

64 This is commonplace where a suspect transported to police headquarters had endeavored first to dispose of any remaining incriminating evidence.

one location should not be combined with those found in another. They should be weighed separately to determine whether the weight of either or both exceeds 25 grams. By separately weighing specimens found in each location, a determination as to whether to charge a disorderly persons violation or a high misdemeanor may be made, though a court subsequently suppresses some of the evidence upon the grounds of an illegal search and seizure.[65]

A second issue involving weight requirements accounts for further law enforcement obstacles. Marihuana by nature gains or loses moisture, hence weight, according to general atmospheric conditions such as temperature and humidity.[66] The problem with the Act concerns the imposed gram limitation and any appreciable weight change since the substance was seized. The approximate weight of marihuana can fluctuate up to 10%, a dilemma immediately confronting the chemist.[67] Chemical analysis usually occurs after the seized marihuana has been in a laboratory safe for 24 hours and has reached its stable room weight. However, the stable room weight of marihuana is not its true weight at any given time.[68] Consequently, it is possible that a person arrested for unlawful possession of 27 grams of marihuana, a high misdemeanor, could receive a downgraded penalty because its weight was reduced to under 25 grams, to which only a disorderly persons offense attaches. The reverse situation could be tragic. An offender apprehended with only 23 grams which when analyzed weighed over 25 grams because of atmospheric conditions, could suffer five years in jail instead of six months.[69]

---

65 A related problem concerns the labeling of substances submitted to chemists for analysis. For example, a search might reveal a container of marihuana in a defendant's pocket and another envelope on the floor several feet away. The containers should be placed in separate property envelopes with specific labels as to where each was found and the name or names of specific defendants against whom they are going to be used. This is particularly important since a court may later find that one of the containers was obtained by virtue of an illegal search but conclude that the other container was seized in compliance with the fourth amendment.

66 Address by Mr. William Seligman, note 9 *supra*. The fact that low temperatures inhibit marihuana seeds from germinating poses another dilemma. An individual could be arrested with 100 grams of seeds (over three ounces) yet escape all punishment because he was apprehended in the winter and the seeds failed to germinate because of the cold temperature. On the contrary, a person found with only one seed could receive six months imprisonment if he was so unfortunate as to be arrested in the summer.

67 Chemical tests recently performed at the request of Essex County Prosecutor Joseph P. Lordi have indicated that the moisture content of marihuana may cause as much as a 10% variation. This means the moisture content of a specimen with a gross weight of 25 grams may be as much as 2.5 grams.

68 Address by Mr. William Seligman, note 9 *supra*.

69 Admittedly, this might be the extreme. In all probability, arrests for 26 or 27 grams of marihuana will be downgraded.

It is a scientific fact that computing the true weight of marihuana is prodigious once it has been ingrained with certain matter.[70] For example, police regularly make seizures of marihuana that has been mixed with other substances such as tobacco or oregano. For the chemist, the outlook is discouraging. He might be confronted with the unenviable task of weighing only the marihuana particles. An amendment to the Act would provide a workable solution by removing some of its literal requirements. Unlawful possession of marihuana could be made to read *unlawful possession of more than 25 grams of any mixture, any part of which is marihuana.* This change will make clear exactly what the 25 grams must consist of.[71]

The weight of the evidence will be taken quite literally by New Jersey's police enforcing the new law on possession of marihuana and hashish.[72] This is not to imply that law enforcement members will be required to carry scales and weigh any drugs taken as evidence. Confiscated substances are sent by individual police departments to either the New Jersey State Police Laboratory in Trenton, the Federal Bureau of Narcotics and Dangerous Drugs in New York City, or to a qualified private facility. There the substances to be used as evidence are analyzed and a report submitted as to identification and quantity. Many police departments will likely be equipped with field kits which will provide an on-the-spot analysis of a suspected substance seized as the basis of an arrest. If it is obvious that the weight of the drug is below the statutory limit, the suspect will be charged on a disorderly persons complaint. Where there are doubts as to weight, the higher offense will invariably be charged, the theory being that if the laboratory weight report warrants the lesser charge, the original charge can be downgraded. But reluctance on the part of some police personnel to assume responsibility in weighing is understandable. An alert defense attorney could immediately challenge an officer's qualifications as a weigh-

70 Address by Mr. William Seligman, note 9 *supra.*

71 It is arguable as to whether marihuana is defined under the Act as pure, or as mixed or compounded with other substances; *see* note 25 *supra.* When the quantity of a substance seized slightly exceeds the 25 gram limitation, caution should be exercised in determining whether the offense is indictable or is a disorderly persons violation. In close cases, local law enforcement agencies should consider the potential variations in weight caused by foreign material or moisture. The better policy appears to be to charge the nonindictable offense.

72 Recent chemical tests have disclosed that specimens of hashish generally include foreign material and moisture. However, the percentage of weight variation is not nearly as great compared to marihuana. Address by Mr. William Seligman, note 9 *supra.* Nevertheless, when the quantity of hashish slightly exceeds the five gram limit, the accused will probably be afforded the benefit of the doubt and charged with the disorderly persons violation.

master. No diligent policeman would risk jeopardizing a case on which he has been working for weeks, only to have it dismissed on such a technicality.

Quite apparent from this discussion, legal handicaps surrounding weight determinations are predestined as effective defense strategy. Attacking the accuracy of the scale[73] or the atmospheric conditions is illustrative. Indeed, the rate of judgments for acquittal and motions to suppress evidence will flourish until these problems are resolved. Judge-made guidelines only risk prolonging and further complicating the issue.[74] The need for clarifying legislation is imminent. Establishing a maximum moisture change index to replace the unduly restrictive aspects of the Act is suggested.

As already demonstrated, the Act has burdened New Jersey chemists with much responsibility. However, moral and ethical considerations also hang in the balance. The circumstances surrounding his chemical analysis, such as time, place, temperature or humidity, are all discretionary and not regulated by the Act in any manner. Thus, a chemist's laboratory techniques can spell the difference between a five year or six month prison term. It will be interesting to see how the judiciary will handle defense allegations that laboratory weight is, for example, partly water.

Although a serious problem before the Act, the absence of adequate laboratory facilities now carries grave ramifications. If unidentifiable substances are seized,[75] the suspect must nevertheless be charged. Municipalities must then forward the drugs through proper channels for analysis, a process which could take six weeks or more to complete. In the interim, the defendant might have to be confined to an already overcrowded county jail. Problems with unrecognizable drugs did not

---

73 The substances seized must be weighed on an accurate scale. Weighing devices employed in making this determination should be calibrated and regularly tested to insure their reliability.

74 For example, it appears that a judge will have to charge the jury, under an indictment for a high misdemeanor for possession of marihuana, to find that the possession was more than 25 grams. If a jury returns a verdict of guilty of possession but finds that the defendant had only 20 grams, the guilty verdict for the high misdemeanor cannot be entered. Such a verdict would also be barred as a conviction for a disorderly persons offense as that is not within the province of the jury.

75 In determining the nature of a particular tablet or capsule, reference should be made to the *Physicians Desk Reference*. This catalog contains photographic reproductions and descriptions of most tablets and capsules and discloses their chemical content. Copies may be obtained from Medical Economics Inc., a subsidiary of Chapman-Reinhold, Inc., Oradel, New Jersey. Another informative manual in this field is entitled *The 300 Most Abused Drugs*, by Edward Ludworth. Copies may be obtained by writing to Trend House, Post Office Box 2530, Tampa, Florida 33601.

plague police before the Act. The substance, usually in a pill, capsule, or tablet form, was classified as a prescription legend drug violative of N.J. STAT. ANN. § 2A:170-77.8 (Supp. 1970). The Legislature was remiss by failing to make additional analysis centers available to facilitate the required procedures under the Act.

Other problems will arise as the transition progresses. As with any new legislation, there exists concern over judicial interpretation. Too vigorous an effort by the bench could delay a full realization of the import of the changes. The judiciary should approach its responsibility with a cautious attitude, conscious that its good faith actions might be criticized as being legislative in nature.

CONCLUSION

The New Jersey approach to drug law revision signals the advent of an enlightened era. The thoroughness of the Act is readily ascertainable. Indeed, achieving an elementary understanding of its import necessitates tedious efforts even for the well-informed. The provisions are many, the changes drastic; and to effectuate its goals some responsible state office or agency should have taken steps to insure that its ramifications were understood in all quarters. The undeniable confusion that beset not only law enforcement personnel but lawyers, prosecutors and judges alike should have been lessened.

Although the legislative intent toward a more realistic approach to the drug problem is evidenced by the Act, it is questionable as to whether that goal will be attained. The purported purpose of the legislation was toward rehabilitation of the offender, not punishment. However, it is obvious that although more stringent penalties are imposed in some cases and reduced in others, little consideration is given toward the establishment and maintenance of rehabilitation centers or programs. It is tragic that the current opportunities for rehabilitation are at best minimal. The answer, it would seem, lies in an organized program to expand and improve rehabilitation procedures.

Directly relevant to the need for improved drug centers is the questionable use of incarceration for drug offenders. It is clear that our penal system is anything but an aid to reformation and rehabilitation; indeed, penal institutionalization fosters drug abuse instead of hindering it.

New Jersey's trek down the road to total awareness of the drug dilemma must be commended. Its approach of considering the relative

harm of the various drugs is realistic. But though the effort is praiseworthy, the Legislature should not lose sight of the distant horizon of total drug reform.

Anthony J. Fusco, Jr.
Stephen A. Pepe