

February 1, 2000

The Sentencing Commission

RE: "ecstasy"

Dear Fellow Citizens,

As a professor of philosophy I wish to raise the issue of ethics in regards punishment for the personal use of the contraband drug popularly known as ecstasy. Punishment must be fair and proportionate to the crime. Can hard treatment (deprivation of wealth, liberty or life) be morally justified as punishment for drug use? No ethicist argues that it is. A search of the philosophical literature turns up a dearth of justifications for the current hard treatment for drug possession. On the contrary, philosophers (i.e., educated people who take moral issues seriously and rationally) find hard treatment for drug use to be *unjustified*, which is to say that the current punitive measures being taken by our government is immoral. To head in the direction of greater "hardness" of treatment is to go deeper into an immoral practice. Rather than producing good, such a policy not only fails to prevent bad (not only is the deterrent factor of hard treatment empirically unsupported, but the theory of deterrence is a contradictory basis for morality insofar as it condones cruelty) but actually increases bad consequences for citizens (we have more citizens in prison now than the combined populations of Alaska, Montana and Vermont). Specific arguments in support of my contention can be found in my enclosed essay. Although the essay addresses the morality of marijuana use, the arguments apply *mutatis mutandis* to the use of ecstasy.

Ethical analysis of the morality of hard treatment can be found in the following two essays, both of which are included in *A Reader On Punishment*, R.A. Duff and D. Garland, eds. (OUP, 1994): Joel Feinberg, "The Excessive Function of Punishment", and A. von Hirsch, "Censure and Proportionality"

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Marijuana and Morals

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It stands to reason that if a behavior is to be prohibited by law and punished severely it must be widely and clearly judged to be immoral. Given the draconian measures taken by the U.S. government to suppress marijuana smoking one would expect that the immorality of this behavior has been soundly established. Amazingly, however, a rational analysis defending the thesis that marijuana smoking is a moral vice is very difficult to find. In fact, I have found none; but negative moral judgements are frequently found in prohibitionist literature. Rhetorical opinions made on the morality of marijuana smoking without the backing of rational analysis are specious, however, even if they

suffice to persuade congressmen to vote for prohibition. There may be nonmoral reasons that justify prohibition, but the war on marijuana is patently not based on rational moral reasoning. My purpose here, however, is not to pick apart the smattering of moralistic statements made by defenders of prohibition, but rather to delineate ways in which one could rationally justify the choice to smoke marijuana. If one can rationally demonstrate the possibility of using marijuana in a way that is consonant with or enhances human virtue rather than vice, then it will become much more evident that the present U.S. policy of prohibition is not only unjust and dysfunctional as others have argued, but also immoral.

Judgements about the morality or immorality of a behavior must be based on rationally defensible standards applied to the practice while considering relevant cultural and socio-historical contexts that give meaning to the behavioral practice. Moral philosophy supplies several standards upon which to base moral reasoning. Drawing upon such standards central to Kantian, utilitarian and virtue ethics, I will deliberate on the moral implications of marijuana use. Insofar as I succeed in demonstrating that marijuana use can be compatible with the choice to live a morally virtuous life, to that extent will my argument go beyond that approach which concedes to the prohibitionists that marijuana smoking is a moral vice (albeit relatively harmless) like tobacco and alcohol use but which should be left as a personal choice and not proscribed by law. That approach has resulted in a stalemate between prohibitionists, including a highly inflated government apparatus deeply invested in policing on the one hand, and the legalization movement on the other, which claims the War on Drugs is a failure. The main contention seems to concern the consequences of perpetuating or ending the War on Drugs, with each side painting a dire picture of American society's future should the other side prevail.

If, however, it can be determined that marijuana smoking is not inherently a vice and that it can be used in a responsible way, then, perhaps, we can shift the debate away from this stalemate to considerations of harm reduction. To that aim I will make a policy proposal that seriously addresses the moral implications of marijuana use. I confine my analysis to marijuana use although it would also be applicable to policy considerations of psychedelics. Ironically, marijuana has been dubbed the gateway drug by prohibitionists as a last resort justification for proscribing it. Their use of the image only considers its function as an open gate, neglecting that the predominant use of a gate is to keep out. I believe that rationalizing our marijuana policy and the corresponding raising of the quality of drug and marijuana education to the highest standards of liberal arts and sciences education will make a significant contribution to closing the gate on the drug problem.

Moral Justifications

This being an exercise in applied rather than theoretical ethics, my aim in this section is not to showcase a particular theory of normative ethics or to make an exhaustive ethical analysis, but to demonstrate how any rational person can draw on normative theories to deliberate on the morality of marijuana use. The main normative theories to be considered are utilitarian, deontological and virtue ethics.

Utilitarian Ethics

Most of the current debate on marijuana use is utilitarian insofar as it focuses on the consequences of the behavior rather than the intent of the user. The utilitarian principle holds that an action is morally good to the extent that its beneficial consequences outweigh the negative ones, taking the general welfare of all into account. Conversely, if an action produces more negative than good consequences for all concerned, then it is morally vicious. In applying the utilitarian principle we are asked to make a thorough, objective analysis of the effects of marijuana use. A frequent criticism of prohibitionist arguments is that the evidence its advocates muster to demonstrate the overwhelming negative consequences of marijuana smoking are neither thorough nor objective. Negative effects are blown out of proportion. Toxicity reports based on exceedingly high dosages fed to animals are inappropriately applied to humans who would never consume such quantities of marijuana. Prohibitionists claim that marijuana smoking causes an amotivational syndrome, but three decades of scientific research has failed to substantiate this. This pattern of distortion has been thoroughly exposed by Lynn Zimmer's and John Morgan's review of the scientific evidence in their book, *Marijuana Myths, Marijuana Facts*.¹

Although the negative effects of marijuana smoking have been greatly exaggerated, this is not to say that there are no negative effects. Aside from the relatively rare cases in which someone with a borderline psychotic syndrome is triggered into active psychosis under the effects of marijuana, most negative effects of marijuana smoking are due to inappropriate use. Prohibition obscures the distinction between appropriate and inappropriate use because all use is *de jure* inappropriate. Moral deliberation, however, requires that we do make that distinction in order to avoid producing negative consequences of marijuana smoking. I will develop this line of thought later. Many of the negative effects attributed to marijuana are actually due to preexisting dysfunctional behaviors and immature traits that in some cases are accentuated by marijuana but are not caused by it. Prohibiting marijuana for these reasons would be like aggressively suppressing a symptom while letting the underlying disease rage untreated. This apparent "negative" effect of marijuana can better be regarded as one of its positive effects insofar as it serves the maieutic function of bringing dysfunctional thinking and behavior more to the surface where awareness, especially with proper mentoring or counseling, can initiate steps to psychological maturity. Although marijuana is not addictive, it is possible to use it excessively and compulsively, in which case the reasons are to be found in the addictive complex of one's personality that one is self-medicating with marijuana. Fortunately it is much easier to separate the psychological issues from the substance abuse in the case of marijuana than in addictions of such other substances as alcohol and cocaine. In sum, by far the majority of negative effects attributed to marijuana smoking can be eliminated or effectively mitigated by rational discrimination and responsible use.

Researchers have observed that many of the effects of marijuana, being so varied and idiosyncratic, are due to intentional, circumstantial and learned behavioral factors rather than to the chemistry of the herb. This is a key to understanding the positive effects of the marijuana high. Even the most universally noted characteristic of the marijuana high, namely euphoria, is not a necessary effect of its chemical properties but is largely dependent on subjective, intersubjective and environmental factors at the time

of smoking. Marijuana smokers soon discover that the high enhances not only recreational experiences but their involvement in artistic, intellectual, athletic, spiritual, literary, psychological, relational/dialogical and other disciplined pursuits. Many of the benefits of marijuana are therefore dependent on the smoker's intention, psychological state, personal qualities, aptitudes, knowledge, skills and experience with the drug. So long as these smokers refrain from using marijuana in self-defeating ways they find that the benefits far outweigh the negative consequences, even the artificially exacerbated negative risks introduced by prohibition. In answer to the prohibitionists' charge that their risking years of imprisonment and loss of their property is indicative of irrational behavior caused by an addictive drug habit, marijuana users can reply that the private nature of the behavior makes apprehension by the police unlikely and so is rather a testimony to the uncontestedly greater balance of good over possible bad effects in their utilitarian calculus. A majority of Americans born between 1950 and 1970 have been labeled as criminal for following this utilitarian logic in regards marijuana smoking.

Deontological Ethics

Deontological ethics determines the moral worth of an action by evaluating the actor's intention rather than the consequences of one's act. Given the difficulty of always having our true motivations completely transparent to consciousness, Kant provides us with criteria to measure the purity of our intent. Naming these criteria as categorical imperatives, Kant formulated three versions, each of which rely on the principle of contradiction:

1. Universalizability: Act only on that maxim through which you can at the same time will that it should become a universal law.
2. Means/ends: Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.
3. Autonomy: Act so that you treat the will of every rational being as a will which makes universal law.

In Kant's deontological ethics one's intent is moral if it is rational, and to be rational one's intent must be found without any contradiction in it. Thus I cannot rationally will to lie without contradiction because if I command that lying be a universal law then there would no longer be any utility for me to lie because no lie would be believed. This application of the first version of the categorical imperative is the least relevant to an evaluation of marijuana smoking. This is because people use marijuana for its effects, and so according to this line of reasoning the choice to smoke marijuana *or not to smoke* it does not fall in the realm of morality but is merely a practical decision. The other two versions of the categorical imperative are more helpful for our inquiry, however.

The principle of autonomy is a central contention of the drug problem today. Prohibition is paternalistic and paternalism is a violation of the principle of autonomy. Paternalism can be justified in cases where the moral agents are demonstrated to be incapable of autonomous decisions, people in comas, psychotics and young children, for example. In these cases those with authority act in the best interest of those whose

autonomy is being overridden. Ethicists have no problem with this *soft* paternalism, which hardly requires any justification. *Hard* paternalism, by contrast, violates people's right to self-determination and can only be justified by appeal to more substantial ethical reasons. The American policy of prohibition fails to provide such ethical reasons and is therefore morally unjustified because it violates the principle of autonomy which is the essential prerequisite for moral action. Not all paternalism is bad; in fact, in my policy proposal I will argue for a form of *weak* paternalism for which I will provide justification. Advocates of hard paternalism, however, who want to control what they deem to be self-destructive, immoral or irrational behavior by agents who otherwise seem to have an unimpaired free will and whose actions cause no harm to others, inevitably justify their authoritarianism with specious reasoning that is unacceptable to rational ethicists.² There is nothing inherently irrational about smoking marijuana, certainly no more than the choice to drink coffee. Even while one is under the influence of marijuana, one's reasoning *need* not be any more impaired than when one is not under the influence. The temporary alteration of consciousness may cause some negative reactions in inexperienced or mentally dysfunctional users. In such cases, the alternative moral regards are either to leave these people alone to learn from their mistakes or to provide them with help, which is weak paternalism. At the very least, after the marijuana high leaves off one's reasoning is not distorted and one can rationally decide whether or not to smoke again, for the marijuana high is not so compelling that it would sabotage one's reasoning ability. But to deprive people of their right to exercise self-determination is simply a cynical undermining of morality in the name of morality.

Kant's second version of the categorical imperative, to treat others as ends in themselves and not merely as means to our own ends, has a special relevance in regards the morality of marijuana smoking. This imperative is historically related to the Golden Rule and like it has a negative interpretation as well as a positive one. The negative version is synonymous with the principle of autonomy insofar as it enjoins us to respect the individual autonomy of persons and not to treat them as slaves, children, animals or things. The positive version exhorts us to elevate our regard of others to the point we can either perceive, or, in any case, to honor the *essence* of fellow humans. The positive version demands more of us ethically than the negative. Philosophical attempts to describe this edified relationship with others have been developed by Buber in his concept of the I-Thou relationship and by Levinas in his concept of the otherness of the Other. The special relevance to the marijuana question is that the altered consciousness of the marijuana high is frequently reported to enable one to perceive the essence of other persons.³ To the extent that smoking marijuana can help one to cultivate this perception of the other, to that extent is the choice to smoke marijuana morally commendable. Along the same line of thought, many ethicists state that rational deliberation of ethical reasoning must be complemented by moral intuition. Marijuana stimulates the intuitive ability of the mind and can thus be recommended as an optional pharmacological aid in a program of moral education.

Virtue Ethics

Virtue ethics focuses on the development of the agent's moral character rather than on the intention or consequences of his actions. There is a widespread assumption among prohibitionists that marijuana smoking leads to degradation on one's moral

character. There is no scientific evidence to support that belief but such innuendoes slip easily from the lips of drug czars and other prohibitionists. To support this belief they refer to the association of marijuana smoking with criminals and juvenile delinquents. This association of marijuana and antisocial activity is ironic because marijuana actually decreases aggressiveness and can help to improve the quality of social behavior as I argued above. Social scientists have found no causal relationship between marijuana smoking and antisocial behavior and that any relationship between them is purely accidental. By far the greatest cause of criminality associated with marijuana is prohibition itself. In traditional societies where marijuana and psychedelics are accepted (such as the Amazon and South Asia) there is no correlation between getting high and antisocial behavior. On the contrary, they are used sacramentally as part of a program of moral development. In India, for example, marijuana is used in the practice of yoga, which is a tradition of moral, mental and spiritual development.⁴

Virtue ethics frees the moral dialogue from the stalemate-grip of the War on Drugs paradigm of Right and Wrong, black and white thinking. The marijuana phenomenon is much more complex than what it is reduced to by such dualistic thinking, which can, therefore, never "solve" it. Don't look to virtue ethics to tell you whether smoking marijuana is good or bad. Instead, virtue ethics will prompt you to ask such questions as: "How does pleasure relate to happiness?" "Am I practicing the Golden Mean of temperance in regards my marijuana smoking? Or, where am I on the scale from greedy to anorexic with it?" "What is the weakest part of my moral character and how is it affected by marijuana?" "How does it affect my virtues of honesty and truthfulness?" "Am I engaging myself in escapism and self-deception?" "In what ways *can* vs. *is* my habit furthering my self-knowledge and integrity?" "Is my marijuana habit causing me to associate with people who are morally edifying or people who distract me from my own moral development?" "Does marijuana push me more toward the extreme of deficit or toward the extreme of excess in relation to such virtues as respect, pride and politeness? What about courage, patience and perseverance?" "Am I growing in contentment or is marijuana a smokescreen for my lack of it?"

According to virtue ethicists, the same act, such as smoking marijuana, could be a morally good behavior if performed by a virtuous person, and a vice when performed by a person of flawed character. Exactly what defines a virtuous person is not completely up to the individual but grows out of one's social context. Philosophers may generally agree on what the most essential virtues are, but the art of living consists in expressing these virtues appropriately, which varies according to social context. This is known as practical wisdom. The moral agent is in symbiotic relationship with society, a relationship that begins with moral training in the family and continues in the various institutions of society. Societies differ in the degree to which they provide a context and opportunities for moral flourishing. The War on Drugs in America reflects the crisis in values that marks our societal shift from the modern to a postmodern worldview. The values of the modern worldview are inadequate to deal with such contemporary problems as the environment and drugs, but rather than courageously experimenting with the new values of an emerging multicultural and integral worldview, the government is fanatically holding on to a course of desperation. Marijuana smokers are the scapegoats in a

paradigm war.⁵ Ostracized from mainstream society they are given no encouragement or opportunity to learn how to use marijuana in ways that will nurture their moral development. This places a tremendous obstacle in the way of ameliorating our societal problem with marijuana. Prohibition prohibits a moral solution to the problem.

This brief exercise in moral deliberation concerning marijuana smoking, though not exhaustive, makes it sufficiently clear that the issue cannot be settled by fiat as the U.S. government is trying to do. A rational person can always choose to smoke marijuana in a way that is morally defensible. People can also choose to smoke it irresponsibly and incur moral debt. To close the door on dialogue, treat it as a criminal problem and resort to coercion is to tear at the moral fabric of society as a whole.

A Moral Drug Policy

If the American people and the leaders who represent them decide to take the moral dimension of the marijuana issue seriously then they must set aside their insistence that they are absolutely correct and open up to dialogue with those who believe differently. Prohibition has failed to resolve the drug problem. I propose that we let the marijuana smokers try to resolve the problem. The solution I am proposing is a middle way between prohibition and legalization. The licensing approach has been proposed by others,⁶ but I am proposing a system that goes considerably beyond the concept of a regulated distributing system. Many licenses require that one take the requisite training before it is granted to one. Before being licensed to buy and smoke marijuana, a person would have to graduate from a course of study that covered such topics as safety, training in moral competence, how to smoke marijuana for best results, how to counsel those who are having bad experiences, exposure to methods of self-inquiry and meditation, symptoms of addiction and how to get help, etiquette, relationship and emotional skills, etc. Schools for such education could be formed by professionals from various fields such as psychology, medicine, philosophy, religion, art and the social sciences. Interested parties, including government representatives, could dialogue over the internet and conferences to develop curriculum protocols before the licensing goes into effect. Schools could then be set up in the private sector (local and state government supported institutions would also be welcome to participate) which would charge students wishing to be licensed for tuition. The schools could also provide counseling and other services for graduates and provide them with opportunities to mentor novices. A national organization of schools could handle accreditation procedures. The government could retain the right to inspect the schools and recall the licenses of irresponsible individuals and schools. The program would essentially be self-financed with minimal government expenditure.

I am presenting this proposal in sketch form as an invitation to dialogue. I think that it is only through dialogue that both sides (the government and the tokers) step up to the moral level. Whether we are ready to embrace this mature level of morality or choose to continue to abuse the name of morality to dehumanize each other remains to be seen.

Endnotes

⁵ There are many accounts of this paradigm war. See M. Woodhouse, *Paradigm Wars: Worldviews for a New Age* (Berkeley: Frog, 1996).

¹ Zimmer, L. and Morgan, J. *Marijuana Myths Marijuana Facts* (NY: Lindesmith Center, 1997). See also, Grinspoon, L. *Marihuana Reconsidered* (San Francisco: Quick American Archives, 1999).

² The three types of arguments for this *strong* form of paternalism are based on utility, morality and rationality. The appeal to utility employs a crude interpretation of utilitarian reasoning that claims that the welfare of the greater society is maximized by the suppression of the rights of a minority (marijuana smokers, for example). This same argument would justify slavery or ethnic cleansing. Honoring the principle of autonomy is necessary for liberal democracy lest it become a tyranny of the majority. The second method by which strong paternalism is defended is by appeal to morality. The assumption is that any decent person knows that marijuana smoking is immoral and that such immoral activity is not self-regarding. In other words, what I do in the privacy of my own home corrupts the moral fiber of society even if no one else is directly harmed by me and no one else knows that I have smoked marijuana. This is prerational, magical (and dysfunctional!) thinking. The final attempt at justification is similar to the previous two except the appeal is to rationality. Smoking marijuana is *irrational* regardless of whether it is moral or immoral or whether or not it affects others. Where the normal institutions of society such as the family, school and church fail to make citizens sufficiently rational to avoid the temptation to engage in such irrational activities as smoking marijuana then the state must intervene lest our society veers into irrational directions as a whole. This argument begs the question of what is irrational, which is a logical fallacy. It also relies on a slippery slope argument, another logical fallacy. All three attempted justifications for strong paternalism, as embodied in the U.S. government War on Drugs for example, fail to qualify as rationally moral.

³ "Stoned thinking is the mirror of straight thinking. When we step into nonordinary reality even for a moment, we experience things directly, see inner contents rather than external forms, and suddenly find ourselves able to participate in changing things for the better. This other way of interpreting perceptions comes first as episodic flashes, unpredictable, discontinuous. But the more flashes of it one has, the easier it becomes to maintain." Andrew Weil, M.D., *The Natural Mind* (Boston: Houghton Mifflin, 1972) p.149.

⁴ Several millions of Americans have taken up the practice of Yoga (a 1978 Gallup survey found 10 million). Practicing Yoga is the practice of religion. Despite the trumpeting of itself to the world as the upholder of religious freedom, the U.S. government will not allow Americans the freedom to practice Aushaddhi Yoga although its practice harms no one and it violates no law other than the prohibition to smoke marijuana.

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specmind

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Comments for the Sentencing Commission
 on Ecstasy emergency re-sentencing
 2 February 2001

Executive Summary: There is no need for an "emergency" change to the sentencing provisions for Ecstasy; democracy requires full public participation. Congress did not mandate an increase in penalties; it mandated a review of penalties to make them appropriate. The penalties for use or sale of MDMA should be decreased, not increased. The discovery, manufacturing and distribution of MDMA has provided positive benefits to millions of citizens. Sentencing guidelines penalizing MDMA use are an unconstitutional regulation of the freedom of thought that underlies many cherished freedoms, and should be eliminated. The re-sentencing of MDMA is part of a misguided attempt to "lock up the truth" -- or at least to lock up the truth-tellers -- about MDMA.

1. There is no need for an "emergency" change to the sentencing provisions for MDMA and related substances ("Ecstasy"); democracy requires full public participation. Such an "emergency" rescheduling provides minimal opportunity for input from the affected public (ten days maximum, more than half of which had expired before most of the community even noticed that the re-sentencing action was in progress).

I believe that the change is being done this way to avoid substantive public comment -- to evade public comment. The public already commented in great detail to Congress as it attempted to pass the Ecstasy Anti-Proliferation Act of 2000, and the result is that Congress significantly reduced the penalties originally provided in the Act. Drug warriors could reasonably conclude that they have a better chance of passing inappropriate and harsh regulatory changes if the public has little chance to comment.

I believe that there are millions of people who have used MDMA, and who neither desire that they themselves be subjected to increased penalties, nor that the people who sold it to them be penalized. Many millions of other citizens of good will (perhaps among them the