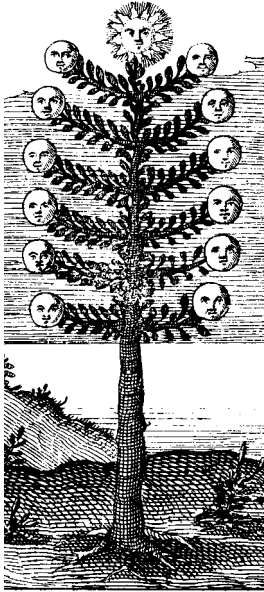


THE
CENTER FOR COGNITIVE LIBERTY & ETHICS

JOURNAL OF COGNITIVE LIBERTIES

RICHARD GLEN BOIRE, ESQ.
EXECUTIVE DIRECTOR



TESTIMONY OF RICHARD GLEN BOIRE, ESQ.
BEFORE THE UNITED STATES SENTENCING COMMISSION
on the topic of
THE PROPOSED AMENDMENT TO INCREASE GUIDELINES
SENTENCES CONCERNING MDMA (ECSTASY)

INTRODUCTION

I am Richard Glen Boire, an attorney and director of the ALCHEMIND SOCIETY: THE INTERNATIONAL ASSOCIATION FOR COGNITIVE LIBERTY.

THE ALCHEMIND SOCIETY is a nonprofit, nonpartisan 501(c)(3) public education organization which 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. We operate the CENTER FOR COGNITIVE LIBERTY & ETHICS (CCLE), an educational law and policy center working in the public interest to protect and promote cognitive freedom and autonomy.

I want to begin by stating that the members of the ALCHEMIND SOCIETY view aspects of the so-called War on Drugs as an attack on the mental autonomy and cognitive liberty of Americans who have responsibly used psychoactive plants and substances to provide genuine insight and understanding about themselves and the world at large. In this respect, we are against any drug law that makes otherwise law-abiding Americans criminals, and punishes them for decisions they make about how to operate their own minds.

I am here today to speak about MDMA, or "Ecstasy," and in particular, on the impact that increased sentences could have on the cognitive freedom of many Americans. In this regard, I have four brief points.

BOARD OF ADVISORS

JOHN PERRY BARLOW

RICK DOBLIN, PH.D.

ALEX GREY

LESTER GRINSPOON, M.D.

LAURA ARCHERA HUXLEY

RALPH METZNER, PH.D.

JONATHAN OTT

DALE PENDELL

SADIE PLANT, PH.D.

DAVID PRESTI, PH.D.

ALEXANDER SHULGIN, PH.D.

MYRON STOLAROFF, M.A.

THOMAS SZASZ, M.D.

I. CONTROLLED SUBSTANCES – YESTERDAY & TODAY

I'd like to begin with an analogy. The control of psychoactive substances is not a new phenomenon. In 1450, Johannes Gutenberg invented the moveable type printing press. In 1557, Pope Paul IV issued the first *Index Librorum Prohibitorum*, creating the controlled psychoactive substances known as unapproved books.¹

Following the mandates of the *Index*, unapproved books were seized and destroyed. Those persons who manufactured (i.e., printed), distributed, or read prohibited books were punished when caught.

Today, people who manufacture, distribute or use certain psychoactive drugs, such as MDMA, are hunted by government agents and punished when caught.

The control of books as dangerous psychoactive substances did not come to an end until 1966 when the *Index Librorum Prohibitorum* was finally abandoned. At that time, the *Index* contained over 4000 forbidden books, including works by Galileo, Kant, Pascal, Milton, Spinoza, and John Locke.

Today, we look at the control of books, and the punishment of those who printed, sold, and read them, as an archaic notion, something contrary to basic concepts of intellectual freedom and a democratic society.

So, my first point is to respectfully submit that this Commission, with regard to setting the punishment for federal drug offenses, is in a similar position to those who previously set the punishment for manufacturing or distributing the controlled substances known as prohibited books. Yet, this Commission, to the extent that it sets punishment for drug offenses in which a person has done nothing more than grow, manufacture, distribute, or use, the psychoactive agents which have been denoted as "controlled substances," participates in an even more pernicious form of

¹ Books are psychoactive substances. They are ingested by reading, and have direct effects on the mind. Books, like other psychoactive substances, can "alter" your thinking, change your view of the world and of yourself, or permit temporary relief (or "escape") from the problems inherent in being human.

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 1450, 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.

For a fascinating survey of suppressed literature as controlled substances, see the multi-volume set *Banned Books*, published by FACTS ON FILE, which covers literature suppressed on religious, social, sexual, and political grounds.

ensorship—a censorship of consciousness itself—by punishing Americans for no other crime than choosing to experience or enable particular states of mind.²

II. HARM REDUCTION VERSUS HARM EXACERBATION?

THE COMMISSION'S ROLE WITH REGARD TO MDMA

With regard to MDMA, this Commission should consider that a percentage of the harm to young adults and other people who ingest MDMA, comes not from MDMA itself, but rather from the ingestion of adulterated, and sometimes entirely misrepresented, MDMA.³

MDMA does not produce violent behavior and, because it is virtually nonaddictive, users of MDMA do not commit crimes against others in order to support a "habit." MDMA almost universally occasions a state of mind that is accepting, empathetic, and insight-oriented. Because of these qualities, MDMA is presently a very popular drug, despite its criminal status.

Raising the punishment for those who sell *genuine* MDMA, as the Commission proposes to do, would create an inverted and anti-social incentive structure—one that has the potential to dramatically increase the individual and social harm associated with what may be sold as "Ecstasy." By increasing the punishment for manufacturing or selling genuine MDMA, the proposed amendment will encourage unscrupulous manufacturers and dealers to sell other drugs as "Ecstasy" in an effort to avoid the significantly increased punishment for selling genuine MDMA.

In this respect, the "MDMA Brief Report, February 2001," which was prepared for this Commission, does not tell the whole story. The story is not just about the impact the Commission's proposed sentencing increase will have on MDMA manufacturers and distributors. The Commission should also take into account the effect such a punishment structure will have on the many young adults and others who are currently using, and will continue to use, MDMA. By creating a punishment scheme that encourages the misrepresentation of other drugs as "Ecstasy," more people who that believe they are buying genuine MDMA, will in fact be sold, *and go on to ingest*, a completely different drug—one that may have an entirely different pharmacological profile than MDMA. The danger, in such a situation, is akin to a long-haul truck driver believing he was taking a No-Doze caffeine-pill, when in fact he was unwittingly ingesting a sleeping pill.

² The Commission has "significant discretion" to determine which crimes have been punished too severely. (28 U.S.C. 994(m) (1982 ed., Supp. IV)).

³ Baggott N, Heifets B, Jones RT, Mendelson J, Sferios E, Zehnder J., "Chemical Analysis of Ecstasy Pills," *JAMA*, (2000) Vo. 284, No. 17, p. 2190 (See "Attachment A"); Grob C., "Deconstructing Ecstasy: The Politics of MDMA Research," *Addiction Research*, (2000) Vol. 8, No. 6, pp. 549-588.

In short, by raising the punishment for those who manufacture or sell genuine MDMA, the Commission will be increasing the individual and social harm that occurs when young adults and others ingest “who-knows-what” drug, having been falsely told it is “Ecstasy.”

III. PUNISH THOSE WHO MISREPRESENT OTHER SUBSTANCES AS MDMA

If this Commission is determined to raise the punishment with regard to “Ecstasy” offenses, it should consider leaving the current equivalencies unchanged, but instead increasing—perhaps dramatically—the punishment for misrepresenting *another drug as “Ecstasy.”* Misrepresenting the identity of controlled substances is a crime under federal law, as well as in many states.⁴

Under such a plan, any person convicted of selling a drug by intentionally misrepresenting it to be MDMA or “Ecstasy,” would receive greater punishment than the current Guidelines punishment for distributing genuine MDMA. By punishing those unscrupulous dealers who misrepresent another drug as MDMA, a vast amount of the individual and social harm associated with “Ecstasy” use would be minimized, and the Commission would avoid the inverted incentive structure that will result if this Commission raises the punishment with regard to manufacturing or distributing *genuine* MDMA.

IV. REPLACE DRUG OFFENSE GUIDELINES WITH AN “UPWARD DEPARTURE” OR “SPECIFIC OFFENSE CHARACTERISTIC”

Lastly, on behalf of the CENTER FOR COGNITIVE LIBERTY & ETHICS and the members of the ALCHEMIND SOCIETY, I submit that the Commission should consider a wholesale revision of Part D of the Federal Sentencing Guidelines – those sections related to drug offenses.

Currently, Section 2D1.1 of the Guidelines—especially those provisions related to establishing “drug equivalencies”—forces this Commission to make impossible comparisons between various drugs, and to set ultimately arbitrary equations under a guise of rationality.

⁴ Federal code section 21 U.S.C. Sec. 802 (7) makes it an offense to sell a “counterfeit drug.” Additionally, counterfeit controlled substance laws exist on the state level. For example, California’s “Imitation Controlled Substances Act,” (Cal. Health & Saf. Code, secs. 109525-109555), makes it a crime to manufacture or distribute an “imitation controlled substance, which is statutorily defined as “(a) a product specifically designed or manufactured to resemble the physical appearance of a controlled substance, that a reasonable person of ordinary knowledge would not be able to distinguish the imitation from the controlled substance by outward appearances, or (b) a product, not a controlled substance, that, by representations made and by dosage unit appearance, including color, shape, size, or markings, would lead a reasonable person to believe that, if ingested, the product would have a stimulant or depressant effect similar to or the same as that of one or more of the controlled substances included in Schedules I through V, inclusive, of the Uniform Controlled Substances Act, pursuant to Chapter 2 (commencing with Section 11053) of Division 10.” (Cal. Health & Saf. Code, sec. 109550.)

One possible method for bringing rationality to the Sentencing Guidelines with regard to offenses involving controlled substances, and to actually reduce the social harm associated with certain drugs, would be for the Commission to abandon the drug equivalency schema, indeed, abandon the entire drug offense section of the guidelines (Part D), and replace it with a simple drug enhancement, an “upward departure” or “Specific Offense Characteristic” to be applied when a federal crime is committed under the influence of, or in possession of, a controlled substance.⁵

Pursuant to this proposal, a person who commits a federal crime under the influence of a drug, or in possession of a drug, would have his or her sentence for the substantive offense increased by an additional drug enhancement or upward departure.

Such a system would leave law-abiding Americans alone. It would return to them the fundamental right to autonomy over their own consciousness, while at the same time significantly enhancing the punishment of any person whose *behavior* after taking a drug causes *actual social harm* (as such harm is codified in the federal criminal code).

Respectfully submitted,

Richard Glen Boire, Esq.
Center for Cognitive Liberty & Ethics
Alchemind Society: The International
Association for Cognitive Liberty

⁵ Such a sentence enhancement would function like currently existing enhancements for using or possessing a firearm in the commission of a crime. The Sentencing Guidelines are replete with firearm enhancements imposed as “Specific Offense Characteristics.” Section 2B2.3, for example, states the Guideline sentence for the crime of Trespassing. While Trespassing is ordinarily punished at a Base Level of 4, the punishment is increased 2 levels “[i]f a dangerous weapon (including a firearm) was possessed [in commission of the trespass.]” (United States Sentencing Commission, Guidelines Manual Section 2B2.3. (Nov. 2000).)

For an example of an “upward departure” see, Federal Sentencing Guideline, Sec. 3B1.4, which increases the punishment of any Guideline Sentence by 2 levels “[i]f the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense... .”