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COGNITIVE LIBERTY & ETHICS

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Report on SB 1103:

A California bill to schedule MDMA (Ecstasy) and to set a mandatory minimum for using, or "being under the influence of," the drug.

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EXECUTIVE SUMMARY

SB 1103 was introduced by Republican State Senator Margett. This report provides an analysis of the bill, concluding that:

1. MDMA (Ecstasy) does not meet the criteria for inclusion in Schedule I; and
2. Imposing a 90-day *mandatory minimum* sentence is ill considered, ineffective, and unjust; and
3. Section 2 of the bill encourages unconstitutional "profiling," and selective enforcement; and
4. Criminalizing a *state of consciousness*, rather than criminal *behavior* is overbroad and unconstitutional.

I. Summary of SB 1103

Section 1 of SB 1103 will classify the drug 3,4-Methylenedioxymethamphetamine (MDMA) within Schedule I of California's controlled substances law.

Section 2 of SB 1103 will modify Section 11550 of the Health & Safety Code to make it a misdemeanor for any person to use or be under the influence of MDMA.

A person convicted of using or being under the influence of MDMA would receive a **mandatory minimum** sentence of 90 days in county jail, (up to a maximum sentence of one year in county jail).

II. Analysis

1. MDMA Does Not Meet The Criteria For Inclusion in Schedule I.

Section 1 of SB 1103 would make MDMA a Schedule I substance under California law. MDMA, however, does not meet the criteria for inclusion in Schedule 1.[1]

Although MDMA is currently a Schedule I controlled substance under federal law, placement in Schedule I was erroneous. MDMA does not meet the criteria for placement in Schedule I because MDMA has an "accepted medical use in treatment" and does not have a "high potential for abuse."[2] Placing MDMA in California's Schedule I will duplicate the federal error.

In 1985, when the federal government first proposed scheduling MDMA, the DEA held hearings on the matter. Thirty-three scientific and expert witnesses testified and ninety-five exhibits were received into evidence.

In a comprehensive opinion, Judge Francis Young, who presided over the hearings, found that MDMA did not satisfy the three criteria necessary for placement in Schedule I.[3] Judge Young found that MDMA does have a safe and accepted medical use in the U.S. under medical supervision. Furthermore, he found that the evidence failed to establish that MDMA had a high potential for abuse.

Based on his thorough examination of the evidence, Judge Young concluded that "the evidence of record requires MDMA to be placed in Schedule III." Placement in Schedule III would allow doctors to use MDMA in therapy and to prescribe it.

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[1] Existing federal law classifies controlled substances into five schedules, and places the greatest restrictions and penalties on the use of those substances placed in Schedule I, including prohibiting the prescribing of any Schedule I controlled substance. Currently MDMA is not classified as a Schedule I drug in California. Prosecutors, however, still charge and convict people of offenses involving MDMA by proceeding under California's Controlled Substance Analog Act (Health & Saf., Sec. 11400).

[2] Under federal law a drug must meet the following criteria in order to be placed in Schedule I:

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision. (21 USC Sec. 812.)

[3] Judge Young's written opinion can be found online at: http://www.mninter.net/~publish/mdma.htm.

Research conducted since the DEA hearing in 1985 continues to confirm MDMA's medicinal potential. In 2001, for example, researchers discovered that MDMA may have utility in treating patients with Parkinson's disease.[4] Longstanding evidence suggests that MDMA is a beneficial adjunct to psychotherapy.[5] Indeed, on November 2, 2001, the FDA approved a protocol for a Phase I clinical study on MDMA's efficacy in treating patients suffering from post-traumatic stress disorder.[6]

Placing MDMA in California's Schedule I will make *all* use of MDMA, including medical use, a criminal offense. It will also further obfuscate MDMA's medical potential, by deterring scientists in California from conducting new research on MDMA's potential as an adjunct to physical or mental healing.

In sum, MDMA does not meet the criteria for inclusion in Schedule I. Placing the drug in Schedule I is not only legally erroneous, it will place significant roadblocks in the way of scientific researchers interested in legitimately studying the medicinal potential of this drug.

2. Section 2's 90-Day Mandatory Minimum is Ill conceived, Ineffective, and Unjust.

Section 2 of SB 1103 will make it a misdemeanor offense for any person to use, or be under the influence of, MDMA. Those convicted will receive a **mandatory minimum** sentence of 90 days in county jail, (and up to a maximum sentence of 1 year in county jail). Before enacting Section 2 of SB 1103, legislators should ask themselves *what benefit is served* by interrupting an otherwise law-abiding person's family life to make them serve 90 days in confinement.

This provision targets bottom-level users, and *mandates* a harsh sentence that bars judges from fashioning an appropriate punishment.[7]

MDMA is nonaddicting, and almost universally occasions a state of mind that is accepting, empathetic, and insight-oriented.[8] Placing an MDMA user in jail for 90-days is not only unjust, it serves no benefit to society. To the contrary, arresting and incarcerating nonviolent MDMA users misdirects police assets, wastes judicial resources, and squanders tax payer dollars.

Michael Tonry, a Professor of Law and Public Policy at the University of Minnesota has extensively researched the effects of mandatory minimum sentences and concluded that "[a]s instruments of public

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[4] See, Jonathan Margolis, "Ecstasy's Dividend: Has a Parkinson's disease sufferer, who can only find relief (albeit temporarily) in an illegal drug, accidentally discovered a reliable treatment?" *Time Europe*, Vol. 157, No. 7, (February 19, 2001).

[5] See, George Greer, M.D. & Requa Tolbert, R.N., M.S.N., "Subjective Reports of the Effects of MDMA in a Clinical Setting," *Journal of Psychoactive Drugs* (Vol. 18 (4): 319-327 (1986). For additional information about past and present studies on MDMA's therapeutic potential, see the website of the Multidisciplinary Association for Psychedelic Studies (MAPS), at: www.maps.org.

[6] See, Rachel Zimmerman, "FDA Permits First Test of Ecstasy As Treatment for Stress Disorder," *The Wall Street Journal* (November 6, 2001).

[7] In the strict terms of Section 2 of SB 1103 "...in no event shall the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 90 days in confinement in the county jail." (SB 1103, Sec. 2.)

[8] Jerome Beck & Marsha Rosenbaum, *Pursuit of Ecstasy: The MDMA Experience* (NY: State Univ. of New York, 1994); Nicholas Saunders, *Ecstasy Reconsidered* (UK: Turnaround Press, 1997).

policy, they do little good and much harm."[9] Likewise, the Federal Judicial Center examined whether mandatory minimums for drug offenses help reduce crime, and concluded:

> … mandatory minimums have not proven effective
> at reducing crime or reducing drug availability.[10]

Further, the Federal Judicial Center found that mandatory minimum sentencing statutes "have unintended consequences that compromise the basic fairness and integrity of the … criminal justice system."[11]

The above critiques of mandatory minimum sentences are especially well leveled at Section 2 of SB 1103. Inasmuch as AB1416 will largely be applied to otherwise law-abiding young adults,[12] legislators should ask themselves how individuals and/or society will be benefited by sending an otherwise law-abiding young adult to county jail for three months, disrupting his or her schooling, employment, and family life?

3. Section 2 will Encourage Unconstitutional "Profiling," Invasive Police Actions, and Selective Enforcement Against Young People at "Raves."

Detecting whether someone has used, or is under the influence of, MDMA is extremely difficult. How is a police officer going to determine the inner state of a person's consciousness?

MDMA is orally ingested. It is not injected, and thus there is no visible mark indicating recent use. MDMA is odorless so, unlike alcohol or marijuana, there is no aromatic indication of recent use. As a result, police officers will be forced to rely on unconstitutional "suspect profiling" and invasive bodily fluid testing.

Recent media coverage has associated MDMA use with young people who attend electronic music events known as "raves," much the same as the government and the media associated marijuana use with jazz musicians and jazz venues in the 1940s.[13] Given the difficulties with determining the inner state of a person's consciousness, police who are charged with enforcing section 2 of SB 1103 will have no other option than to resort to unconstitutional profiling of a class of people. Will police sweep through electronic music events, detaining or arresting dancers who hold light sticks or water bottles? Will young people who hug each other at a rave be detained? Will young people be rounded up at raves and forced to submit to blood tests on site, or forced to urinate in bottles?

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[9] Michael Tonry, "Mandatory Penalties," 16 *Crime & Justice: A Review of Research*, (Michael Tonry ed., 1990), pp. 243–44.
[10] Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Term*, Federal Judicial Center, (1994), p. 14.
[11] Id. p. 1.
[12] As one prosecutor glibly commented: "If there are young people around, Ecstasy will be there." New Jersey Prosecutor Terrence Farley, quoted in, Jason Laughlin, "State Cracks Down on Club Drugs," *Cherry Hill Courier-Post*, New Jersey, August 28, 2000.

[13] See, Philip Jenkins, "Ecstasy and Synthetic Panics, *Journal of Cognitive Liberties*, (Vol. 1, No. 3, Fall, 2000), pp. 7-28; Charles Whitebread, "The History of the Non-Medical Use of Drugs in the United States," *Journal of Cognitive Liberties*, (Vol. 1, No. 3, Fall, 2000), pp. 29-64.

These problems, among others, indicate that section 2 of SB 1103 would be extremely difficult to enforce, and would require unconstitutional or highly invasive police tactics. Likewise, the lack of enforcement guidance leaves the police with almost unbridled discretion, and thus encourages selective law enforcement.

4. Section 2 Violates The Constitutional Right Of Citizens To Autonomy Over Their Own Mental Processes.

To respect the Constitution, any prohibition concerning the use of MDMA should be strictly limited to criminalizing *conduct* that harms others, or which poses a clear and present danger of harm to others. For example, driving an automobile after taking MDMA should be a crime. Likewise it should be a crime to give another person MDMA without their knowledge, or to use the drug to facilitate rape. However, in order to respect the fundamental rights of citizens to autonomy over their own minds and cognitive processes, the mere possession and/or use of MDMA should not be a crime.

The right to make choices about the content of one's mind and the mode of one's mental processes is the quintessence of individual freedom and liberty. So long as a person is not causing harm to another person, or presenting a clear and present danger of harm, a person has a fundamental right to autonomy over his or her own mind. By making it a criminal offense to "use or be under the influence of" MDMA, section 2 of SB 1103, improperly makes criminals out of otherwise law-abiding citizens based solely on an "unapproved" state of consciousness. This prohibition, in addition to codifying an Orwellian concept akin to "thought crime," is an unconstitutional infringement on the fundamental right to freedom of thought as protected by the First Amendment, and on the fundamental right to privacy, including the Fifth Amendment right to autonomy over one's interior thoughts.

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The CENTER FOR COGNITIVE LIBERTY & ETHICS (CCLE) is a nonpartisan, nonprofit, law, policy and education center working in the public interest to protect fundamental civil liberties. The CCLE seeks to foster cognitive liberty – the basic human right to unrestrained independent thinking, including the right to control one's own mental processes and to experience the full spectrum of possible thought.