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DO THE SENTENCING PROVISIONS OF THE NEW YORK DRUG LAWS CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?—*PEOPLE V. BROADIE*

People are terrorized by the continued prevalence of narcotic addiction and the crime and human destruction it breeds.

—Nelson Rockefeller, Governor's
Annual Message to the New York
State Legislature, January 3, 1973

In the United States the distribution of narcotic drugs was first regulated in 1914 with the passage of the Harrison Narcotics Act.¹ Prior to that enactment, opiates, although readily available, were not viewed as a menace, and were often used by normally socialized and productive citizens.² After the passage of the Act, addicts were required to buy drugs on the black market. Unfortunately, these drugs were often adulterated and contaminated.³ Over the years, drug penalties were made more severe by both federal and state laws. Prices increased without any noticeable decrease in supply,⁴ and ultimately, an increase in drug related crimes followed each price increase.

Within this milieu,⁵ the criminal laws proved unsuccessful in the con-

1. Pub. L. No. 63-223, 38 Stat. 785 (Dec. 17, 1914). Although the act was originally passed as a measure for taxing and reporting the sale of opiates, it was later used to control their sale. For a discussion of various legal developments concerning the Harrison Act, see E. BRECHER, *LICIT AND ILLICIT DRUGS* 48-50 (1972) [hereinafter cited as BRECHER]; Israel & Denardis, *The Irrationality of a Law Enforcement Approach to Opiate Narcotics*, 50 J. URBAN L. 631, 636-43 (1973) [hereinafter cited as Israel & Denardis]; King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L. J. 736 (1953) [hereinafter cited as King].

2. BRECHER 3-20, 33-44; O. RAY, *DRUGS, SOCIETY, AND HUMAN BEHAVIOR* 187-90 (1972) [hereinafter cited as RAY].

3. BRECHER 47, 96, 101; Israel & Denardis 645-46, 655-56; RAY 195.

4. Although the supply of heroin remained unchanged from the early 1920's until 1952, the price rose from \$25 to \$50 an ounce in the 1920's to \$3000 an ounce in 1952. BRECHER 58; COMMISSION TO STUDY AND REVIEW THE PENALTY PROVISIONS OF THE NEW JERSEY CONTROLLED DANGEROUS SUBSTANCES ACT AND TO STUDY THE NATURE AND SCOPE OF THE STATE'S DRUG TREATMENT PROGRAMS, *FIRST REPORT TO THE LEGISLATURE* 168 (Oct. 1974) [hereinafter cited as N.J. DRUG STUDY COMM.], cited in Brief for the Defendants McNair and Mosley, at 23, *People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975).

5. For an excellent and well-documented history and sociology of narcotic use, see BRECHER 1-192, 528-32. See also Brief for the Defendants McNair and Mosley, *supra* note 4, at 18-50, 103-13; J. DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS AND MORAL JUDGMENT* (1970); FORD FOUNDATION DRUG ABUSE SURVEY PROJECT, *DEALING WITH DRUG*

trol of drug use.⁶ Detoxification programs also failed.⁷ Because of the physiological and psychological phenomena symptomatic of narcotics addiction,⁸ only a small minority of narcotics addicts have been successfully detoxified. Most have either returned to the use of narcotics or fallen victim to other serious problems such as alcoholism, barbiturate addiction, or insanity.⁹

The experience of the State of New York in this matter, while admittedly quantitatively unique,¹⁰ has demonstrated the futility of addressing the narcotics problem through the criminal justice system. Nevertheless, in his 1973 annual message to the New York State Legislature, Governor Nelson Rockefeller placed great emphasis on the need for toughening the state drug laws.¹¹ He discussed the "reign of fear" created by drug abuse and indicated that people have "lost patience with the courts" in dealing with the problem. He spoke of how all attempts at education and treatment had failed,¹² of how police efforts to enforce the law were frustrated by suspended sentences and plea bargaining, and of the need for a more effective deterrent to drug use.¹³ With considerable speed, the legislature enacted a series of drug statutes which became effective on September 1, 1973.¹⁴ New York sentencing provi-

ABUSE (1972); RAY 180-210; E. ZINBERG & J. ROBERTSON, *DRUGS AND THE PUBLIC* (1972); Israel & Denardis, *supra* note 1; King, *supra* note 1; Lindsmith, *The Narcotic Lobby and the Drug Problem*, 8 VAL. L. REV. 591, 592-603 (1974). *But see* D. LOURIA, *THE DRUG SCENE* (1968).

6. BRECHER 64-100; Israel & Denardis 664-75; King, *supra* note 1; RAY 190-93.

7. BRECHER 64-89.

8. *See* RAY 197-208; Israel & Denardis 648-52. Although the withdrawal symptoms last for a relatively short period of time, the neurophysiological changes created by the drug and thus the severe craving for narcotics lasts for many years. BRECHER 66-78.

9. BRECHER 85-89. Therapeutic communities are successful only so long as the addict remains within the community. Most addicts who leave such communities return to their drug addiction. *Id.* at 78-85.

10. *People v. Broadie*, 37 N.Y.2d 100, 116, 332 N.E.2d 338, 345, 371 N.Y.S.2d 471, 480 (1975). *Citing* BRECHER 72, the court noted that half of the nation's addict population is located in New York City.

11. Annual Message of the Governor, Jan. 3, 1973 [hereinafter cited as Annual Message of the Governor], in N.Y. SESS. LAWS at 2309, 2317-19 (McKinney 1973).

12. It is unclear whether this was actually the case. There exists statistical evidence indicating that in New York there was a decline in heroin use, heroin related deaths, and heroin related crimes prior to the enactment of the new laws. These statistics were reported by the N.J. DRUG STUDY COMM. 162, *cited in* Brief for the Defendants McNair and Mosley, *supra* note 4, at 23. The statistics were possibly a result of the success of the Dole-Nyswander methadone maintenance program used in New York. *See* note 91, *infra*.

13. Annual Message of the Governor, *supra* note 11, at 2317-19.

14. N.Y. SESS. LAWS chs. 276, 277, 278, 1051 (McKinney 1973). For a comprehensive discussion of the changes created by these statutes see Signorelli, *A Judicial Analysis and Critique of the New Drug and Sentencing Laws*, 46 N.Y. ST. B. J. 9 (1974). For an

sions for the possession or sale of controlled substances are the most severe in the nation. These laws, which apply to most categories of drug offenses,¹⁵ include indeterminate sentences with mandatory minimums and a mandatory maximum of life imprisonment;¹⁶ limited opportunities for a suspended sentence;¹⁷ parole only after serving the minimum sentence;¹⁸ severe limitations on plea bargaining;¹⁹ and the disallowance

excellent discussion and criticism of the New York drug laws and applicable cases, see Note, *Drug Abuse, Law Abuse, and the Eighth Amendment: New York's 1973 Drug Legislation and the Prohibition Against Cruel and Unusual Punishment*, 60 CORNELL L. REV. 638 (1975).

Both the New York Times, Nov. 10, 1974, at 1, col. 5 (city ed.) and June 25, 1974, at 1, col. 2; and the New York Post, Sept. 4, 1974, at 3, col. 1, reported that there was no noticeable decrease in drug traffic in the first year after the effective date of the new laws. Rather, the result has been to make the drug traffic more circumspect and to increase the cost of the drugs. N.Y. Times, June 25, 1974, at 60, col. 1, 3; N.Y. Post, Sept. 4, 1974, at 64, col. 4. The only real success of the law has been the creation of important informants. N.Y. Times, Nov. 10, 1974, at 72, col. 4 (city ed.); N.Y. Post, Sept. 4, 1974, at 64, col. 1. This gain, however, has been offset by the subsequent reticence of some prosecutors to prosecute to the full extent of the law. N.Y. Times, Nov. 10, 1974, at 72, col. 4 (city ed.); N.Y. Times, June 25, 1974, at 60, col. 1.

15. Class A felonies are now subclassified as A-I, A-II, and A-III felonies. N. Y. PENAL LAW ANN. § 55.05 (McKinney 1975). The controlled substances offenses include seven degrees of criminal possession and six degrees of criminal sale. *Id.* §§ 220.00 *et seq.* (McKinney Supp. 1974-75). First, second, and third degree criminal possession or sale are classified as A-I, A-II, and A-III felonies, respectively. These offenses involve small amounts of controlled substances. Sale or possession with intent to sell any amount of a narcotic drug is at least an A-III felony. *Id.* §§ 220.16, 220.39. For narcotic drugs, an aggregate weight standard is used; the degree of the offense is determined not by the actual amount of the drug, but rather by the total weight of the substance or mixture containing the drug. *Id.* §§ 220.00 *et seq.* If a drug offense is classified as an A-I, A-II, or A-III felony, the attempt to commit such an offense falls within the same felony classification as the actual commission of the offense. *Id.* § 110.05 (McKinney 1975).

1975 amendments to the penal law exclude methadone from the definition of "narcotic drug." N.Y. Sess. LAWS ch. 785, § 1 (McKinney 1975). These amendments reduced the penalties for methadone offenses, *id.* chs. 785, 786, and allowed for the resentencing of those convicted for methadone offenses under the 1973 laws. *Id.* ch. 783.

Under the pre-1973 statutes, criminal possession of a dangerous drug in the first degree was a class C felony. REVISED PENAL LAW OF 1965, N. Y. Sess. LAWS ch. 1030, § 220.20 (McKinney 1965), (repealed 1973), and the criminal sale of a dangerous drug in the first degree was a class B felony. *Id.* § 220.40.

16. N. Y. PENAL LAW ANN. §§ 70.00(2)(a), 70.00(3)(a) (McKinney 1975).

17. A suspended sentence or probation is not allowed, *id.* § 60.05(1), unless the defendant is providing material assistance in the investigation of drug offenses. *Id.* § 65.00(1)(b). Even then, the probationary sentence is for life. *Id.* § 65.00(3)(a)(ii).

18. N. Y. CORRECTION LAW ANN. § 212(3) (McKinney Supp. 1974-75). This release on parole is accompanied by lifetime supervision. *Id.* § 212(8).

19. If a person is indicted for a class A drug felony, he may not plead guilty to less than a class A felony. N. Y. CRIM. PROC. LAW ANN. § 220.10(6)(a) (McKinney Supp. 1974-75).

of civil commitment²⁰ and youthful offender treatment²¹ in many cases.²²

In recent months, the New York courts have examined the constitutionality of these laws.²³ In the trial level decision of *People v. Mosley*,²⁴ Judge Celli ruled that these laws were a violation of the cruel and unusual punishment clauses of article I, section 5 of the Constitution of the State of New York,²⁵ and of the eighth amendment to the United States Constitution.²⁶ This decision was quickly offset by *People v. Gardner*,²⁷ in which Justice Quinn ruled that the sentencing provisions of the drug laws were not cruel and unusual punishment and thus were constitutional.²⁸ Three appellate division decisions, *People v. Broadie*,²⁹ *People*

20. A narcotic addict charged with a class A felony may not be civilly committed to the Drug Abuse Control Commission. N. Y. MENTAL HYGIENE LAW ANN. § 81.25(b)(3) (McKinney Supp. 1974-75).

21. From 1971 to 1975 there was no youthful offender treatment for persons indicted for a class A felony. N. Y. SESS. LAWS ch. 981, § 1 (McKinney 1971), (repealed 1975). Although this provision remained unchanged by the 1973 amendments, its effect was drastically altered by reclassifying B, C, or D drug felonies as A-I, A-II, or A-III felonies. 1975 amendments to the criminal procedure law allow youthful offender treatment for those indicted for a class A-III felony. N. Y. SESS. LAWS ch. 832, § 1 (McKinney 1975).

22. In any event, the legislation is overreaching. The addict who possesses drugs for his own use suffers the same life sentence as the person who sells drugs. No differentiation is made between the addict selling to support his own habit and the importer or large dealer selling purely for profit. Further, the statute does not distinguish between those selling drugs to addicts and those selling drugs to non-addicts. Hallucinogens and other non-addictive drugs are incorrectly classified with the narcotic drugs traditionally associated with criminal activity. Both BRECHER 353-93 and RAY 212-49 provide a discussion demonstrating that hallucinogens are not as dangerous as commonly believed. See BRECHER 370-80 for a discussion of such popular misconceptions. For a well-documented discussion of the various categories of psychoactive drugs, see generally BRECHER, *supra* note 1, and RAY, *supra* note 2.

23. See notes 24-34 and accompanying text *infra*.

24. 78 Misc. 2d 736, 358 N.Y.S. 2d 1004 (Monroe County Ct. 1974), *rev'd sub nom.*, *People v. McNair*, 46 App. Div. 2d 476, 363 N.Y.S. 2d 151 (4th Dept. 1975), *appeal aff'd sub nom.*, *People v. Broadie*, 37 N.Y. 2d 100, 332 N.E. 2d 338, 371 N.Y.S. 2d 471 (1975). The defendant had pleaded guilty to a third degree criminal sale of a controlled substance, an A-III felony, and thus the defendant was subject to an indeterminate sentence with a mandatory maximum of life imprisonment. See notes 15-22 and accompanying text *supra*.

25. "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." N. Y. CONST. art. I, § 5.

26. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. CONST. amend. VIII.

27. 78 Misc. 2d 744, 359 N.Y.S. 2d 196 (Sup. Ct. Crim. Term, Westchester County Part II 1974).

28. Four subsequent trial court decisions reached the same result. *People v. Bullock*, 80 Misc. 2d 73, 362 N.Y.S. 2d 682 (Sup. Ct. Monroe County 1974); *People v. Wixson*, 79 Misc. 2d 557, 360 N.Y.S. 2d 818 (Sup. Ct. Crim. Term, Westchester County Part I 1974);

v. *Venable*,³⁰ and *People v. McNair*,³¹ subsequently upheld the constitutionality of the statutes against eighth amendment challenges.³² Recently, the New York Court of Appeals in *People v. Broadie*,³³ affirmed these appellate division decisions.³⁴ Before discussing these opinions, it is necessary to consider the constitutional framework of the eighth amendment.

The eighth amendment to the Constitution of the United States prohibits cruel and unusual punishment. The meaning of "cruel and unusual punishment" is flexible; it is not limited to that definition envisioned by the framers of the Constitution.³⁵ The Court in *Weems v.*

People v. Hollingsworth, 79 Misc. 2d 468, 360 N.Y.S. 2d 765 (Albany County Ct. 1974); *People v. Spencer*, 79 Misc. 2d 72, 361 N.Y.S. 2d 240 (Sup. Ct., Erie County 1974).

29. 45 App. Div. 2d 649, 360 N.Y.S. 2d 906 (2d Dept. 1974), *aff'd*, 37 N.Y. 2d 100, 332 N.E. 2d 338, 371 N.Y.S. 2d 471 (1975).

30. 46 App. Div. 2d 73, 361 N.Y.S. 2d 398 (3d Dept. 1974), *aff'd sub nom.*, *People v. Broadie*, 37 N.Y. 2d 100, 332 N.E. 2d 338, 371 N.Y.S. 2d 471 (1975).

31. 46 App. Div. 2d 476, 363 N.Y.S. 2d 151 (4th Dept. 1975), *aff'd sub nom.*, *People v. Broadie*, 37 N.Y. 2d 100, 332 N.E. 2d 338, 371 N.Y.S. 2d 471 (1975).

32. In upholding the statutes, two of the appellate division departments held that the unconstitutionality of a statute must be proved "beyond a reasonable doubt." *People v. McNair*, 46 App. Div. 2d 476, 482, 363 N.Y.S. 2d 157, 158; *People v. Broadie*, 45 App. Div. 2d 649, 650, 360 N.Y.S. 2d 906, 908 (the appellate court approved the trial court's use of the "beyond a reasonable doubt" test). This test was not mentioned by the New York Court of Appeals in *People v. Broadie*, 37 N.Y. 2d 100, 332 N.E. 2d 338, 371 N.Y.S. 2d 471 (1975), nor has the author found any support in the literature for it.

33. 37 N.Y. 2d 100, 332 N.E. 2d 338, 371 N.Y.S. 2d 471 (1975). A petition for writ of habeas corpus was filed on behalf of defendants McNair (No. Civ-75-422) and Mosley (No. Civ-75-416) with Judge Burke of the United States District Court for the Western District of New York. Phone conversation with Leslie Bradshaw (attorney for McNair and Mosley), Oct. 14, 1975. Oral argument is scheduled for Jan. 12, 1976. Phone conversation with Leslie Bradshaw, Dec. 2, 1975 .

34. Although most of the opinion concerned whether there was a violation of the eighth amendment, the appellants also challenged the statutes on equal protection grounds. The court of appeals dismissed this challenge in one sentence by stating:

The constitutional equal protection . . . arguments of appellants are not separately discussed because the same reasoning which supports the concededly and intendedly severe sentences, especially with regard to deterrence, would sustain, if valid, a reasonable classification between defendants in drug cases and in other cases.

People v. Broadie, 37 N.Y. 2d 100, 111, 332 N.E. 2d 338, 341, 371 N.Y.S. 2d 471, 475 (1975). The court made no attempt to support this assertion. Since the equal protection clause of the fourteenth amendment and the cruel and unusual punishment clause of the eighth amendment have separate historical developments, it is of questionable validity to say that the same analysis applies to both amendments.

35. Historical analysis indicates that the intent of the framers was to prohibit torture and excessive punishments. See, e.g., *Furman v. Georgia*, 408 U. S. 238, 258-63 (1972) (Brennan, J., concurring). Nevertheless, the Supreme Court has clearly stated that the

United States,³⁶ referring to the cruel and unusual punishment clause, stated: "The clause . . . may be therefore progressive, and is not fastened to the absolute, but may acquire meaning as public opinion becomes enlightened by a humane justice."³⁷ This theme was reiterated in *Trop v. Dulles*.³⁸ Chief Justice Warren, speaking for the Court, stated: "[T]he words . . . are not precise, and . . . their scope is not static. The Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society."³⁹ The more recent case of *Furman v. Georgia*⁴⁰ lends further support to this position.

Although it is clear that torture and other inherently cruel punishments violate the eighth amendment,⁴¹ a punishment need not be inherently cruel to be unconstitutional. The Supreme Court has used a number of tests to determine eighth amendment violations. For example, the Court in *Weems*⁴² applied a proportionality test to determine that a fifteen year sentence of hard labor followed by lifetime parole supervision for a false entry in a government expense account was excessive under the eighth amendment.⁴³ The Court examined the punishment as it related to the offense and compared the punishment to punishments for other crimes in that jurisdiction, and for similar crimes in other jurisdictions.⁴⁴ This same proportionality test was used in *Trop*⁴⁵ to de-

meaning of cruel and unusual punishment should change as society develops. See notes 36-40 and accompanying text *infra*.

36. 217 U. S. 349 (1910).

37. *Id.* at 378.

38. 356 U.S. 86 (1958).

39. *Id.* at 100-01. *Accord*, *Goss v. Bomar*, 337 F. 2d 341 (6th Cir. 1964).

40. 408 U. S. 238 (1972) (*per curiam*). Three Justices wrote opinions stating that the eighth amendment has a contemporary meaning. 408 U.S. 238, 241-42 (Douglas, J.); 408 U.S. 238, 269 (Brennan, J.); 408 U.S. 238, 327 (Marshall, J.).

41. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 263 (1972) (Brennan, J.), *id.* at 319 (Marshall, J.); *People v. Broadie*, 37 N.Y. 2d 100, 111, 124, 332 N.E. 2d 338, 341, 371 N.Y.S. 2d 471, 475 (1975).

42. 217 U.S. 349 (1910).

43. The Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 367. *Accord*, *Ralph v. Warden, Maryland Penitentiary*, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); *Dembrowski v. State*, 251 Ind. 250, 240 N.E. 2d 815 (1968); *Workman v. Commonwealth*, 429 S.W. 2d 374 (Ky. Ct. App. 1968); *Cannon v. Gladden*, 203 Ore. 629, 281 P.2d 233 (1955). See also *In re Lynch*, 8 Cal. 3d 410, 423 n.13, 503 P.2d 921, 929 n.13, 105 Cal. Rptr. 217, 225 n.13 (1972). *Cf.* *People v. Broadie*, 37 N.Y. 2d 100, 332 N.E. 2d 338, 371 N.Y.S. 2d 471 (1975) (the court uses the proportionality test but reaches a contrary result). This principle is embodied in the Illinois Bill of Rights. ILL. CONST. art. I, § 11.

44. For a discussion of the proportionality test, see Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 853-70 (1972).

45. 356 U.S. 86 (1958).

termine that expatriation for wartime desertion was unconstitutional. Chief Justice Warren's plurality opinion explicitly stated that mental suffering can be as violative of the eighth amendment as physical mistreatment.

In the five to four decision in *Furman*,⁴⁷ the majority justices agreed that the death penalty was unconstitutional because it was administered in an arbitrary manner.⁴⁸ Several different tests were used to reach this conclusion.⁴⁹ Justice Douglas placed emphasis on the racially discriminatory fashion in which the death penalty is applied.⁵⁰ Justice Stewart considered the death penalty to be "freakishly" imposed.⁵¹ Justices Brennan and Marshall agreed that a penalty is unconstitutional if it is unacceptable to human society.⁵² One of Justice Marshall's tests concerns the creation of new punishments; a new punishment may be cruel and unusual unless it is intended to serve a humane purpose.⁵³ Marshall also wrote that a punishment is cruel if it involves excessive pain and suffering,⁵⁴ and Justice Brennan concluded that a punishment violates the eighth amendment if it is "degrading to the dignity of human beings."⁵⁵ Brennan's test, which includes both physical and non-

46. *Id.* at 101.

47. 408 U.S. 238 (1972). The Court provided a short per curiam opinion. Five Justices concurred in separate opinions: Douglas, *id.* at 240; Brennan, *id.* at 257; Stewart, *id.* at 306; White, *id.* at 310; and Marshall, *id.* at 314. Four dissents were entered: Burger, *id.* at 375; Blackmun, *id.* at 405; Powell, *id.* at 414; and Rehnquist, *id.* at 465.

48. 408 U.S. 238, 249-57 (1972) (Douglas, J.), *id.* at 274-77 (Brennan, J.), *id.* at 309-10 (Stewart, J.); *id.* at 312-14 (White, J.); *id.* at 363-69 (Marshall, J.).

49. For a discussion and criticism of the tests used, see Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment after Furman v. Georgia*, 25 STAN. L. REV. 62 (1972).

50. 408 U.S. at 249-57 (Douglas, J.).

51. *Id.* at 309-10 (Stewart, J.).

52. *Id.* at 277-79 (Brennan, J.); *id.* at 332 (Marshall, J.).

53. *Id.* at 331 (Marshall, J.). In view of the fact that the mandatory sentences for drug violations were previously unknown in New York, the analysis of Justice Marshall provides additional reason for scrutiny.

54. *Id.* at 330. *But cf.* *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). The state attempted to electrocute the prisoner, but the current failed. The Supreme Court upheld the right of the state to place the petitioner in the electric chair for a second time. Justice Reed's plurality opinion stated:

The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution.

Id. at 464.

55. 408 U.S. 238, 271-74 (1972) (Brennan, J.).

physical suffering,⁵⁶ is thus somewhat broader than the one delineated by Marshall.

Both Justices agree that a punishment may be excessive when it is unnecessary.⁵⁷ Specifically, if a punishment less severe than the death penalty might achieve the same penal purpose, then the lesser penalty must be employed.⁵⁸ Justice White adopted this "necessity" test.⁵⁹ He reasoned that the death penalty is so seldom used that it contributes to neither deterrence nor retribution.⁶⁰ The death penalty causes

the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.⁶¹

Ten years prior to *Furman*, in *Robinson v. California*,⁶² the Supreme Court determined that a narcotics addict may not be punished for his status or condition. The Court held that the California statute that imposed a ninety day sentence for the "crime" of being a narcotics addict violated the eighth amendment. More recently, however, the

56. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation is considered non-physical suffering).

57. Justice Marshall explained that the "entire thrust of the eighth amendment is . . . against 'that which is excessive.'" 408 U.S. 238, 332 (1972) (Marshall, J.).

58. Justice Brennan strongly approved this test when he wrote:

Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment. This view of the principle was explicitly recognized by the Court in *Weems v. United States*, [217 U.S. 349, 381 (1910)].

Id. at 280 (Brennan, J.).

59. Professor Singer has referred to the "necessity" test as the "least drastic alternative" test. The "least drastic alternative" serving the necessary penal purposes ought to be used. Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 57-59 (1972).

60. 408 U.S. 238, 311 (1972) (White, J.).

61. *Id.* at 312. Professor Wheeler is highly critical of the "necessity" test used by Justices Brennan, Marshall, and White. He writes: "In most instances this type of test would be identical to a proportionality test and, in the remaining instances, would be impracticable." Wheeler, *supra* note 49, at 74. He further indicates that there is little data to demonstrate the extent of deterrence created by any one punishment. Therefore, he maintains that the three Justices based their opinions on inconclusive data. Wheeler further states that even if the extent of deterrence can be ascertained, it would still be difficult to determine the amount of deterrence necessary to justify specific punishment. He thus concludes that the *Weems* proportionality test is the better method of determining the constitutionality of punishments. Wheeler, *supra* note 49, at 77-78.

62. 370 U.S. 660 (1962).

United States Court of Appeals for the District of Columbia Circuit in *United States v. Moore*⁶³ and the New York Court of Appeals in *People v. Davis*⁶⁴ ruled that addictive compulsion to use narcotic drugs is not a defense to the charge of possession of narcotics or narcotics paraphenalia. Both courts distinguished *Robinson* by stating that regardless of the condition or status of being an addict, the defendant had committed the substantive criminal act of possession of narcotics or narcotics paraphenalia. Possession of such items is not merely a status or condition.

The case of *People v. Broadie* concerned a consolidation of cases involving either the sale of controlled substances or the possession of large quantities of narcotics.⁶⁵ The court acquiesced to the legislative determination of punishment for drug law violations. Citing the doctrine of judicial restraint,⁶⁶ the court stated:

[W]hile the courts possess the power to strike down punishments as violative of constitutional limitations, the power must be exercised with especial restraint. . . . [T]he instant sentences do not rise to the gross disproportionality violative of constitutional limitations.⁶⁷

63. 486 F.2d 1139 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973).

64. 33 N.Y. 2d 221, 306 N.E.2d 787, 351 N.Y.S. 2d 663 (1973), *cert. denied*, 416 U.S. 973 (1974).

65. Eight cases were consolidated for appeal. In seven of those cases, defendants appealed conviction for sale of narcotic drugs; one defendant appealed conviction for possession of one ounce or more of heroin. 37 N.Y. 2d 100, 110, 332 N.E. 2d 338, 341, 371 N.Y.S. 2d 471, 474. The opinion contains an appendix which discusses the history of the cruel and unusual punishment clause of the eighth amendment. *Id.* at 119-30, 332 N.E. 2d at 347-54, 371 N.Y.S. 2d at 483-92.

66. *Id.* at 110, 332 N.E. 2d at 341, 371 N.Y.S. 2d at 474. For a well articulated analysis of the principles of judicial restraint, see Justice Frankfurter's concurring opinion in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 466-72 (1947). In *Resweber* the state attempted to electrocute the prisoner, but the current failed. Upholding the right of the state to place the petitioner in the electric chair for a second time, Justice Frankfurter wrote:

This Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh [electrocution]. One must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation. . . . I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution.

Id. at 471.

67. 37 N.Y. 2d 100, 110-11, 332 N.E. 2d 338, 341, 371 N.Y.S. 2d 471, 475 (emphasis added). The *Weems* test finds an eighth amendment violation whenever the punishment is *disproportionate* to the offense. In *Broadie*, however, the New York Court of Appeals

The court of appeals noted that in New York no punishment has ever been found to be unconstitutionally disproportionate to the crime.⁶⁸ Nevertheless, the court recognized the validity of the *Weems*⁶⁹ proportionality test.⁷⁰ The court ruled that it is the maximum punishment that must be considered. Since a defendant is liable for the maximum term of punishment, the mere possibility of a lesser punishment or parole is insufficient to create a finding of constitutionality.⁷¹

In looking at the nature of the offense, Chief Judge Breitel determined that it was reasonable for the legislature to look beyond the danger of an isolated transaction of a single sale of narcotics to the harm created by the widespread distribution of the drugs.⁷² The court determined that

chose to narrow the *Weems* standard by requiring proof of *gross* disproportionality before a violation would be found.

68. *Id.* at 111, 332 N.E. 2d at 341, 371 N.Y.S. 2d at 475.

69. *Weems v. United States*, 217 U.S. 349 (1910). See notes 42-44 and accompanying text *supra*.

70. 37 N.Y. 2d 100, 111, 332 N.E. 2d 338, 341-42, 371 N.Y.S. 2d 471, 475. *Accord*, *People v. Mosley*, 78 Misc. 2d 736, 738, 358 N.Y.S. 2d 1004, 1006-07 (Monroe County Ct. 1974), subsequently reversed on other grounds, see note 24 *supra*. The appellate division refused to recognize the validity of the test. See, e.g., *People v. Venable*, 46 App. Div. 2d 73, 78-79, 361 N.Y.S. 2d 398, 405 (3d Dept. 1974). The *Broadie* opinion approved the *Weems* precedent of comparing a challenged punishment with punishments for other offenses in the same jurisdiction and with punishments for similar offenses in other jurisdictions. 37 N.Y. 2d 100, 112, 332 N.E. 2d 338, 342, 371 N.Y.S. 2d 471, 476.

71. *In re Lynch*, 8 Cal. 3d 410, 503 F.2d 921, 105 Cal. Rptr. 217 (1972). *Accord*, *People v. Broadie*, 37 N.Y. 2d 100, 111, 332 N.E. 2d 338, 341, 371 N.Y.S. 2d 471, 475; *People v. Mosley*, 78 Misc. 2d 736, 739, 358 N.Y.S. 2d 1004, 1008 (Monroe County Ct. 1974), subsequently reversed on other grounds, see note 24, *supra*. *Contra*, *People v. Venable*, 46 App. Div. 2d 73, 77, 361 N.Y.S. 2d 398, 404.

72. 37 N.Y. 2d 100, 112, 332 N.E. 2d 338, 342, 371 N.Y.S. 2d 471, 476. This type of reasoning is invalid when applied generally. For example, if the legislature were to look beyond the danger created by the individual motorist who speeds to the danger created by all motorists who speed, the legislature ought to severely punish automobile speeding. Using the same logic, if the combined value of items taken in separate petit larcenies is greater than the combined value of merchandise stolen in grand larcenies, the legislature ought to punish petit larceny more severely than grand larceny.

Deterrence has as its principal purpose the prevention of crime. If deterrence fails, society prefers to endure the lesser crime over the more severe. For this reason, deterrence is effective only when the punishment is proportional to the harm. For example, arson is punished more severely than theft because arson is more harmful to society. See *Wheeler*, *supra* note 44, at 852-53; *Wheeler*, *supra* note 49, at 72-73. The act of arson is a violent crime; the sale of narcotics is not. A violent crime is more harmful to society than a non-violent crime. Therefore, it does not make sense to punish the sale of narcotic drugs more severely than the act of arson. To punish *mala in se* crimes with less severity than *mala prohibita* offenses reflects an insensitivity to social morality and human life.

The sale of a drug is not, in and of itself, a violent act. *People v. Mosley*, 78 Misc. 2d 736, 739, 358 N.Y.S. 2d 1004, 1008 (Monroe County Ct. 1974), subsequently reversed on

the existence of an illegal drug market leads to violent crime. In addition, the sale of illegal drugs increases the addict population, and as a direct result, the incidence of crime against property.⁷³ Judge Breitel concluded that "[d]rug dealing in its present epidemic proportions is a grave offense of high rank."⁷⁴

With regard to the offenders, the court determined that each was "actually or presumptively . . . [a] seller"⁷⁵ As such, each was a crucial link in the drug distribution system.⁷⁶ In order to break the link and deter distribution, the legislature could reasonably require severe

other grounds, *see* note 24, *supra*. The court recognized that the actual danger created by drug use is probably overstated. *Id.* For literature supporting the position that the dangers of drug use are exaggerated, *see* note 5, *supra*. For further source material, *see* BRECHER, *supra* note 1.

Crime associated with the use of narcotic drugs is a result of the drug distribution system. An addict may commit crimes to obtain drugs; a seller, on the other hand, commits crimes to maintain his position and influence in the illegal drug market. BRECHER 11-12, 50-63; RAY 187-94; Israel & Denardis 669-73; King 737-39, 748-49. *See also* notes 1-9 and accompanying text *supra* and note 87 and accompanying text *infra*. For a discussion of the appellate court's uncertainty on this point, *see* notes 74, 85-86 and accompanying text *infra*.

Narcotic drugs such as heroin, morphine, meperidine, etc., are used medically for the purpose of analgesia (*i. e.*, to dull pain). Known side effects include constipation and addiction. Other medical problems such as undernourishment, contraction of contagious disease, injection of harmful contaminants, etc., are directly related to the illegal drug distribution system. For a well-documented discussion supporting these points, *see* BRECHER 21-33, 47-100; RAY 193-204. Although it is commonly believed that narcotics addiction leads to lethargy, numerous studies indicate that the use of narcotic drugs is unrelated to the mental or physical deterioration of the addict. BRECHER 21-32; RAY 187-91, 197-201. There is also considerable evidence supporting the hypothesis that what is often reported as death by heroin overdose is in actuality an overdose of heroin in combination with some other substance, *e. g.*, quinine or alcohol. BRECHER 101-14.

73. 37 N.Y. 2d 100, 111-13, 332 N.E. 2d 338, 393, 371 N.Y.S. 2d 471, 477.

74. *Id.* at 113, 332 N.E. 2d at 343, 371 N.Y.S. 2d at 477. The court of appeals failed to adequately treat the issue of whether the crimes are caused by the drugs themselves or by the fact that the drugs are illegal. *See* notes 85-86 and accompanying text *infra*. If it is the illegality of the drugs that causes crime, *see* note 72, *supra*, then the solution lies either in making the drugs legal or in removing them from the jurisdiction of the criminal law.

75. *Id.* at 114, 332 N.E. 2d at 343, 371 N.Y.S. 2d at 478. Seven of the defendants were convicted for selling controlled substances. One defendant was convicted for possessing one or more ounces of heroin. The court ruled that the legislature could have reasonably presumed that one who possesses a large quantity of drugs is a seller. *Id.* at 113, 332 N.E. 2d at 343, 371 N.Y.S. 2d at 478.

76. *Id.* at 114, 332 N.E. 2d at 343-44, 371 N.Y.S. 2d at 478. Although the court recognized that inflexible sentences do not serve the goal of rehabilitation, it stated that this was not necessary if the goals of isolation and deterrence were served. The court clearly rejected retribution as a legitimate penological purpose. *See also* *People v. Oliver*, 1 N.Y. 2d 152, 160, 134 N.E. 2d 197, 202, 151 N.Y.S. 2d 367, 373 (1956).

penalties. Further, because of the high recidivist rate of those offenders released from prison, isolation could be considered a desirable goal.⁷⁷

In comparing the punishments for drug offenses with other crimes in the jurisdiction, the court found that these offenses were punished as severely as other class A felonies⁷⁸ and more severely than class B felonies.⁷⁹ This result was upheld on the basis of a reasonable legislative determination that drug offenses are inherently harmful because they lead to other crimes.⁸⁰

Drug offenses are punished more severely in New York than in any other jurisdiction.⁸¹ On this point the court reasoned that since drug use

77. Prior increases in penalties for drug offenses have never accomplished the legislative purpose of isolation and deterrence. Therefore, it is illogical for the court to conclude that heavier penalties will succeed. The New York Court of Appeals came close to conceding this point when it stated: "[T]he pragmatic value [of the 1973 drug laws] might well be questioned, since more than a half-century of increasingly severe sanctions has failed to stem, if indeed it has not caused, a parallel crescendo of drug abuse." *People v. Broadie*, 37 N.Y. 2d 100, 118, 332 N.E. 2d 338, 346, 371 N.Y.S. 2d 471, 481. See note 87 and accompanying text *infra*. Cf. Annual Message of the Governor, *supra* note 11, at 2318, which states: "All the laws we now have on the books won't work to deter the pusher of drugs."

78. All class A felonies carry a mandatory maximum of life imprisonment. N. Y. PENAL LAW ANN. § 70.00(2)(a) (McKinney 1975). Class A-I felonies carry a mandatory minimum of from 15 to 25 years, *id.* § 70.00(3)(a)(i); Class A-II felonies carry a mandatory minimum of from 6 to 8 years, *id.* § 70.00(3)(a)(ii); and Class A-III felonies carry a mandatory minimum of from 1 to 8 years. *Id.* § 70.00(3)(iii). Drug offenses are punished more severely than non-drug offenses because of the procedural limitations on suspended sentences, probation, plea bargaining, and civil commitment applicable only to drug offenders. See notes 15-20 and accompanying text *supra*.

Class A-I felonies include first degree arson, N. Y. PENAL LAW ANN. § 150.20 (McKinney 1975), first degree kidnapping, *id.* § 135.25; murder, *id.* § 125.25; and attempted first degree murder, *id.* § 110.05(1). First degree murder involves the intentional killing of a police officer or an employee of a correctional facility; or an intentional killing committed by a convict while incarcerated or after escape from a correctional institution in which he had been serving a life sentence or an indeterminate term of at least 15 years to life. *Id.* § 125.27. First degree murder has a mandatory death sentence. *Id.* § 60.06.

79. Class B felonies carry a discretionary maximum of 25 years, *id.* § 70.00(2)(b), and no mandatory minimum, *id.* §§ 70.00(3)(b). Class B felonies include second degree arson, *id.* § 150.15, second degree kidnapping, *id.* § 135.20, first degree manslaughter, *id.* § 125.20, first degree rape, *id.* § 130.35, and first degree robbery, *id.* § 160.15.

80. 37 N.Y. 2d 100, 116, 332 N.E. 2d 338, 345, 371 N.Y.S. 2d 471, 480. For a criticism of this position, see note 72, *supra*.

81. *Id.* at 116, 332 N.E. 2d at 371, 345 N.Y.S. 2d at 480. Most other states authorize maximum penalties of from five to twenty years for narcotic sales. *People v. Mosley*, 78 Misc. 2d 736, 742, 358 N.Y.S. 2d 1004, 1010 (Monroe County Ct., 1974), subsequently reversed on other grounds, see note 24, *supra*. For a table comparing the penalties for drug offenses in the various states, see Brief for the Defendants McNair and Mosley, *supra* note 4, Table 1, at app. A28-A29.

is most extensive in New York,⁸² more severe penalties are justified.⁸³ Chief Judge Breitel concluded by stating that "in the exercise of judicial restraint and with respect for the separation of powers, the Court does not necessarily approve or concur in the Legislature's judgment in adopting these sanctions."⁸⁴ The legislative determination was upheld.

Although the court disagreed with some of the legislature's findings, its adherence to the doctrine of judicial restraint required deference to the legislative action. Strict adherence to the philosophy of restraint is problematic. For example, the court stated that "[b]ecause of their illegal occupation . . . drug traffickers do often commit crimes of violence against law enforcement officers and, because of high stakes, engage in crimes of violence among themselves"⁸⁵ The statement approaches an admission by the court that it is the illegality of drugs

People v. Mosley had also compared the drug penalty to the penalties recommended by model legislation. Model legislation condemns life imprisonment, recommends five year sentences, reserves lengthy terms for those who commit particularly heinous crimes, and allows for the possibility of discharge from parole. 78 Misc. 2d 736, 743, 358 N.Y.S. 2d 1004, 1011. *Accord, In re Foss*, 10 Cal. 3d 910, 924, 519 P.2d 1073, 1081-82, 112 Cal. Rptr. 649, 657-58 (1974). See MODEL SENTENCING ACT § 9 (2d ed. 1972); MODEL PENAL CODE §§ 6.06, 305.12 (1962); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 142-43 (official ed. 1967).

82. *Citing BRECHER 72*, the court noted that over half of the nation's addict population is located in New York City. 37 N.Y. 2d 100, 116, 332 N.E. 2d 338, 345, 371 N.Y.S. 2d 471, 480.

83. *Id.* Local differences in criminal problems may justify differences in legal treatment. Nevertheless, punishment may not be extreme. This is the essence of the *Weems* proportionality test. To use the large addict population of New York to justify the severe penalties for drug sales ignores the *Weems* requirement.

84. *Id.* at 117-18, 332 N.E. 2d at 346, 371 N.Y.S. 2d at 481. The opinion left an important point for future litigation: "This is not to say that in some rare cases on its particular facts it may not be found that the statutes have been unconstitutionally applied." *Id.* at 119, 332 N.E. 2d at 347, 371 N.Y.S. 2d at 482. Since the *Broadie* court dealt exclusively with actual or presumed dealers, the issue of mandatory sentencing of mere users remains an issue.

85. *Id.* at 112, 332 N.E. 2d at 342, 371 N.Y.S. 2d at 477.

Even the questions whether "the policy of criminalization, which raises the cost and increases the difficulty of obtaining drugs, does in fact make the drug user a proselytizer of others in order that he may obtain the funds to acquire his own drugs", and whether "the compulsion of the addict to obtain drugs and the moneys to purchase them causes him to commit collateral crime that otherwise he might not commit", are questions about which reasonable men can and do differ. . . .

Id. at 118, 332 N.E. 2d at 346, 371 N.Y.S. 2d at 482, *quoting* PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 302 (Additional Views of Dr. Brewster, Judge Breitel, Mrs. Stuart, and Mr. Young) (official ed. 1967).

and not the drugs per se that causes drug-related crime. Nevertheless, the court ultimately acquiesced to the legislative determination that drug trafficking in and of itself generates "collateral crime, even violent crime."⁸⁶ Although the court emphasized that it was reasonable for the legislature to determine that the new laws would serve the penological purposes of isolation and deterrence, such a conclusion is unreasonable in that it fails to consider the experience of the past sixty years: "[E]very similar effort since the Harrison Act of 1914 has failed."⁸⁷

The *Broadie* court gave too much deference to the findings of the legislature. As a result, it failed to properly apply the standards developed by the United States Supreme Court in *Weems v. United States*⁸⁸ and *Furman v. Georgia*.⁸⁹ Proper application of the *Weems* proportionality test would have resulted in a determination that the sentencing provisions were disproportionate to the crime.⁹⁰ Use of the *Furman* test of Justices Brennan, White, and Marshall would have required the conclusion that the sentencing provisions were cruel and unusual because they served no valid legislative purpose.⁹¹

86. 37 N.Y. 2d 100, 113, 116, 332 N.E. 2d 338, 343, 345, 371 N.Y.S. 2d 471, 477, 480. See note 74, *supra*.

87. *Id.* at 118, 332 N.E. 2d at 346, 371 N.Y.S. 2d at 482. See note 77 *supra*. The court stated: "[T]he Legislature could reasonably conclude that drug trafficking was a grave offense; that the defendants, as sellers, posed a serious threat to society; and that the sentencing statutes, though severe and inflexible, would serve, at least, to isolate and deter." *Id.* at 117, 332 N.E. 2d at 345, 371 N.Y.S. 2d at 480. Even though a severe penalty will isolate the particular offender from society, if the goal of deterrence is not achieved, a new drug dealer will quickly replace the former seller. Such a result defeats the practical purpose of isolation. Because narcotic drugs are addictive, deterrence is almost impossible. The physiological and psychological craving for narcotics created by addiction is so strong that an addict will do almost anything to get the drug. Criminal penalties cannot offset such compulsion. Consequently, the drug market is a seller's market and the financial returns are high. There are always people willing to take the risk of selling drugs; the dealer simply increases his prices as his risks (*i. e.* criminal penalties) increase. BRECHER 64-100, 528-31. See notes 3-9 and accompanying text *supra*. For a discussion of the neurophysiological phenomenon of addiction, see RAY 197-204.

88. 217 U.S. 349 (1910).

89. 408 U.S. 238 (1972).

90. See note 67 and accompanying text *supra*.

91. See notes 57-61 and accompanying text *supra*. Nor should the possible lack of alternative criminal solutions to the problem of drug addiction be a barrier to such a result. Solutions may be found outside the criminal justice system. BRECHER 115-82, 528-31; Isreal & Denardis 675-80; King 748-49; Brief for defendants McNair and Mosley, *supra* note 4, at 107-13. For example, in Great Britain, where narcotics can be obtained legally, there is no significant black market and very little crime associated with drug use. Further, combined heroin and methadone maintenance programs permit many addicts to hold regular employment. BRECHER 120-29; Isreal & Denardis, 678-79. Police efforts are directed at preventing non-addicts from obtaining narcotics. Since these non-addicts do

In *Law, Language, and Ethics*, Professors Bishin and Stone pose the question, "If Judges are supposed to be wise, doesn't this give them

not have the addict's craving for narcotics, deterrence efforts have been successful. Most important, the number of addicts has remained small. In 1951, for example, the United Kingdom achieved a record low of 301 addicts. BRECHER 121-22. Anti-drug maintenance advocates point to an elevated addict population in the mid-1960's. This numerical increase is misleading; the elevated figures resulted in part from a Canadian and American addict migration into Great Britain and in part from the use of new statistical reporting methods which tended, to inflate the real number of addicts. *Id.* at 123-28. In addition, Brecher believes that a massive anti-drug campaign had the effect of luring non-addicts into experimentation with narcotics. *Id.* at 126.

By the end of the 1960's, the number of addicts began to decrease; at the end of 1970 there were only 1,430 reported addicts. *Id.* at 127. This figure is rather modest compared to the estimated 250,000 to 315,000 addicts in the United States. *Id.* at 80. The figure is even more remarkable in light of the fact that the population of the United Kingdom is about one quarter that of the United States. THE 1975 WORLD ALMANAC & BOOK OF FACTS 143, 577 (Newspaper Enterprise Ass'n, Inc. ed. 1974). For a full description of the British drug experience, see H. JUDSON, *HERION ADDICTION IN BRITAIN: WHAT AMERICANS CAN LEARN FROM THE ENGLISH EXPERIENCE* (1974).

Except for limited efforts, drug maintenance was unknown in the United States prior to the advent of methadone maintenance programs. During the late 1930's and early 1940's, many Kentucky physicians prescribed narcotics to addicts. As a result, black market activity was minimal. The crime rate among addicts did not differ appreciably from that of the general population. BRECHER 9-11, 129-34. For a discussion of the operation of municipal narcotics clinics between 1912 and 1925, see *id.* at 115-17; Israel & Denardis 639-40. In general, methadone maintenance programs have been rather successful. Methadone does not produce the "high" created by heroin and it is easier to administer because it can be taken orally. In New York, where the Dole-Nyswander program is used, the success rate in terms of scholastic achievement, employment, socially acceptable behavior, and reduction or crime is impressive. BRECHER 140-52. The number of arrests of all those admitted to methadone maintenance programs decreased by 74%. The number of arrests for those on methadone maintenance for 13 months or longer decreased by 96%. N. Y. TEMPORARY COMM. TO EVALUATE THE DRUG LAWS, EMPLOYING THE REHABILITATED ADDICT (N. Y. Legislative Doc. No. 10, 1973), cited in Brief for Defendants McNair and Mosley, *supra* note 4, at 107. Other methadone programs have not been as successful as Dole-Nyswander. This outcome is primarily attributable to administrative mismanagement. BRECHER 163-75. See also National Comm. on Marijuana and Drug Abuse, *Drug Use in America* 162, 176-81, 319-23 (Gov't. Print. Off., Wash., D. C., March, 1973), cited in Brief for Defendants McNair and Mosley, *supra* note 4, at 108; CANADIAN COMM. OF INQUIRY INTO THE NON-MEDICAL USES OF DRUGS, TREATMENT REPORT 23-30 (Information Canada, Ottawa, 1972), cited in Brief for Defendants McNair and Mosley, *supra* note 4, at 108. Nevertheless, maintenance centers have long waiting lists. For this reason, there are illicit sales of methadone to those who cannot get the drug legally. BRECHER 529. Methadone maintenance does not work for everyone, and not all addicts want methadone maintenance. Thus, a combined heroin and methadone maintenance program is preferable. *Id.* at 528-32. The system of heroin maintenance has worked well in Great Britain for over fifty years. Since the introduction of methadone, more than half of the heroin maintenance addicts have switched to methadone. *Id.* at 176-77.

some special expertise on the *wisdom* of legislation?"⁹² Judges should reach decisions through a process of reasoned elaboration.⁹³ With regard to the examination of legislation, reasoned elaboration requires the questioning of the *wisdom* of the legislation. To refuse to examine the *wisdom* of the legislation effectively forecloses independent judicial review. Nevertheless, Chief Judge Breitel was content to state that "[t]he Court thus does not pass on the *wisdom* of the Legislature's acts."⁹⁴ The court relied upon the doctrine of the separation of powers to justify judicial restraint.⁹⁵ But separation of powers cannot serve this purpose. Rather separation of powers provides a system of checks and balances among the three branches of government. This system enables the judiciary to eliminate or modify unwise law, either by finding a constitutional infirmity⁹⁶ or by construing it in such a way as to limit its application. The role of the judiciary in this scheme is crucial because the judicial branch alone reaches its decisions through the process of reasoned elaboration. For example, in *Furman*,⁹⁷ Justices Brennan, Marshall, and White found the death penalty to be unconstitutional as applied because a less severe penalty would achieve the same purpose.⁹⁸ Similarly, the Court has held that statutes are unconstitutional if they do not adequately serve valid legislative purposes.⁹⁹ In view

92. W. BISHIN & C. STONE, *LAW LANGUAGE, AND ETHICS* 898 (1972) (emphasis added).

93. See generally H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 160-89 (tent. ed. 1958).

94. 37 N.Y. 2d 100, 118, 332 N.E. 2d 338, 348, 371 N.Y.S. 2d 471, 482 (1972) (emphasis added).

95. *Id.* at 117, 332 N.E. 2d at 346, 371 N.Y.S. 2d at 481.

96. Professors Hart and Sacks emphasize this point when they write: "The sanction of nullity is pervasive in the whole theory of American public law, although the point is not always appreciated. Its most familiar form is the power of the courts to disregard a statute which they deem to be unconstitutional." HART & SACKS, *supra* note 93, at 174.

97. 408 U. S. 238 (1972).

98. See notes 57-61 and accompanying text *supra*.

99. In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court found unconstitutional a Georgia statute which required that abortions be performed only in hospitals accredited by the Jt. Commission on Accreditation of Hospitals and with approval by the hospital abortion board and two consulting physicians. The alleged purpose of the statute was to protect the health of the public. The Supreme Court determined that the regulation was unrelated to this purpose because the licensing of physicians provided adequate protection. The Court in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) found unconstitutional a Massachusetts statute prohibiting the sale of contraceptive devices to unmarried persons (except to control the spread of disease). It stated that the statute did not serve the legislative purposes of deterring premarital sex or of regulating the distribution of potentially harmful items. See also *Ravin v. State*, 537 P.2d 494 (Alaska Sup. Ct. 1975), in which the Alaska Supreme Court found a statute prohibiting the private possession of marijuana to be unconstitutional as an invasion of the right to privacy. It stated that there was insuffi-

of such precedents, it would have been within the proper exercise of judicial wisdom and prerogative for the New York Court of Appeals to have found the 1973 drug sentencing statutes violative of the eighth amendment.

The New York drug laws were passed in response to the demand for more effective law enforcement in the late 1960's and early 1970's.¹⁰⁰ Those laws remain as do the public misconceptions which fostered them. Until these attitudes change, the legislature will continue to experience difficulty in addressing the problem of drug abuse. Through a process of reasoned analysis, the judiciary must find a rational solution to the drug problem.

Eliot J. Greenwald

cient evidence demonstrating the harmfulness of marijuana to reasonably conclude that the state purpose of protecting the public health was served. *Accord*, *People v. Fries*, 42 Ill. 2d 446, 250 N.E. 2d 149 (1969), where the Illinois Supreme Court found a statute requiring motorcyclists to wear helmets unconstitutional on the grounds that the statute did not protect the public safety because it was directed at the safety of the cyclist only (but a statute requiring glasses, goggles, or a transparent shield was constitutional because it protected the public safety by allowing the cyclist to see where he was going). *Id.* at 450, 250 N.E. 2d at 151.

100. The *New Yorker's* "The Talk of the Town" provides interesting commentary on the issue of the public attitude towards crime:

In the last decade or so, a wave of fear swept over the nation and then subsided. Politicians, the press, and television took up the issue of crime for a few years and then dropped it. The spread of crime was a real and enduring affliction, but the campaign to cope with it turned out to be illusory and evanescent, and vanished like last year's fad. What it left behind is what we see around us now: a collection of damaged institutions; a deeper suspicion than ever among citizens that what they hear from public men has nothing at all to do with the conditions of their daily lives; and a rising rate of crime.

The *New Yorker*, Jan. 6, 1975, at 23.