

November 17, 2003

American Bar Association
Justice Kennedy Commission
ABA Criminal Justice Section
740 15th Street, NW
Washington, D.C. 20005

Dear Chairman Saltzburg and members of the Justice Kennedy Commission,

In response to the Commission's solicitation for input from scholars, advocates, and other interested parties who focus on criminal justice issues, the Center for Cognitive Liberty & Ethics (CCLE) respectfully submits the following testimony to the committee on the subject of drug offenses and incarceration.

The CCLE is a nonprofit law and policy institute working to advance sustainable social policies that protect freedom of thought. The CCLE opposes criminal drug prohibition as an overbroad infringement upon the fundamental right to freedom of thought and maintains that ill-considered drug policies underlie many of the "inadequacies - and the injustices - in our prison and correctional systems" that Justice Kennedy has called attention to. Accordingly, the CCLE recommends that the Commission critically evaluate the impact of laws that penalize the personal possession of marijuana on our criminal justice system.

I Laws That Penalize the Personal Possession of Marijuana Significantly Impact the Criminal Justice System by Contributing to High Rates of Arrest and Incarceration.

Marijuana is the most commonly used illegal drug in the world, used by an estimated 163 million people.¹ According to U.S. Government statistics, nearly 95 million Americans (one third of the population) have tried marijuana during their lifetime.² The number of Americans who smoked marijuana in the last year

¹ Global Illicit Drug Trends 2003, published by the United Nations Office for Drug Control and Crime Prevention (ODCCP), Section 1.3.4, page 136. Online at http://www.unodc.org/pdf/report_2003-06-26_1.pdf

² 2002 National Survey on Drug Use and Health, Department Of Health And Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), Table H1. Online at: <http://www.samhsa.gov/oas/nhsda/2k2nsduh/2k2SoFW.pdf>

(32,132,000) is greater than the entire population of Connecticut, New Jersey, New Hampshire, and New York combined (31,556,164).³

In the United States is it 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 2001 the Federal Bureau of Investigation's Uniform Crime Reports (UCR) estimated that the single highest arrest count at the state and local level was for drug offenses. According to the UCR, law enforcement agencies nationwide made 1,586,900 arrests for drug offenses.⁵ More than four-fifths of drug law violation arrests were for simple possession.⁶ 40.4% of drug possession arrests are for marijuana alone.⁷

In 2002, a total of 697,082 people were arrested for marijuana offenses. Of those, 613,986 people were arrested for marijuana possession alone.

High arrest rates, in turn, impact incarceration rates for drug offenses. Prisoners sentenced for drug offenses constituted the largest group of federal inmates (55%) in 2001, down from 60% in 1995.⁸ Although no specific statistics are available for marijuana offenses, rates of incarceration for drug possession alone are striking. In 1997, there were 55,099 drug offenders in federal prison and 10,122 of these were imprisoned for possession alone. That same year, state prisons held 216,668 drug offenders, of whom, 92,110 were imprisoned for possession alone.⁹

This is a colossal injustice and a waste of criminal justice resources.

In 1972, President Nixon commissioned a review of the country's marijuana laws. After reviewing the scientific evidence, the Shafer Commission, reported:

³ Figures obtained from the 2002 National Survey on Drug Use and Health (See footnote 2, *infra*) and United States Census Bureau Data Profiles for 2002. 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 Bureau of Justice Statistics, Drug & Crime Facts web page at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/DCF.pdf> (last revised October 7, 2003)

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Drug War Facts, "Prisoners" online at <http://www.drugwarfacts.org/prison.htm>, citing Harrison, Paige M. & Allen J. Beck, PhD, US Department of Justice, Bureau of Justice Statistics, Prisoners in 2002 (Washington, DC: US Department of Justice, July 2003), p. 11, Table 18.

⁹ Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2001, p. 499, Table 6.30, available online at <http://www.albany.edu/sourcebook/>.

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.¹⁰

II Laws that Penalize the Personal Possession of Marijuana are Inconsistent with Respect for Individual Freedom and Fundamental Constitutional Guarantees

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 75 years ago, 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 freedom of thought and to autonomy over one’s own mind and brain chemistry is one of “those liberties of the individual which history has 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, freedom of thought 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...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

¹⁰ National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, Washington, DC: U.S. Government Printing Office (1972). A plethora of government studies, both before and after the Shafer Commission’s report, have found that criminal laws against marijuana use are bad public policy. See, e.g., Indian Hemp Drugs Commission, *Report of the Indian Hemp Drugs Commission*, Simla, India: Government Central Printing Office (1894); Canal Zone Committee, *The Panama Canal Zone Military Investigations* (1925); 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); Advisory Committee on Drug Dependence, *Cannabis*, London: Her Majesty’s Stationary Office (1969); Canadian Government Commission of Inquiry, *The Non-Medical Use of Drugs*, Ottawa, Canada: Information Canada (1970); Werkgroep Verdovende Middelen, *Background and Risks of Drug Use*, The Hague: Staatsuitgeverij (1972); Senate Standing Committee on Social Welfare, *Drug Problems in Australia –An Intoxicated Society?*, Canberra: Australian Commonwealth Government Printing Office (1977); National Research Council, *An Analysis of Marijuana Policy*, Washington, DC: National Academy Press (1982); McDonald, D. et al., *Legislative Options for Cannabis in Australia, Report on the National Task Force on Cannabis*, Canberra: Australian Government Publishing Service (1994); Ministry of Health, Welfare and Sport, *Drug Policy in the Netherlands: Continuity and Change*, The Netherlands (1995).

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.¹¹

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 consciousness that gives rise to ideas, as it provides for the subsequent expression of those ideas.

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 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.¹² Both types of laws place barriers around and within the individual's

¹¹ 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).

¹² 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

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, or who is unable to care for him or herself in public. 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).)

III Constitutional Alternatives to Criminal Prohibition of Marijuana are Adequate to Protect Public Health and Safety

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, 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.” (*Abouod 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, and so long as he or she is able to care for him or herself in a public place. To abide by this principle of self-determination, and to respect the constitutional rights of all Americans to freedom of thought and to autonomy over their own cognition, laws concerning marijuana must target harmful conduct rather than disfavored mentation.

Accordingly, the CCLE submits that the Justice Kennedy Commission should recommend that the federal government and the fifty states should repeal laws that make the personal possession, use, or cultivation of marijuana a criminal offense. The state and federal governments’ legitimate interests in protecting the health and safety of their citizens are well-served by existing laws that make it a crime to be unable to care for oneself in public due to the affects of marijuana or any another drug (i.e., “public intoxication laws”), and by existing criminal laws, such as driving while impaired by marijuana, or selling marijuana to minors, which target conduct that is dangerous to others.

“unauthorized” way of thinking. In this respect, the “war on marijuana” is not about the plant or its preparations, anymore than book banning was a war on paper and ink.

Repealing laws that make the personal possession, use, or cultivation of marijuana a crime would significantly reduce state and federal law enforcement costs and associated drains on judicial resources by keeping more than half a million, otherwise peaceful and law-abiding, Americans out of the criminal justice system every year. An open society, committed to democracy, can provide for the security and welfare of its citizens without over broadly infringing on their freedom of thought and privacy.

In conclusion, and for the forgoing important reasons, Chairman Saltzburg and members of the Justice Kennedy Commission, the CCLE requests that the Commission call for the repeal of state and federal personal possession of marijuana offenses as an important step toward addressing high rates of incarceration and other forms of fundamental unfairness in our prison and corrections system.

The CCLE would like to thank the committee for the opportunity to present this testimony. If we can be of any further assistance, please do not hesitate to contact me, or my associate, Julie Ruiz-Sierra, at (530) 750-7912.

Respectfully submitted,

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Co-director and Legal Counsel