



CCLE Legislative Report

Prepared for Members and Committees of State Legislatures

Medical Marijuana & Cognitive Liberty

First Amendment Implications of Marijuana Legislation

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CENTER FOR COGNITIVE LIBERTY & ETHICS

Executive Summary

Medical marijuana is controversial for one reason; namely, as part and parcel of its beneficial medicinal properties, the plant produces a mild shift in consciousness that many people find enjoyable, beneficial, and in some cases spiritual. Under well-established legal principles related to intellectual freedom, freedom of thought, freedom of expression, and privacy, the government is not permitted to restrain the manner or mode in which a person thinks. The Center for Cognitive Liberty & Ethics submits this analysis to clarify that concerns related to the psychoactive effects of marijuana (when used for medicine or otherwise) are not only misplaced, such concerns are contrary to law in light of our nation's abiding respect for individual liberty and freedom of thought.

About the Center for Cognitive Liberty & Ethics (CCLE)

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The CCLE is an independent nonprofit law, policy, and public education center working in the public interest to foster cognitive liberty – the right of each individual to think independently and to use the full spectrum of his or her mind. The CCLE encourages social policies that respect and protect the full potential and autonomy of the human intellect.

CCLE Legislative Analysis Service

Prepared for Members and Committees of the «State» Legislature

*Our whole constitutional heritage rebels
at the thought of giving government
the power to control men's minds.*

Justice Thurgood Marshall
Stanley v. Georgia, 394 U.S. 557, 565 (1968)

Background

MARIJUANA IS THE MOST COMMONLY USED ILLEGAL DRUG IN THE WORLD, used by an estimated 144 million people.¹ According to U.S. Government statistics, 76 million Americans (34 percent of the population) have tried marijuana during their lifetime.² The number of Americans who smoked marijuana in the last year (18,589,000) is almost exactly equivalent to the entire population of New York state (18,976,457).³

In the United States it is currently a federal offense to possess, distribute or cultivate marijuana. The same actions with regard to marijuana are also made criminal under the laws of all fifty states.⁴ In 2000, 647,662 Americans were arrested under state laws for simple possession (i.e., possessed for their own use, not for sale) of marijuana.⁵

Yet, in 1972 a presidential commission appointed to review of the country's marijuana laws found that "[m]arijuana's relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it.... Existing social and legal policy is out of

¹ Global Illicit Drug Trends 2001, published by the United Nations Office for Drug Control and Crime Prevention (ODCCP), Table 4, page 70. Online at: http://www.undcp.org/world_drug_report.html

² 2000 National Household Survey on Drug Abuse, Department Of Health And Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), Table F1. Online at: <http://www.samhsa.gov/oas/nhsda.htm#NHSDAinfo>

³ Figures obtained from the 2000 National Household Survey on Drug Abuse (See footnote 2, *infra*) and United States Census Bureau Report for 2000. Online at: <http://www.census.gov/>

⁴ See, *A Guide To State Controlled Substances Acts* (Revised January 1999), National Criminal Justice Association. Eight states have passed laws or referenda that protect *some* medical users of marijuana.

⁵ Crime in the United States 2000 Uniform Crime Reports, Federal Bureau of Investigation, Table 4.1, p. 216. Online at: <http://www.fbi.gov/ucr/00cius.htm>

proportion to the individual and social harm engendered by the drug.”⁶ Since then, a plethora of government studies have found that criminal laws against marijuana use are bad public policy.⁷

In the past decade a growing number of doctors and medical researchers have found that marijuana may have beneficial medicinal properties for some people. In 1999, for example, the Institute of Medicine completed a comprehensive examination of marijuana’s medical efficacy and concluded, “Nausea, appetite loss, pain and anxiety . . . all can be mitigated by marijuana.”⁸ A Gallup pole conducted that same year (March 19-21, 1999) found that 73% of Americans are in favor of “making marijuana legally available for doctors to prescribe in order to reduce pain and suffering.”

As a result of the new medical research and changing public opinion, eight states (Alaska, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington) have modified their state criminal laws to permit the lawful cultivation, possession, and use of marijuana for medical purposes.

The First Amendment and Cognitive Liberty

CENTRAL TO THE FIRST AMENDMENT is the democratic principle that the government must treat people as ends not means. In the United States, each person is free to develop his or her mind and own belief system, and encouraged to form unique ideas and to express them to others. As Justice Brandeis pointedly expressed, the First Amendment protects the “freedom to think as you will and to speak as you think,” noting further “[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties.... They believed liberty to be the secret of happiness and courage to be the secret to liberty....” (*Whitney v. California* (1927) 274 U.S. 357, 375.)

The right to cognitive liberty – freedom of thought and autonomy over one’s own mind and brain chemistry – is one of “those liberties of the individual which history has

⁶ National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, Washington, DC: U.S. Government Printing Office (1972).

⁷ See Appendix A, *infra*.

⁸ Janet E. Joy, Stanley J. Watson, Jr., and John A. Benson, Jr., *Marijuana and Medicine: Assessing the Science Base*. Division of Neuroscience and Behavioral Research, Institute of Medicine (Washington, DC: National Academy Press, 1999).

attested as the indispensable condition...of an open as against a closed society.” (*Kovacs v. Cooper* 336 U.S. 77, 95 (1949) (J. Frankfurter, concurring opinion).) Indeed, cognitive liberty is something so fundamental to the integrity of free human beings, that it forms the necessary substrate for, and is the common principle underlying, some of our most well-established and cherished constitutional rights. As Justice Benjamin Cardozo extolled, “...freedom of thought...one may say...is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.” (*Palko v. Connecticut*, 302 U.S. 319, 326-327 (1937).)

Speech is the expression of a person’s ideas. In practical terms, “[w]e can only express what we are capable of thinking.” (Richard M. Restak, *The Mind* (1988), p. 204.) Free speech, free exercise of religion, free association, a free press, and the right to assemble, are all moot if the thinking that underlies these actions has already been constrained by the government.⁹

The First Amendment thus recognizes that language and consciousness are inherently connected: limit one and you necessarily limit the other. Thus, in order to prevent the erosion of the First Amendment’s guarantees, the Amendment must be understood as providing at least as strong a protection for the underlying free consciousness that gives rise to ideas, as it provides for the subsequent free expression of those ideas.

Marijuana Prohibition and the First Amendment

LAWS THAT MAKE IT A CRIMINAL OFFENSE TO USE MARIJUANA and/or possess it for personal use are intended to prohibit people from experiencing the states of mind that can

⁹ Professor Michael H. Shapiro, has outlined the core logic of this proposition as follows:

(1) The First Amendment protects communication of virtually all kinds, whether in written, verbal, pictorial, or any symbolic form, and whether cognitive or emotive in nature.

(2) Communication entails the transmission and reception of whatever is communicated.

(3) Transmission and reception necessarily involves mentation on the part of both the person transmitting and the person receiving.

(4) It is in fact impossible to distinguish in advance mentation that will be involved in or necessary to transmission and reception from mentation that will not.

(5) If communication is to be protected, *all* mentation (regardless of its potential involvement in transmission or reception) must therefore be protected.

(Michael H. Shapiro, “Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies,” 47 Southern Cal.L.Rev 237, 256 (1974).

be occasioned by smoking or eating portions of the *Cannabis* plant. At their most fundamental level, laws banning the use of marijuana are indistinguishable from laws or other government actions aimed at banning certain books.¹⁰ Both types of laws place barriers around and within the individual's mind. Both types of laws are inimical to the fundamental principles that animate democratic society, and both types of laws violate basic notions of individual freedom and self-determination. The government has no authority to outlaw certain knowledge, certain ways of thinking, or certain states of consciousness.

The government clearly has an interest in regulating the *behavior* of a person who presents a clear and present danger to others. But, the government has no legitimate interest, and no authority to limit the *range and types of consciousness* that a citizen is permitted to experience within his or her own mind. As explained by the United States Supreme Court in unequivocal terms, the government “cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.” (*Stanley v. Georgia*, 394 U.S. 557, 566 (1968).)

Laws that prohibit – on a wholesale basis—the use of marijuana and/or its possession for personal use, also trespass upon the First Amendment, by narrowing a person's capacity to produce ideas. (See, *Bee v. Greaves* (10th Circ. 1984) 744 F.2d 1387, 1393-1394 [“The First Amendment protects communication of ideas, which itself implies protection of the capacity to produce ideas”].) Marijuana prohibition laws are a prior

¹⁰ Attempts to control the written word date from at least AD 325 when the Council of Nicaea ruled that Christ was 100 percent divine and forbade the dissemination of contrary beliefs. Since the invention of the printing press in 1452, governments have struggled to control the printed word. Presses were initially licensed and registered. Only certain people were permitted to own or control a printing press and only certain things could be printed or copied. (This was the origin of today's copyright rules.) Works printed without prior authorization were gathered up and destroyed, the authors and printers imprisoned.

Scholars disagree as to the exact date, but some time around 1560, Pope Paul IV published the *Index Librorum Prohibitorum* a list of forbidden books (i.e., controlled substances) enforced by the Roman government. When the *Index* was (finally) abandoned in 1966, it listed over 4,000 forbidden books, including works by such people as Galileo, Kant, Pascal, Spinoza and John Locke. (For a fascinating survey of suppressed literature, see the multi-volume set *Banned Books*, published by Facts on File, which covers literature suppressed on religious, social, sexual, and political grounds.)

All such efforts to control, censor, or prohibit the written word were efforts to suppress the *ideas* that were conveyed by the words. In the same way, today's laws that prohibit marijuana are aimed at suppressing an “unauthorized” way of thinking. In this respect, the “war on marijuana” is not a war on the plant or its preparations, anymore than book banning was a war on paper and ink.

restraint on consciousness itself, a restraint even more destructive of First Amendment values than a prior restraint on speech.

A Constitutional Alternative:

States Should Seek to Control Dangerous *Conduct* not Consciousness

FEDERAL AND STATE LAWS that make an otherwise law-abiding citizen a criminal merely for augmenting his or her thinking through the use of marijuana, whether for medical purposes or not, are unconstitutionally overbroad because they infringe on the fundamental right of peaceful people to self-determine their own mind states. Such laws inappropriately target interior *matters of the mind*, a private and intimate zone that is off-limits to government regulation. “In a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.” (*Aboud v. Detroit Bd. of Educ.*, (1977) 431 U.S. 209, 235.)

A person ought to be free to manage his or her own *mental states* as long as his or her *conduct* does not present a clear and present danger to others. To abide by this principle of self-determination, and to respect the constitutional rights of all Americans to autonomy over their own cognition, laws must target conduct rather than mentation.

Accordingly, to avoid unconstitutionally infringing on the cognitive liberty rights of its citizens, the personal possession, use, or cultivation of marijuana should not be a criminal offense. A state’s legitimate interests in protecting the health and safety of its citizens is well-served by existing laws that make it a crime to be unable to care for oneself in public due to the use of marijuana or any another drug (i.e., “public intoxication laws”), and by existing criminal laws, such as driving while impaired by marijuana, which target conduct that is dangerous to others.

To the extent that states are determined to retain their general criminal prohibitions concerning marijuana, a medical accommodation or exemption is necessary as an act of compassion for sick and injured people, and to conform state law to recent scientific and medical findings showing the medical efficacy of marijuana.

Appendix A: Government Reports on Marijuana

Indian Hemp Drugs Commission, 1894:

"The commission has come to the conclusion that the moderate use of hemp drugs is practically attended by no evil results at all." Indian Hemp Drugs Commission, *Report of the Indian Hemp Drugs Commission*, Simla, India: Government Central Printing Office (1894).

U.S. Panama Canal Zone Report, 1925:

"The influence of [marihuana] ... has apparently been greatly exaggerated.... There is no evidence ... that it has any appreciably deleterious influence on the individual using it." Canal Zone Committee, *The Panama Canal Zone Military Investigations* (1925).

U.S. LaGuardia Commission Report, 1944:

"There [is] no direct relationship between the commission of crimes of violence and marihuana ... and marihuana itself has no specific stimulant effect in regard to sexual desires. The use of marihuana does not lead to morphine or cocaine or heroin addiction." Mayor's Committee on Marijuana, *The Marijuana Problem in the City of New York: Sociological, Medical, Psychological, and Pharmacological Studies*, Lancaster, PA: Jacques Cattell Press (1944).

The British Wootten Report, 1969:

"[We] intended to present both sides of the controversy.... But once the myths were cleared, it became obvious that the case for and against was not evenly balanced. By any ordinary standards of objectivity, it is clear that cannabis is not a very harmful drug..... Possession of a small amount of cannabis ... should not be punished by imprisonment...." Advisory Committee on Drug Dependence, *Cannabis*, London: Her Majesty's Stationary Office (1969).

The Canadian LeDain Commission Report, 1970:

"Physical dependence to cannabis has not been demonstrated and it would appear that there are normally no adverse physiological effects ... occurring with abstinence from the drug, even in regular users.... Since cannabis is clearly not a narcotic we recommend that the control of cannabis be removed from the Narcotic Control Act.... The Commission is of the opinion that no one should be liable to imprisonment for simple possession." Canadian Government Commission of Inquiry, *The Non-Medical Use of Drugs*, Ottawa, Canada: Information Canada (1970).

U.S. National Commission on Marihuana and Drug Abuse, 1972:

"There is little proven danger of physical or psychological harm from the experimental or intermittent use of natural preparations of cannabis.... Marihuana's relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it.... Existing social and legal policy is out of proportion to the individual and social harm engendered by the drug." National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, Washington, DC: U.S. Government Printing Office (1972).

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The Dutch Baan Commission, 1972:

"Cannabis does not produce tolerance or physical dependence. The physiological effects of the use of cannabis are of a relatively harmless nature.... The current law does not respect the fact that the risks of the use of cannabis cannot be equaled to the risks of the use of substances that are pharmacologically much more potent.... This hurts the credibility of the drug law, and the prevention efforts based on the law are made untrustworthy." Werkgroep Verdovende Middelen, *Background and Risks of Drug Use*, The Hague: Staatsuitgeverij (1972).

Commission of the Australian Government, 1977:

"One of the most striking facts concerning cannabis is that its acute toxicity is low compared with that of any other drugs.... No major health effects have manifested themselves in the community.... Legal controls [should] not [be] of such a nature as to ... cause more social damage than use of the drug.... Cannabis legislation should be enacted that recognises the significant differences between ... narcotics and cannabis in their health effects.... Possession of marijuana for personal use should no longer be a criminal offence." Senate Standing Committee on Social Welfare, *Drug Problems in Australia –An Intoxicated Society?*, Canberra: Australian Commonwealth Government Printing Office (1977).

U.S. National Academy of Sciences Report, 1982:

"Over the past 40 years, marijuana has been accused of causing an array of antisocial effects including ... provoking crime and violence, ... leading to heroin addiction, ... and destroying the American work ethic in young people. [These] beliefs ... have not been substantiated by scientific evidence.... The advantages of a policy of regulation include ... the savings to economic and social costs of law enforcement ... , better controls over the quality and safety of the product, and, possibly, increased credibility of warnings about risks." National Research Council, *An Analysis of Marijuana Policy*, Washington, DC: National Academy Press (1982).

Australian National Drug Strategy Committee, 1994:

"Australia experiences more harm ... from maintaining cannabis prohibition policy than it experiences from the use of the drug.... We conclude that cannabis law reform is required in this country." McDonald, D. et al., *Legislative Options for Cannabis in Australia, Report on the National Task Force on Cannabis*, Canberra: Australian Government Publishing Service (1994)

Report by the Dutch Government, 1995:

"Cannabis is not very physically toxic.... Everything that we now know ... leads to the conclusion that the risks of cannabis use cannot ... be described as "unacceptable" It has been demonstrated that the more or less free sale of ... [marijuana] for personal use in the Netherlands has not given rise to levels of use significantly higher than in countries which pursue a highly repressive policy.... Dutch policy on drugs over the last twenty years ... can be considered to have been successful." Ministry of Health, Welfare and Sport, *Drug Policy in the Netherlands: Continuity and Change*, The Netherlands (1995).