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Time for a change: irrational interpretations of drug laws

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Forty-five years is long enough.

On Feb. 8, 1968, police officers stopped Dave Rogers as he drove down the road with three friends. The officers soon found a very small quantity of marijuana in a match box. Rogers did not personally possess any marijuana or drug

paraphernalia. The prosecutor charged Rogers with transportation of marijuana based on the testimony of two of the occupants that Rogers saw one of the other occupants smoke a joint while Rogers was driving. The charge of transporting marijuana did not rest on the fact that Rogers smoked or possessed marijuana while driving the car, but that another person in the car did so. The jury convicted Rogers of transporting marijuana. Transportation of marijuana, then as now, is punished in the same statute that punishes one who sells marijuana - and was punishable then by five-years-to-life in prison.

In reviewing Rogers' appeal, the state Supreme Court ruled that Rogers was properly charged and convicted of transporting marijuana. In a closely-divided decision, the Supreme Court held that a conviction for transporting marijuana or, for that matter, any other illegal drug, did not require proof the defendant intended to sell or distribute the drug. The prosecutor only had to prove the individual (1) knowingly possessed the drug, directly or indirectly, and (2) moved. *People v. Rogers*, 5 Cal. 3d 129 (1971). The court opined the law in no way required proof that the drug was transported or moved with the intent or purpose of selling or providing the drug to another.

The dissent deemed that decision "unjust" and "absurd," predicting that "transportation" would not be limited to an individual driving a considerable distance by car. And the dissenters were right. Subsequent appellate decisions have held that an individual walking (*People v. Ormiston*, 105 Cal. App. 4th 676 (2003)) or riding a bike (*People v. LaCross*, 91 Cal. App. 4th 182 (2001)) with any quantity of illegal drugs is guilty of transporting that drug, and is thus punishable just as one who sells that drug

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to another. The laws outlawing transportation of drugs have been construed to outlaw any "transportation of controlled substances" to another location, even if the distance is insignificant." *Ormiston*, 105 Cal. App. 4th at 684.

That conclusion is at odds with the structure of the statutes enacted to punish drug offenses, whether we consider statutes applicable to marijuana (Health and Safety Code Sections 11357-11360), cocaine, heroin and other opiates (Sections 11350-11352), or methamphetamine, LSD and other drugs (Sections 11377-11379). California prescribes a particular sentence for simple possession of the drug, a somewhat higher sentence when the drug is possessed for sale, and the highest prison sentence when the defendant sells the drug. For example, an individual convicted of simple possession of cocaine can receive up to three years in prison; an individual convicted of possession of cocaine for sale can receive up to four years in prison; and an individual convicted of selling cocaine can receive up to five years in prison. In each case, an individual who "transports" a drug, or is guilty of even "offering to transport" that drug, is punished in the same statute as one who *sells* that drug.

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The question in *Rogers* was, what does "transport" mean? Does it encompass any movement by an individual while in possession of an illegal drug, or does it mean movement with the intent to sell or transfer that drug to another? The *Rogers* majority ruled the individual is guilty of transporting a drug even if the drug is plainly for personal use. Neither the Supreme Court nor the state Courts of Appeal have changed or challenged that ruling in the 45 years since *Rogers* was stopped.

Drugs are not used as one would use Woody Allen's "Orgasmatron" in "Sleeper": the user enters and is fulfilled. Rather, drug users go someplace to purchase their drug of choice, and often return to some other place to consume. Even if the drug is consumed "on the spot," it would be rare for the user not to walk a few steps, for example, to get paraphernalia to use the drug, or a match, or a comfortable chair.

Consider the paper-thin differences between conduct which constitutes simple possession of a drug or narcotic and conduct which constitutes "transportation" of that substance under [Rogers].

Example 1: Two individuals - call them Nick and Nora - each purchase two ounces of marijuana at the front door of an apartment in a building. Nick walks out of the building to the sidewalk, where he is arrested by police officers. The officers enter and arrest Nora still standing at the door. Nora may be charged with simple possession of marijuana, now a misdemeanor, while Nick may be charged with transporting

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marijuana, a felony punishable by up to three years in prison. Compare Section 11357 (c) with Section 11360.

Example 2: Two other individuals - Laurel and Hardy - successively drive up to a man on a street corner and each purchases one rock of cocaine. Laurel drives off and is arrested a block away. Hardy is arrested still sitting in his car at the location where he bought the cocaine. Laurel may be charged and convicted with transporting cocaine, punishable by up to five years in prison, while Hardy may be charged with only simple possession of cocaine, punishable by no more than three years in prison. Compare Section 11350 with Section 11352.

Example 3: A couple - Rogers and Hammerstein - are in their living room when officers arrive at the house to execute a search warrant. Rogers walks from the living room through the dining room to the front hall to open the door for the officers, where he is detained. Hammerstein remains seated in her favorite chair. As a result of finding one rock of cocaine in each person's pocket, Rogers is charged with transporting cocaine, while Hammerstein is charged with simple possession of cocaine.

There are thus enormous consequences to each of the above individuals as the result of the very small "movement." Those charged with simple possession are eligible for drug diversion (Pen. Code Section 1000), while those charged with transporting drugs are generally not so eligible. All those charged with "transportation" face longer sentences, and enhanced sentences if any are charged in the future with many drug crimes. See Pen. Code Section 1203.07(a)(3) (prohibiting probation to defendant with prior conviction for transporting certain drugs); Health and Safety Code Section 11370.2 (adding three year enhancement for prior conviction).

Allowing the prosecution of an individual for transportation who carries marijuana or some other drug for personal use grants broad discretion to prosecutors. The more forgiving prosecutor charges both Nick and Nora, Rogers and Hammerstein, with simple possession. However, another prosecutor can, with impunity, charge Nick, but not Nora, Rogers but not Hammerstein, with transporting the drug, wielding the much-greater-punishment as a cudgel.

Further, as was evident in *Rogers* itself, the defendant need not even personally possess the drug in issue. If the defendant knowingly permits another to carry a marijuana joint or a bindle of cocaine or twist of heroin while driving them both to a restaurant for dinner, the prosecutor can charge the driver with transporting that drug.

Whatever one's views on illegal drugs, it is unfair - bordering on irrational - to treat Nick and Nora differently based on who did, or did not, walk a short distance. This "unjust" and "absurd" disparity of results, as Justice Mosk observed in this *Rogers'* dissent, is easily remedied. The state Legislature should clearly provide that "transporting" an illegal drug means "transporting for purposes of sale."

California citizens and the state Legislature have made considerable strides moving from a punitive model to a treatment model for individuals charged with drug crimes in our criminal courts. More remains to be done. Forty-five years of this unwise construction of California statutes applicable to those who "transport" drugs is more than enough.

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