



## On The Right to Get High

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**On The Right to Get High**

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## Abstract

**Key Words:** cognitive liberty, drugs, addiction, Lance Dodes, psychedelics, cocaine, marijuana, drug laws, free will, alchemind.

This paper argues that the criminalization of drugs, via the criteria the FDA [Food and Drug Administration] uses to put drugs into different schedules, is illegitimate on scientific and philosophical grounds. The most contemporary developments in the study of drug use and drug addiction, undermine the legitimacy of the FDA scheme (as embodied in the Controlled Substances Act of 1970); these developments suggest that addiction to a drug is a result, not a cause, of the psychological difficulties a person may be experiencing while using the drug(s). What is known about drugs suggests that the way a drug is experienced, including whether someone has an addictive relationship with a drug, depends on the “set”, or “one’s *internal* environment and personality characteristics”,<sup>1</sup> and “setting” “the *external* social and physical environment.”<sup>2</sup> Therefore, it is far more than the pharmacological properties of a drug—and those properties’ impact on the neurochemistry of an individual—that are responsible for the way a drug is experienced. The FDA scheme ignores “set” and “setting;” it magnifies the role of the drug’s pharmacological properties to the drug experience and conflates physical and psychological addiction. The FDA scheme is illegitimate, and through its use in controlling drugs, violates the right animating the spirit of the Constitution and our laws: to stimulate, control, and manipulate one’s own brain and body. This paper addresses the way in which drug prohibition violates the fundamental right to cognitive liberty, and in doing so fills in some holes in the legal basis for the right to use drugs currently being formulated by attorney Richard Glen Boire.

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<sup>1</sup>Richard G. Schlaadt and Peter T. Shannon, Drugs: Use, Misuse, and Abuse, Fourth Addition, Prentice-Hall, Inc., 1994, p. 3.

<sup>2</sup>Schlaadt and Shannon, Drugs: Use, Misuse, and Abuse, p. 4.

*Preface: Quotations to Consider Before and While Reading the Paper:*

“To think that a man should be allowed a gun and not a drug!”<sup>3</sup>

“It will be instructive to consider some of the similarities between the medieval wars against witchcraft and the modern wars against drugcraft. In each of these contests we witness a ritualized dramatization of the defiance and defense of the dominant social ethic; a concealed conflict between indigenous or illicit healers and their accredited or professionalized competitors; and, ultimately, a struggle between individuals aspiring to care for themselves by contracting for their own healing, and collectives or states insisting upon caring for their members by subjecting them to procedures they define as therapeutic. Our contemporary drug problems thus cannot be understood without paying proper attention to the subtle but powerful tensions between accredited and unaccredited healers, physicians and quacks, licit and illicit drugs, scientific medicines and folk medicine—tensions that have profound emotional as well as economic ramifications.”<sup>4</sup>

“... there can be no Darvon or Valium without chemists, pharmaceutical industries, and physicians to prescribe them! This makes the modern physician appear as a scientist, not a magician; and it makes him indispensable—as the protector of the patient from the quack, and even from himself!”<sup>5</sup>

“... it is worth noting that while the amphetamines have now entered into the Valhalla of ‘Dangerous Drugs’ whose illicit possession in New York State can now earn one a permanent prison diet, the medical use of these and related drugs continues to be a big business. Thus, the 1973 edition of the Physicians’ Desk Reference, the standard guide to all American pharmaceutical preparations, lists, in its ‘Drug Classification Index,’ no fewer than thirty-four different preparations classified as ‘Anorexics’; these drugs are also cross-indexed as ‘Anti-Obesity Preparations.’”<sup>6</sup>

“Many people are shocked at the idea that pushers should not be punished at all. Their reaction to this suggestion is much like that of people after the Inquisition and the Nazi program were well established:

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<sup>3</sup>forty-year-old man, landscape architect, quoted in Andrew Weil, M.D. & Winifred Rosen, Chocolate to Morphine: Understanding Mind-Active Drugs (Houghton Mifflin Company, Boston) 1983, p. 166.

<sup>4</sup>Thomas Szasz, M.D., Ceremonial Chemistry: The Ritual Prosecution of Drugs, Addicts, and Pushers (Anchor Press/Doubleday, New York) 1994, p. 61.

<sup>5</sup>Szasz, Ceremonial Chemistry p. 65.

<sup>6</sup>Ibid. p. 109.

there could be no question then—even in the minds of the most ‘liberal’ and ‘well-meaning’ persons—that ‘something had to be done’ with or to witches and Jews. ‘Reasonable’ people could debate only what that ‘something’ ought to be. The suggestion that nothing should be done would, in the first two instances, have constituted heresy and anti-nazism; and would, in the third instance, be viewed as advocating the heroinization of helpless children from Harlem to Honolulu.<sup>7</sup>

“One cannot make another person free, much less a whole nation. But it then remains for that nation to face the consequences of its decision: It must henceforth punish those who wish to exercise these ‘illegal’ freedoms; it must reconcile its anti-capitalistic ideologies and institutions; and it must live with itself—which societies no less than individuals must be able to do—in the wee hours of the morning when it must realize that it savagely persecutes pushers, who like the abortionists of such recent past, merely offer a product or service for which there is an intense demand, while it indecisively indulges those who commit countless acts of direct violence against their fellow citizens.”<sup>8</sup>

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<sup>7</sup>Ibid., p. 70.

<sup>8</sup>Ibid., p. 73.

*On the Need for This Paper:*

Many different people from starkly different backgrounds have written about drugs, the right to use drugs, and all the other subjects to which this paper alludes. However, my research shows that none has juxtaposed theories of addiction and the right to stimulate the mind through drugs, in the way this paper will.

Furthermore, the literature I have found<sup>9</sup> addressing the same issues I do, is geared more toward exposing the farces upon which our current prohibition is based, and the people who helped institutionalize those farces. Thomas Szasz's Ceremonial Chemistry is perhaps the most interesting and radical of the books of this genre. However, as provocative as is Szasz's book, the wide-sweeping aspersions he casts on institutions does undermine the integrity and perceived legitimacy of his work. It is not that Szasz does not present facts to support his statements; it is simply that some of his statements are too far-reaching to be supported by any amount of evidence. For example, in his discussion of the American Medical Association's role in perpetuating falsities about drugs, Szasz writes, "The American Medical Association's position on self-medication and drug control has at least been consistent during the past fifty years. It has never told the truth about drugs (as that 'truth' was seen and recorded by contemporary chemists and pharmacologists), if telling it was in conflict with government policies."<sup>10</sup>

This paper will not accuse or expose. Rather, it will juxtapose what is known about addiction with a legal basis for cognitive liberty to show that drug prohibition cannot be justified on moral or legal grounds. An attorney named Richard Glen Boire has already begun to formulate a legal basis for the notion of cognitive liberty. He describes cognitive liberty as "a right to freedom of thought, to independent thinking, to autonomy over his or her own mind and brain chemistry, and the right to experience the full spectrum of

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<sup>9</sup>See, e.g., Szasz, Ceremonial Chemistry, supra Footnote 4.

<sup>10</sup>Ibid., p. 128.

possible thought.”<sup>11</sup> My paper fills in some of the less developed and less persuasive of the second part of Boire’s argument: that drug prohibition violates the right to cognitive liberty without a compelling interest on the government’s part. This paper will show that drug prohibition cannot be justified on moral grounds, and that the law outside of the area of drugs supports the notion that the drug prohibition violates the spirit of our legal tradition.<sup>12</sup>

***A Note On the Paper’s Organization:***

This paper is organized in a fashion similar to what I would imagine would be a lawyer’s utopian vision of a trial. The “Introduction” is analogous to the opening argument (that is, if opening arguments could be argumentative), the “Evidentiary Section” to pieces of evidence, and the “Conclusion” to the closing argument. Throughout each section, the paper presents arguments and deals with the counter-arguments the author imagines might be made. In essence, the paper presents evidence and cross-examines itself throughout. The paper’s structure differs from a trial in that the sections do attempt to try to resolve the apparent flaws, instead of waiting until the end of the paper. However, like a trial, the paper does not explicate in each section the pieces of evidence to the overall argument. This is because to do so would be repetitive, and would result in an oversimplification of the paper’s main arguments. Rather, the argument is presented in the “Introduction” and “Conclusion,” and the “Evidentiary Section” provides elements to support it. The Paper also includes a “Prologue,” which has no analogy in a trial situation. The “Prologue” can be thought of as the one opportunity missing from a trial that every lawyer wishes they could have, a moment to reflect on what has happened, consider the implications of the trial, and offer some thoughts on

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<sup>11</sup>Richard Glen Boire, “Brief in Defense of Cognitive Liberty,” available at [www.alchemind.org](http://www.alchemind.org).

<sup>12</sup>Boire, “Draft Outline of Memorandum of Points & Authorities in Support of Cognitive Liberty as a Fundamental Right, and of Drug Prohibition as an Unconstitutional Violation of that Fundamental Right,” available at [www.alchemind.org](http://www.alchemind.org).

areas that while not relevant, per se, are tangentially related to the trial.

This paper delves into many issues in only a cursory way. This was a conscious decision; I decided to keep the sections sort and to the point in an effort to maintain the connections between the evidentiary points and the overall argument. If I had gone into lengthy discussion with interesting but extraneous information about each point, the overall argument likely would have gotten lost. The bibliography and footnotes should satisfy any reader's desire to know more about a particular area.

Ultimately, despite the resemblances between this paper's organization and a trial, this is a thought paper and should be read as such.

***Defining Terms:***

In his book, The Pleasure Seekers, Joel Fort, M.D. gives a very apt description of the connotations associated with psychoactive drugs. As Dr. Fort writes, "Conventionally honorable men and traditional sources of information tell us that the word 'drugs' refers only to marijuana, LSD, and narcotics, and that these substances are so destructive and dangerous that anyone who comes near them or thinks of using them must be handled as a criminal."<sup>13</sup>

This paper will not adopt the definition of drug given by the general public. Rather, when this paper discusses "drugs," it will be referring to all "psychoactive drugs," or non-caloric<sup>14</sup> "substances that affect mood, perception, and thought."<sup>15</sup> Please note, however, that this paper adopts this rather restrictive

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<sup>13</sup>Joel Fort, MD, The Pleasure Seekers: The Drug Crisis, Youth, and Society (The Bobbs-Merill Company, Inc., a subsidiary of Howard W. Sams & Co., United States) 1969, p. 3.

<sup>14</sup>In his class, "Drugs and the Brain," Dr. David Presti indicated that a drug is defined as non-caloric. University of California at Berkeley, Fall 2001.

<sup>15</sup>Weil, M.D. and Rosen, Chocolate to Morphine, p. 10.



definition of “drug” only in order to facilitate discussion of the non-caloric substances affecting consciousness. Many of the ideas in this paper are actually premised on the notion that “foods, drugs, and poisons are not clear-cut categories.”<sup>16</sup> In fact, the premise of the paper is that there is no difference in kind between drugs and any other object, activity, or person that affects human consciousness.

This paper also refers to “set” and “setting.” “Set” has been defined as “expectation, especially unconscious expectation, as a variable determining people’s reactions to drugs.”<sup>17</sup> However, in this paper, the word “set” will also connote a drug user’s psychological state more generally, the emotions and thoughts when going into the drug experience. “Setting” is the “environment—physical, social, and cultural—as a variable determining people’s reactions to drugs.”<sup>18</sup>

Because it is so confusing and cumbersome to describe the status of a drug, e.g. whether it is listed in the Controlled Substances Act, altogether proscribed, or available for most people over a certain age, this paper will conceive of drugs via the classification system laid out in Stonybrook Professor Erich Goode’s book, Between Politics and Reason: The Drug Legalization Debate.<sup>19</sup>

The first category is “legal drugs.” These drugs are not listed in the Controlled Substances Act, and though subject to certain rules and laws, “. . . these substances may be acquired and consumed under most circumstances without violating the law.”<sup>20</sup> Alcohol and tobacco constitute the most prominent examples of these types of drugs. The second category is “prescription drugs.” As Goode explains, any drug in

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<sup>16</sup>Ibid.

<sup>17</sup>Ibid., p. 220.

<sup>18</sup>Ibid.

<sup>19</sup>Erich Goode, Between Politics and Reason: The Drug Legalization Debate (St. Martin’s Press, New York)

<sup>20</sup>Ibid., p. 46.

Schedules II to V in the Controlled Substances Act fall into this second category.<sup>21</sup> Finally, there are the Schedule I drugs. These drugs are “completely illegal,” and therefore fall into a third category by that name. “Completely illegal drugs” are those listed in Schedule I of the Controlled Substances Act.<sup>22</sup> Please note that this paper does not delve particularly into the distinction between prescription, illicit, and legal drugs other than in a general way. I have introduced this schema simply as a means to clarify for the reader the general legal classifications governing the control of drugs.

This paper will also refer to the term “psychoactive.” The definition of the term, as used in this paper, is that given by Erich Goode, in his book, Between Politics and Reason. As Goode writes, a psychoactive substance is “any and all substances that influence or alter the workings of the human mind.”<sup>23</sup>

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<sup>21</sup>Ibid., p. 46.

<sup>22</sup>Ibid., p. 47

<sup>23</sup>Ibid., p. 12.

## INTRODUCTION

*“...the so-called war on drugs is not a war on pills, powder, plants, and potions, it is war on mental states — a war on consciousness itself — how much, what sort we are permitted to experience, and who gets to control it. More than an unintentional misnomer, the government-termed war on drugs is a strategic decoy label; a slight-of-hand move by the government to redirect attention away from what lies at ground zero of the war — each individual’s fundamental right to control his or her own consciousness.”*

Richard Glen Boire, [www.alchemind.org](http://www.alchemind.org)

Drugs have contributed to my life. They have allowed me to experience emotions and see perspectives previously unavailable to me. This is not to say that drugs cannot be bad, or that they have not at times mad me feel miserable depressed or sick. But it is to say that 1) anything can be bad; so to say that drugs are bad isn’t really saying much about them that distinguishes them from any other stimuli<sup>24</sup> that can contribute to a negative experience; and 2) The only difference between those substances we consider drugs and other stimuli we experience is that we have a better idea of the neurological manipulation associated with drug use. We know to a better degree how a drug will play with our minds, at least given a particular set and setting and some knowledge of the drug’s pharmacological properties, while we are usually less aware of how the overall effect of a random event or person we experience will affect us.

People have advocated for the decriminalization<sup>25</sup> of drugs on a wide variety of premises. The most socially acceptable and most popular rationale for advocating their decriminalization is the cost/benefit argument. This argument suggests that the costs of enforcement outweigh the possible deterrent benefits of criminalization.

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<sup>24</sup>The word “stimuli” encompasses anything—from drugs to people to activities to objects—that can have a psychoactive effect on an individual.

<sup>25</sup>I use “decriminalization” throughout the paper to mean broadly “removing drug use from the criminal system.”

My paper does not argue this cost/benefit rationale, however. The paper asks, rather, if prohibition has any merit at all, on both philosophical and pragmatic levels. However, the paper does not address the pragmatic arguments that have been made in favor of decriminalization. This paper will not discuss the racial bias involved in the enforcement of drug laws, the exorbitant incarceration rates, or the collateral crime associated with prohibition. The only pragmatic argument with which this paper deals concerns the effect of drugs on an individual's ability to control their behavior. The only pragmatic issue this paper addresses, then, are those consequences which have been argued as being inherent to the use of a psychoactive drug, that is the neuro-chemical, psychological, and physical consequences of the drug's use.

Ultimately, this paper maintains the following premise: We (human beings and Americans) possess a fundamental right to stimulate our minds as we please. This right is that upon which the Bill of Rights is based. Morally, this right should be curbed by society only if either of two situations exist: (a) The way in which we stimulate our minds, e.g. drugs, has the property that it will always and necessarily produce violent behavior in humans, and (b) There is some property of a drug that necessarily takes away the free will of an individual in such a way that distinguishes the drug from any other stimuli.

With respect to (a), science tells us that there has never been a drug that has this property. What is known about drugs suggests that there is no drug known to produce the same effect in all people, let alone a behavioral effect as specific as violence.<sup>26</sup> What is known is that the pharmacological property of a drug is just one factor contributing to the way the drug is experienced. The set and setting of the user are also critical. Furthermore, there is no reason to make a drug criminal when you can simply make the behavior criminal, even if we were in a hypothetical universe where prohibition would actually deter people who really

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<sup>26</sup>For some interesting anecdotal evidence on this issue, see Weil, M.D. and Rosen, *Chocolate to Morphine*, pp. 179-211, "Appendix: First-Person Accounts and Comments." See especially, "Positive Experiences with PCP," p. 204, the story of a man who described his thinking on PCP as imaginative and lucid, and who claims that the drug allowed him to jog, barely clad, in the snow without getting cold.

wanted to get a hold of a drug. While the paper does not delve deeply into (a), the explication of this point is necessary to appreciate (b), the argument with which this paper is most concerned.

With respect to (b), this paper argues there is no property of drugs that distinguishes it so much from other potential objects of addiction that it should be criminalized. In order to argue that the government has any basis to prevent people from using drugs, order it would have to establish that free will exists above and beyond the way in which our external stimuli interact with our brain chemistry and psychology to produce certain reactions. The government would have to argue that doing a drug deprives a person of this choice, this free will, more than any other potential object of addition or object, person, or other psychoactive stimuli. This argument is possibly the only one the government could make to show its compelling interest in violating cognitive liberty.

This paper contends 1) there is no data to support the notion that drugs are different in kind from any other thing, like food or sex, that may become the subject of an addiction; and 2) It is questionable whether we have free will to begin with, that is, apart from the way our external stimuli and brain chemistry interact to produce reactions. The notion that free will does not exist undermines the value the criminal justice system places on retribution, and on the attention the concept of intent receives by the law. While this paper does not argue that the entire criminal justice system should be overturned, it does argue that it is illegitimate to deprive people of the fundamental right to stimulate themselves through drugs—an activity that does not produce harm inherently to anyone but the user—based on a moral conjecture rather than a direct and deliberate harm done to others inherently by the drug use.

Based on arguments (a) and (b), this paper concludes that the grounds the FDA [Food and Drug Administration] uses to put drugs into different schedules is illegitimate on scientific and philosophical grounds. The most contemporary developments in the study of the relationships people form with drugs, undermine the legitimacy of the FDA scheme (as embodied in the Controlled Substances Act of 1970); these devel-

opments suggest that the addiction to a drug is a result, not a cause, of the psychological difficulties a person may be experiencing while using the drug(s). What is known about drugs suggests that the way a drug is experienced, including whether someone has an addictive relationship with a drug, depends on the “set”, or “one’s *internal* environment and personality characteristics”,<sup>27</sup> and “setting” “the *external* social and physical environment.”<sup>28</sup> Therefore, it is far more than the pharmacological properties of a drug, and those properties’ impact on the neurochemistry of an individual, that are responsible for the way a drug is experienced. The FDA scheme ignores “set” and “setting;” it magnifies the property of a drug in the drug experience and conflates physical and psychological addiction. The FDA scheme is illegitimate, and through its use in controlling drugs, violates the right animating the spirit of the Constitution and our laws: the right to control, stimulate, and manipulate one’s own brain and body, the right to cognitive liberty manifested in drug use.

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<sup>27</sup>Richard G. Schlaadt and Peter T. Shannon, Drugs: Use, Misuse, and Abuse, Fourth Addition, Prentice-Hall, Inc., 1994, p. 3.

<sup>28</sup>Schlaadt and Shannon, Drugs: Use, Misuse, and Abuse, p. 4.

## *EVIDENTIARY SECTION*

### *The FDA Classification System*

The Controlled Substances Act<sup>29</sup> classifies drugs based on the drug's abuse potential, accepted medical use, and safety. Each drug is listed in a schedule, from I to V; drugs listed in Schedule I are absolutely prohibited, and those in II through V being allowed for limited uses. The lower the schedule number, the more tightly the FDA controls the substance.

For example, the substances listed in Schedule I have the following properties: high potential for abuse,<sup>30</sup> no currently accepted medical use in treatment in the United States,<sup>31</sup> and a lack of accepted safety.<sup>32</sup> Those listed in Schedule V, on the other hand, have a "low potential for abuse" relative to the drugs in the other schedules,<sup>33</sup> accepted medical use in the United States,<sup>34</sup> and "abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV."<sup>35</sup>

The word, "abuse," is never explicitly defined in the statute. One can therefore only derive the definition

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<sup>29</sup>21 U.S.C.A. 812.

<sup>30</sup>21 U.S.C.A. 812, (1)(A).

<sup>31</sup>21 U.S.C.A. 812, (1)(B).

<sup>32</sup>21 U.S.C.A. 812, (1)(C).

<sup>33</sup>21 U.S.C.A. 812, (5)(A).

<sup>34</sup>21 U.S.C.A. 812, (5)(B).

<sup>35</sup>21 U.S.C.A. 812, (5)(C).

of abuse as used in the Act, by referencing parts of the Act, such as the schedules. As the definition of a Schedule V drug reveals, the scheduling of a drug in a particular category largely depends on the FDA's determination of the extent of physical or psychological dependence emanating from abuse of a particular substance.

***Schedule I Drugs Have Been Known to Have Health and/or Psychological Value to Users***

*In 1915, the lead sentence in a lead article in the Journal of the American Medical Association characterized opium thus: 'If the entire material medica at our disposal were limited to the choice and use of only one drug, I am sure that a great many, if not the majority, of us would choose opium; and I am convinced that if we were to select, say half a dozen of the most important drugs in the Pharmacopoeia, we should all place opium in the first rank.'*<sup>36</sup>

In 1970, at a United Nations conference called to enact new anti-drug treaties, the director of the United States Bureau of Narcotics and Dangerous Drugs, acting as the chief U.S. delegate to the conference, offered this view on opium: 'The social consequences of continuing opium production far exceed the medical or economic advantages of having it available. Halfway measures will not suffice—only total worldwide prohibition as soon as possible can eliminate this scourge of mankind.'<sup>37</sup>

*The pharmacological effects of opium have not changed between 1915 and 1970. It is clear what has: official and popular American opinion about opium.*<sup>38</sup>

As the quotation suggests, it is the opinion of the medical community and the Food and Drug Administration that has changed since drugs were available without prescription, not the pharmacological properties of the drugs. In fact, the Controlled Substances Act, in its very definition of the attributes relevant to scheduling, admits that it is simply current medical practice that is taken into account, with no justification for making

<sup>36</sup>Szasz, *Ceremonial Chemistry*, p. 77, quoting David I. Macht, the history of opium and some of its preparations and alkaloids, *Journal of the American Medical Association*, 64: 477-481 (Feb. 6), 1915; p. 477.

<sup>37</sup>Szasz, *Ceremonial Chemistry*, p. 77, quoting John Ingersoll, quoted in U.S. urges 'bold new' efforts by U.N. body on narcotics abuse, *The New York Times*, Jan. 13, 1970, p. 11.

<sup>38</sup>*Ibid.*, p. 77.



this the criteria. Moreover, the scheduling of drug ignores the experiences of those who use them, and deprives those who get benefits out of the use of a particular drug the right to experience the mental and/or physical pleasure the drug creates.

Among the drugs listed in Schedule I, all have been known to be helpful to many who have experimented with them. This is not to say that the drugs do not cause harmful consequences in certain situations and if used with sufficient frequency and quantity. However, it is to say that simply because the FDA deems drugs to be Schedule I does not ipso facto mean that they are wholly invaluable. Furthermore, it is not for the FDA to decide whether a certain psychoactive state is inherently valuable or not. It is the right of the user to determine her own feelings about a drug; it is a user's choice to experiment and determine the value for herself.

There have been a plethora of studies revealing the therapeutic benefits of LSD, both with respect to the drug's ability to help assuage other conditions, and as a positive boon to the consciousness.<sup>39</sup> However, the reader should be cautioned that this information is not being conveyed in order to insinuate that it is more moral or just for a drug to be prohibited simply because it does not produce what we consider to be profound or consciousness-raising experience.

The point is simply that the prohibition on the use of psychedelics is an obvious example of the role of drug prohibition in denying people the right to stimulate their minds in the ways they please. The point is not to argue that it is more egregious to make criminals out of psychedelic users rather than cocaine users. This paper seeks not to make value judgments on the value of using different drugs. Simply stated,

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<sup>39</sup>See, e.g., R.E.L. Masters and Jean Houston, Ph.D., The Varieties of Psychedelic Experience (Dell Publishing New York), 1966.

the psychedelics, as Schedule I substances, are deemed to have no accepted medical use, high abuse potential, and a lack of accepted safety. However, a plethora of books and articles have been written giving evidence of psychedelics' ability to ameliorate medical, psychiatric, and psychological problems. As Andrew Weil, M.D. and Winifred Rosen give an overview of the benefits of psychedelics in their book Chocolate to Morphine: Understanding Psychoactive Drugs:

The benefits people have claimed from using psychedelics range from cures of mental and physical problems to increased

appreciation of the beauty of nature to better understanding of themselves to just having good times. Some medical doctors and psychologists have been able to cure patients of serious emotional disorders by means of psychedelic therapy.<sup>40</sup>

LSD research, for instance, has revealed the drug's use as therapy for drug addictions such as cocaine and alcohol. <sup>41</sup> Ralph Metzner, Ph.D., uses the concept of consciousness-contraction to explain drug addiction, i.e. addiction occurs when one is "so focused on a particular mode of psychological satisfaction that you neglect your families and friends."<sup>42</sup> As Metzner explained, LSD's consciousness-expanding qualities serve as an antidote this contraction of consciousness associated with addictions.

Many people who have taken psychedelics claim that the drugs have enabled them to have a deeper or greater understanding of the universe, and that psychedelics can be used as a tool to help others achieve this understanding. According to Mariavittoria Mangini,<sup>43</sup> who has done research with middle-aged people

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<sup>41</sup>Ralph Metzner, Ph.D. is a professor at California Institute of Integral Studies and a psychotherapist. He teaches classes on altered state of consciousness. He has written over 75 articles on psychedelics and numerous books in the area, including *The Psychedelic Experience* (with Leary and Alpert, 1964) and *Maps of Consciousness* (1971). The biographical information was obtained from the program to the Students for Sensible Drug Policy forum, "Religious Freedoms, Spirituality, and Shamanistic Practices," April 16, 2002, 2040 Valley Life Sciences Building, University of California at Berkeley, Berkeley, CA.

<sup>42</sup>Metzner, UC Berkeley Forum, April 16, 2002.

<sup>43</sup>Mariavittoria Mangini is the author of a book, "Yes, Mom took acid:" the Sociohistorical Impact of Historic Psychedelic Drug Use in Adults, a book exploring the influence of psychedelic experiences on the value system of middle-aged people who have used psychedelics. Information for this biography was also obtained from the program to the Students for Sensible Drug Policy Forum, Berkeley, CA.

about their psychedelic experiences, the most common theme among these experiences is the notion of the interconnectedness of the world. Obviously, the Controlled Substances Act does not take into consideration insights such as the one Mangini has discerned. Rather, the Controlled Substances Act, alludes to the idea of “accepted medical use.” Therefore, it is only an undefined medical community that is relevant to deciding whether a drug is useful. There is no mention of the experiences of the people who use the drugs, apart from the way in which the majority of doctors (at least the minority who define “accepted medical use”) might interpret those experiences. Furthermore, the psychological or emotional impact of a drug, other than its association with abuse and addiction, is not even relevant to determining anything about its scheduling level.

It is worth noting the irony in criminalizing a Schedule I drug like MDMA (or, as it is known on the street, “ecstasy”), as the feeling of inter-connectedness often experienced by users can be viewed as a means of bringing together disparate members of society. In essence, feeling more connected to the world can mean feeling more kinship to others. In fact, it is this relationship to others, this empathy, that is for many the hallmark of the MDMA experience.

With respect to marijuana, another Schedule I drug, there is a plethora of research on the medical benefits of the drug which I need not account in this paper. The following is a particularly compelling story of the therapeutic benefits of the drug:

I have multiple sclerosis. About three years after it was diagnosed I discovered marijuana. A friend told me it was relaxing. My main

problem then, aside from partial blindness, was tenseness and tremors in my muscles. Pot cured it, and I've smoked regularly ever since, about four to five times a week. If I go without it for a week, the muscle tremors come back . . . Most people with MS have repeated attacks and keep losing body function. I'm convinced that pot has kept me in remission all these years.<sup>44</sup>

While many psychedelics (including marijuana) seem to have the advantage over other drugs in that they are often not the sources of addiction, simply because a drug causes a physical and/or psychological addiction does not mean that for some, possibly all of addicts, using a drug may be the best manifestation of an addiction. Furthermore, for some, the benefits of the drug's psychoactive effects outweigh the negative aspects of using the drug. As a thirty four-year old rock singer was quoted as saying:

The first opiate I ever took was codeine... It made me feel right for the first time in my life . . . I never felt right from as far back as I can remember, and I was always trying different ways to change how I felt. I used lots of drugs, but none of them really did it for me. Codeine was a revelation, and I've been an opiate user ever since... Opiates have caused me lots of trouble, but what they do for my head is worth it.<sup>45</sup>

In his book, Legislation of Morality: Law, Drugs, and Moral Judgment, Troy Duster lends support to the notion that drugs may actually be the best way for some to deal with their psychological problems. As he writes, "My own view is that while many, if not most, psychic problems are best worked out without the use of drugs (e.g., social and personal solutions), *some psychic and physical problems benefit from the administration of drugs.*"<sup>46</sup> According to the FDA, however, such data does not amount to what the Controlled Substances Act deems, "accepted for medical treatment in the United States." The problem is simply that the Controlled Substances Act also does not take into account the potential psychological benefits potentially garnered by those who take the controlled drugs.

However, the drug area is but one example of the way in which medical norms and frames have begun to

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<sup>46</sup>Troy Duster, Legislation of Morality: Law, Drugs, and Moral Judgment, (The Free Press: New York), 1970, p. 240.

dominate the public consciousness. We have come to accept the notion that the opinions of the medical profession, or at least those dominating the profession, should constitute the final word on a variety of subjects. Drugs is simply one context in which the medicalization of a problem has come to dominate as the only realm through which to view it. The distinction between drugs and others realms is that with respect to the former, failing to follow medical norms results in imprisonment.

“Indeed, society, and especially the medical profession’s, attitudes toward those who think the wrong thoughts (the insane), who take the wrong drugs (the addict), and who possess the wrong weight (the obese), display some remarkable similarities.”<sup>47</sup>

In the seventeenth century, a new medical specialty was created to study and control those who deviated from medical norms of social conduct; thus was psychiatry born. In the twentieth century, a new medical specialty was created to study and control those who deviated from medical norms of drug use; thus was drug-abuseology born. And in the 1960s, a new medical specialty was created to study and control those who deviated from medical norms of body weight; thus was bariatric medicine born. The professionalization of these exercises in malicious medical meddling into personal habits is important for several reasons: each of these pseudomedical enterprises redefines personal preference as a scientific and medical problem; conceals medical coercion as treatment; and, perhaps most importantly in the long run, creates an immense economic interest among physicians for fraudulently misrepresenting simple moral judgments as sophisticated medical diagnoses and crude coercions as refined therapeutic interventions.”<sup>48</sup>

One of the most prominent examples of the medical establishment’s dominance is the area of weight management. “Body weight lends itself perfectly to the contemporary passion for defining human qualities in terms of medical norms.”<sup>49</sup> “Overweight persons are called ‘carboholics’ and ‘foodaholics’; many declare themselves as helpless vis-à-vis food as alcoholics are vis-à-vis alcohol, and seek relief from submitting themselves to authorities whose coercions they shamelessly seek and invite.”<sup>50</sup>

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<sup>47</sup>Szasz, *Ceremonial Chemistry*, p. 107.

<sup>48</sup>*Ibid.* p. 108.

<sup>49</sup>*Ibid.*, p. 107.

<sup>50</sup>*Ibid.* , p. 111.

There is no inherent difference between the devices medical doctors use and that used by “illegitimate” drug pushers to convince individuals of the benefits of the therapy each promulgates. Talking about a surgery that involves shortening of the digestive tract, Szasz, M.D. says the following: “The physicians who perform these operations are famous and respected surgeons, who publish their researches in the most prestigious medical journals. At the same time, ordinary people who sell amphetamines are heading for life imprisonment. Such is life in the Age of madness, where the ruling religion is Scientific Medicine.”<sup>51</sup>

**Addiction, Morality, Free Will, and the Opposition:**

“Passion is a frequent companion of ignorance, and the two are like a settled married couple in the discourse about drugs.”

-Troy Duster, Legislation of Morality: Law, Drugs, and Moral Judgment, p. 30

Moral arguments against the use of psychoactive substances are perhaps the most long-standing and the most difficult to oppose. The following quotation from a pamphlet released by the Public Health Service of the federal government in 1951, “What to Know About Drug Addiction,” gives a summary of one strand of this argument: “Usually, [drug addicts] are irresponsible, selfish, immature, thrill-seeking individuals who are constantly in trouble—the type of person who acts first and thinks afterward.”<sup>52</sup>

However, there is another moral argument that I think is far more provocative and worthy of attention. It is the “enslavement theory,”<sup>53</sup> i.e. the notion that using drugs can lead to addiction, whether physical or

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<sup>51</sup>Szasz, Ceremonial Chemistry, p. 121.

<sup>52</sup>“What to Know About Drug Addiction,” Washington, D.C.: Public Health Service Publication No. 94, 1951, quoted in Duster, Legislation of Morality, p. 20.

<sup>53</sup>Please note that I am adopting the phrase used by James A. Inciardi in “Legalizing Drugs: would It Really Reduce Violent

psychological or both, and that that addiction deprives the addict of free will. Therefore, people must be prevented from doing psychoactive substances, especially those that can create physical addiction, in order to preserve their freedom. As James A. Inciardi explains in The Drug Legalization Debate, “. . . for the better part of this century there has been a concerted belief that addicts commit crimes because they are ‘enslaved’ to drugs, that because of the high prices of heroin, cocaine, and other illicit chemicals on the drug black market, users are forced to commit crimes in order to support their drug habits.”<sup>54</sup> In essence, the notion underlying Inciardi’s theory is that becoming addicted to drugs deprives the addict of the right to make free choices, and in doing so, deprives the individual of the capacity to exercise her rights. It as though the drug were controlling the person’s actions, and so the government must prohibit people from using substances that can rest so much control from them as to deprive the users of their ability to make choices about their lives. The government is, in essence, saving people from themselves, ensuring the individual’s ability to continue to have freedom of choice.

This section will counter the enslavement argument in two ways. It will show that modern addiction theory and science supports the notion that drugs are not exclusively enslaving, nor are they necessarily more enslaving than any other addiction. Second of all, through presenting the latest developments on addiction in general, and my own theories on the subject, this paper will offer additional support for combating the “enslavement” argument.

People can become addicted to or dependent on any kind of object. Discussing the existence of nondrug addiction?” p. 63, The Drug Legalization Debate. However, Inciardi does not use the phrase as I do, to refer to drugs’ abilities to deprive people of their freedom. Rather, he uses the phrase to refer to the belief that the ability of drugs to enslave their users accounts for much of the crime committed by drug users seeking to support their addictions.

<sup>54</sup>James A. Inciardi, “Legalizing Drugs: Would It Really Reduce Violent Crime?” in The Drug Legalization Debate, James A. Inciardi, Editor, Sage Publications, Inc. United States, p. 62.

tions like sex and gambling, Lance Dodes wrote in his 2002 publication on addiction, The Heart of Addiction, “I realize that it might seem unusual to include nondrug addictions in a discussion of the role of physical addiction. But there is not a sharp distinction between drug and nondrug addictions.”<sup>55</sup> Furthermore, Dodes suggests that all that is known about addiction suggests that it is not a physical but a psychological process at work:

Hence, while we are learning more and more all the time about the way drugs affect the brain, this does not provide any evidence for a physical, biochemical cause of addiction. Indeed, there is simply no evidence of any neurochemical or neuroanatomical deficit in people that accounts for their having or developing an addiction.<sup>56</sup>

A drug’s ability to create physical withdrawal after sustained use, does not mean that the drug will cause a particular individual to continue using it. The problem is, however, that the general conception of addiction is at odds with what the science. Most people do not realize that physical and psychological addiction are not inextricably entwined with one another; they think of physical addiction as leading to psychological enslavement. People confuse physical with psychological addiction.<sup>57</sup>

According to Dodes, the confusion has come about because when people first recognized the effects of physical withdrawal from certain drugs, they attributed the fact that the addict felt better after obtaining the drug to the drug’s physical qualities, not on the fulfillment of the addict’s need manifested in the repeated use of the drugs. “Perhaps, if centuries ago, the first conditions recognized as addictions had been nondrug behaviors, if people had first applied the word ‘addiction’ to behaviors such as compulsive gambling, then physical dependence wouldn’t have seemed so central to the problem of addiction.”<sup>58</sup>

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<sup>55</sup>Dodes, M.D., p. 70.

<sup>57</sup>Dodes p. 78.

<sup>58</sup>Dodes, p. 78.



Dodes theorizes that the confusion between true addictions and physical ones arose because those who first witnessed addictive behavior lived in a time before the discovery of the field of psychology. The only frame people had available to them to was the physical. Unfortunately, Dodes does not have an explanation for why this presumption has remained so intact for many years. However, the following may be part of the explanation for the sustained ignorance: It would require much psychological experimentation to distinguish the physical from the psychological effects of taking a physically addicting drug. Since the beginning of the first temperance movement, the drug has been blamed for behavior. It is much easier to blame a drug for behavior than to look behind the behavior and try to discover what is really animating it.<sup>59</sup> Furthermore, identifying and arresting drug users is a proxy for determining which members of society will respect their own values and forsake society's.

In order to present the most recent developments on these theories, it is important to first define addiction, and to unpack the meanings attributed to the word, "addiction."

In his book, The Myth of Addiction, Lance Dodes, M.D., provides the following description of the conception of addiction to which most of the lay public subscribes:

Many people take for granted that addiction is a physical problem. The very words used to describe addictions—that one is "hooked on" drugs, or even the less colloquial version of this, that one is "addicted to" drugs—suggest that drugs somehow physically capture people. Adding to this impression are movies and television shows almost everyone has seen in which people are shown in psychical agony withdrawing from narcotics, or feeling desperate to get a "fix" of their drug to prevent withdrawal effects. This desperate search looks as though it must be an important factor at the very core of addiction.<sup>60</sup>

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<sup>59</sup>Sedi Keshavarzi, law student at Boalt and future world leader.

Many others have depicted the public's view of addiction in a manner similar to that Dodes describes. For instance, as John Booth Davies, editor of the journal, Addiction Research and Theory,<sup>61</sup> wrote in a recent article about the myth of addiction,

At the present moment, the standard line taken by a majority of people in the media, in treatment agencies, in government and elsewhere, hinges around notions of the helpless addict who has no power over his/her behaviour; and the evil pusher lurking on street corners, trying to ensnare the nation's youth.<sup>62</sup>

Many consider addictions to fall into two types, "physical" and "psychological." However, Dodes, M.D., in elucidating the most contemporary view of addiction, suggests that calling both an addiction is somewhat of a misnomer. In his 2002 book on the subject, The Myth of Addiction, Dodes ultimately concludes, "An addiction, then, is truly present only when there is a psychological drive to perform the addictive behavior—that is, only when there is a psychological addiction. For this reason, I call behaviors in which this psychology is present *true addictions*, in contrast to cases in which there is only a physical addiction."<sup>63</sup> According to Dodes, "physical addiction" is "a state in which both tolerance and withdrawal are present. The drugs to which the body reacts by developing tolerance, and subsequently withdrawal, are said to be 'physically addictive' drugs."<sup>64</sup> However, Dodes suggests that "...the popular conception of physical addiction being at the core of the general problem of addiction is false[.]"<sup>65</sup>

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<sup>61</sup>John Booth Davies is also Professor of Psychology and Director of the Centre for applied Social Psychology at the University of Strathclyde, U.K.

<sup>63</sup>Dodes, p. 74.

<sup>64</sup>Ibid. p. 70. For a more thorough discussion of withdrawal and tolerance, see Dodes, Chapter Six: "Hooked by the Mind: Physical and Psychological Addiction," pp. 69-80.

<sup>65</sup>Ibid. p. 70.

First of all, as Dodes wrote, “Then there are a large number of serious addictions in which there is no physical addiction at all.”<sup>66</sup> According to Dodes, the most prominent examples of these are addictive gambling and addictive sex. Most importantly, Dodes contends, “. . . there is no sharp distinction between drug and nondrug addictions.”<sup>67</sup> Dodes most persuasive argument for this controversial statement is “[t]he fact that many people with addictions routinely switch back and forth between drug and nondrug addictions, or perform both addictions at the same time.”<sup>68</sup>

Second, Dodes points out the prevalence of people switching from a drug of one pharmacological type to one of another type.<sup>69</sup> According to Dodes, “This switching would be impossible if physical addiction to one drug were essential to the nature of their problem. If physical addiction were the major problem, they could only switch between drugs when they were capable of *physically* substituting for each other.”<sup>70</sup> It is the switching phenomenon that provides Dodes with the linchpin of his theory, that “. . . the drive behind addiction is a psychological compulsion to perform a particular *action*, such as using a drug, regardless of type.”<sup>71</sup>

Thirdly, Dodes says that there is a significant population of people who have addictions but are not addicted to the one physically addicting drug they use.<sup>72</sup> Dodes offers the following example of a person who would fit into this category of addict: a binge drinker who uses alcohol in a way that is destructive to her life, but who never drinks for a sufficient period of time to develop tolerance and withdrawal.

Finally, Dodes also points to people who use a drug in a way he would characterize as “addictive,” but where

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<sup>66</sup>Ibid., p. 70.

<sup>67</sup>Ibid., p. 70.

<sup>68</sup>Ibid., p. 70.

<sup>69</sup>Dodes, p. 71

<sup>70</sup>Dodes, p. 71

<sup>71</sup>Dodes, p. 71.

<sup>72</sup>Dodes, p. 71.

the drug itself does not produce tolerance and withdrawal in the way that drugs we call physically addictive do. However, the most persuasive arguments Dodes gives for his view of addiction as a “human problem that resides in people, not in the drug or in the drug’s capacity to produce physical effects”<sup>73</sup> occur in his discussion of the following type of people: “people with addictions who regularly use just one drug that does indeed produce tolerance and withdrawal[.]”<sup>74</sup> Dodes points to two pieces of evidence on the subject. First, the failure of a successful withdrawal from a drug to act as assurance against future use, suggests that “... the essence of the addiction exists separately and independently from the presence of physical effects brought about by the drug itself, or by withdrawal from the drug.”<sup>75</sup>

Second, Dodes points to the renowned study following the heroin habits of soldiers who used the drug in Vietnam. The study’s relevance lies in heroin’s production of tolerance and withdrawal symptoms in those that become physically addicted to the substance, the phenomenon that is purported to result necessarily from using the drug in a sufficient amount for long enough.

According to the study, “usage and addiction essentially decreased to pre-Vietnam levels”<sup>76</sup> when the soldiers returned to the United States. “Clearly, the essence of the addiction exists separately and independently from the presence of physical effects brought about by the drug itself, or by withdrawal from the drug.”<sup>77</sup> Furthermore, the results of the study revealed that the addiction went into remission for 95% of those addicted in Vietnam, in marked contrast to the addiction remission rates experienced at heroin detoxification centers in the United States. As Dodes writes, “Practically none of those patients in these

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<sup>73</sup>Dodes, p. 72.

<sup>74</sup>Dodes, p. 72.

<sup>75</sup>Dodes, p. 72

<sup>76</sup>Dodes, p. 72, quoting, Robins L, Helzer, J., and Davis, D. Narcotic use in southeast Asia and afterward. *Archives of General Psychiatry* 1975, 32: 955-61.

<sup>77</sup>Dodes, p. 72.

programs stayed clean from drugs after detoxification.”<sup>78</sup>

If ceasing the use of heroin had been too painful for the Vietnam users, they would have killed themselves in large number. If heroin had been their only source of real enjoyment, would they not have been able to stop. Moreover, the most profound conclusion that can be made from the starkly contrasting addiction figures is that whether or not a person has a true addiction depends not upon whether the drug is physically addicting but on whether the person using the drug has a predisposition for addiction at the time the drug is introduced into their environment. As Dodes writes: “An addiction, then, is truly present only where is a psychological drive to perform the addictive behavior—that is, only when there is psychological addiction.”<sup>79</sup> Dodes also suggests that in order for a person to experience a true addiction, she must possess a “psychological predisposition for it.”<sup>80</sup> As Dodes writes:

“It was the abnormal setting that had encouraged the drugs’  
use [in Vietnam], but even though they had been physically  
addicted to them, they did not continue to use them addictively  
because they did not have the psychological predisposition for it.”

This should not be surprising. Not everyone, of course, has the psychological makeup to utilize a drug, or another activity, for the meanings and purposes I have describing in addictions. Those people who have different psychological compositions find other ways to manage difficult feelings.<sup>81</sup>

In addition to the Vietnam study, Dodes also points to the prevalence of smoking cessation among cigarette

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<sup>78</sup>Dodes, p. 73.

<sup>79</sup>Dodes, p. 74.

<sup>80</sup>Dodes, p. 73.

<sup>81</sup>Dodes, p. 73.

users, despite the physically addicting qualities of nicotine.

Nicotine is known to be capable of producing physical addiction with tolerance and withdrawal and cravings. Nonetheless, there are millions of Americans who stopped smoking cigarettes once they realized that smoking was dangerous to their health.<sup>82</sup>

However, the fuzziness with which Dodes distinguishes the psychological predisposition requisite to addiction from that which he calls “psychological addiction” suggests that addiction may be universal, and that the definition of it may encompass even more activities than Dodes suggests. It is somewhat unclear whether the psychological predisposition Dodes refers to is one and the same as the “psychological drive” to which he also refers as necessary to addiction.

Anecdotal evidence discussed in other works on addiction, support Dodes’s theories. The evidence marshaled by Nils Bejerot, in his book Addiction and Society<sup>83</sup>, also shows that the insight Dodes has gleaned from his experience with addiction in the United States mirrors the experiences of those involved in drug-using communities in other parts of the world, e.g. Sweden. For example, in an account, entitled, “A Girl Related her Boyfriend’s Story,” the girl writes: “. . . it is quite easy to take enough [drugs] to get physical withdrawal symptoms without becoming an addict.”<sup>84</sup>

As Andrew Weil, M.D. and Winifred Rosen explain in Chocolate to Morphine: Understanding Mind-Active Drugs, “Dependence on anything is not easy to break. More often than not, people simply switch dependencies, substituting one for another without achieving greater freedom.”<sup>85</sup> As the authors indicate, dependence on drugs may not be the worst way in which a person’s can manifest their need to be dependent upon an object

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<sup>83</sup>Nils Bejerot, Addiction and Society, Thomas: Springfield, Illinois, 1970.

<sup>84</sup>Bejerot, p. 202.

<sup>85</sup>Weil, M.D. and Rosen, p. 168.

or activity.

*The “Truth” About Addiction: Who Do We Turn To?*

Some say, “the addicts themselves.”

In fact, many suggest that the ignorance shrouding our understanding of drug addiction lies largely in our refusal to hear what addicts have to say about that which society presumes is one of their larger problems. As Davies wrote in “Myth of Addiction, “. . . drug research continues to make naïve use of what people say about their addictions.”<sup>86</sup>

I am arguing, however, that even seeking out the views of what we might term “drug addicts” is so artificial to begin with that we will not be able to profit from it much. To begin with, the problem of who would constitute the appropriate research pool, would create innumerable problems, at least if we do not start from the presumption that everyone is a drug addict. It is artificial to place in an exclusive category substances we know to have a “psychoactive” effect on us. There are many things that can form the basis for an addiction. I think it is ironic that the one type of substance we recognize as such an object, is the only one we choose to legislate against.

It is possible that it is the ease with which we all can identify a “psychoactive effect” when dealing with certain substances, is responsible for their demonization. There are certain non-caloric substances that seem to make us think differently than we did in the moment prior to the drug enters our bloodstream. However,

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<sup>86</sup>Davies, “The Myth of Addiction,” p. 42.

why should we criminalize those substances whose changes are profound enough to be signaled out as such, and by most who take the drugs? And why do we assume that the effect of smoking pot every day is more or less profound than a particular mental state we might have if we ate eggplant everyday?<sup>87</sup>

Let us assume, however, that the problems of identifying an appropriate group for study, could be surmounted. It seems as though one of the only ways imaginable to hope to do this is to take a group composed not exclusively of those who have been in treatment. Why?

People who are in drug treatment, or who have been in drug treatment , may adopt the attitude, promoted by many in the drug treatment field, that the drug they use is the problem in their lives. Having been conditioned to view drugs in this way, how can one expect to get a view of addiction untainted by what is likely very recent and very profound conditioning?

The current understandings of drug abuse and addiction suggest that it is not a drug that produces addiction. Rather, people with “addictions” may manifest them in certain objects. Drugs may and often do function in fact as these objects of addiction, but they do not necessarily.<sup>88</sup>

### ***Do We Even Have Free Will?***

It is questionable whether we have “free will” even if we do not become addicted to drugs.

The problem is that convincing the government that we really do not have what they define as “free will”

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<sup>87</sup>Many have theorized that eggplant and other members of the nightshade family produce depressed feelings in those who consume them. While this may be based on anecdotal evidence alone, it is quite well known that foods such as turkey (containing triptomine) cause happiness and relaxed feelings.

<sup>88</sup>See Lance Dodes, M.D., The Heart of Addiction (New York: HarperCollins 2002).



to begin with undermines the entire criminal justice system.

Free will, responsibility, and punishment are connected issues, and the view you take on any one of these will influence the view you have on another. People have commonly thought that unless we have free will, we cannot be held morally responsible for any of our acts, and unless we can be held morally responsible for an act, we cannot be praised or blamed for that act. But if you cannot be praised or blamed for your actions, then it makes no sense to speak of just desert in terms of reward and punishment. So, according to the common view, all depends on the acceptance of free will.<sup>89</sup>

The criminal justice system, with its focus on intent, and its reliance on retribution as one of the main rationales for its existence, would likely lose a lot of validity if people accepted the notion that our actions are pre-ordained by our stimuli and brain chemistry. I am arguing here not that the criminal justice system needs to be revamped but that the system cannot punish people for an activity that does not inherently harm others, i.e. drug use, when punishment relies upon a premise (that free will exists) that is questionable at best. <sup>90</sup>

### **Philosophical and Legal Basis for the Right to Use Drugs**

*“Just as Newspeak was intended to make certain Old(speak) thoughts literally unthinkable, so the War on Entheogens makes certain sorts of cognition and awareness all but inaccessible.”*

Richard Glen Boire, [www.alchemind.org](http://www.alchemind.org)

#### **• Why Constitutionality of Drug Prohibition is Presumed**

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<sup>90</sup>For some interesting writing suggesting that free will does not exist or exists to a lesser degree than most assume, see The Crime of Punishment: The Humanitarian Theory, pp. 472-477, in Louis P. Pojman, Introduction to Philosophy (Wadsworth California) 1991.

In his book, Our Right to Drugs, Thomas Szasz asks: “How can the government of the United States—crafted and considered to possess the most prudently limited powers of any government in the world—prohibit a competent adult from growing or ingesting an ordinary plant, such as coca leaf or hemp?”<sup>91</sup>

First of all, the government has consistently ignored the Ninth Amendment, i.e. the Ninth Amendment instruction to the government that the rights not explicitly in the Constitution are “retained by the people.”

Second, as Szasz explains, the states and the federal government have turned to the police powers and interstate commerce clauses of the Constitution, respectively. With respect to the states, “Under the police power, the states can prohibit a wide range of activities regarded as endangering the public welfare, for example, gambling, obscenity, and drugs, notably alcohol.”<sup>92</sup> However, the federal government must rely on the Commerce Clause<sup>93</sup> and the argument that the clause allows Congress to decide what commerce can be prohibited from being transported inter-state.<sup>94</sup>

The Food and Drug Act was passed in 1906. While there have been constitutional challenges to it, they have consistently failed.<sup>95</sup>

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<sup>91</sup>Thomas Szasz, Our Right to Drugs: The Case for a Free Market (New York: Praeger), 1992, p. 9.

<sup>92</sup>Szasz, p. 9.

<sup>93</sup>Article I, section 8, clause 3

<sup>94</sup>Szasz, p. 10.

<sup>95</sup>See Find sources on the history of drug laws, etc.

Thomas Szasz quotes the Supreme Court's decision in McDermott (1913) Supreme Court as exemplary of the Court's doctrine in this area:

[Congress] has the right not only to pass laws which shall regulate legitimate commerce among the States and with foreign nations, but has the full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are *injurious to the public health* outlaws of such commerce.<sup>96</sup>

As Szasz puts it, "here we come to the nub of the matter. Under the pretext of the commerce Clause plus the prevailing medical legerdemain about dangerous drugs, the Supreme Court, has, in effect, become the mouthpiece of the Food and Drug Administration and of organized American medicine."<sup>97</sup>

The Supreme Court's decision in Wickard v. Filburn ostensibly provides a basis for the federal government's intervention in drug commerce. In Wickard v. Filburn, the Supreme Court held that federal agricultural regulations embodied in Congressional legislation could be applied to a farmer who used his crop solely for home consumption and for the next seeding. The Supreme Court rejected Filburn's argument that the intrastate nature of his professional activity exempted him from federal regulations. In order to do this, the Supreme Court redefined the word, "market" broadly enough to encompass any conceivable commerce activity. As the Court wrote:

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<sup>97</sup>Thomas Szasz, Our Right to Drugs, p. 10.

The Act includes a definition of ‘market’ and its derivatives so that as related to wheat in addition to its conventional meaning it also means to dispose of ‘by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged. . . . Hence, marketing quotas . . . also [embrace] what may be consumed on the premises. Penalties do not depend upon whether any part of the wheat is sold or intended to be sold.

- **Whose Psyche Is It Anyway?**

“You get out of the drug experience only what you put into it. The ‘Otherworld’ from which you seek illumination, is after all, only your own psyche.”

-Peter Furst, anthropologist, author of Flesh of the Gods (1972), quoted in Weil and Rosen, Chocolate to Morphine, p. 109.

Ralph Metzner, M.D., has raised the point that psychosis is also simply a distorted perspective, another reality. But I ask whether the experience we call a drug is all that different from any other perspective? Isn’t it simply another way to see things? Isn’t it true that there is no way to really describe the distinction between being on “drugs” and other types of perspectives that might differ from the one we have most of the time? Metzner alluded to the notion that when we think of our extended family, or of loved ones that are far away, we are living in a different reality when we think of them. Isn’t our experience entirely in our heads, anyway? Why is that we want to criminalize an activity whose psychoactive effects we are aware?

“The phrase *right to life, liberty, and the pursuit of happiness*, once a vibrantly defiant proclamation, has become meaningless cant, a kind of semantic mummy—the carefully preserved corpse of what only yesterday was a courageous Man. As the preamble to the Declaration, As the preamble to the Declaration of Independence and the Founding Fathers’ other writings on political philosophy imply, they saw Man as a being endowed by his Creator with inalienable rights, among them the right to life, liberty, and property. To exercise such rights, Man must be a self-disciplined adult possessing a right anterior to those they enumerated—a right so elementary it never occurred to the Framers that it needed to be named, much less

than its protection needed to be specifically safeguarded.”<sup>98</sup>

What is the point in giving up the rights of nature, what is the point of living in a society, if to do so you must give up the right to control your own body and mind? As Szasz wrote, “What does it profit a man if he gains all the rights politicians are eager to give him, but loses control over the care and feeding of his own body?”<sup>99</sup> I am arguing that it is not the government’s duty, nor is it right for the government to be the arbiter of acceptable and unacceptable pleasure and to assume that longevity of life is universally desired. Through the current system of drug control in the United States, people are being deprived of their bodies “[b]y being deprived of the freedom to care for it and to control it as he sees fit.”<sup>100</sup>

When a private person takes away an individuals’ life, liberty, or property, we call the former a criminal, and the latter a victim. When an agent of the state does such a thing, and does it rightfully, according to law, we regard him as a law enforcement officer carrying out his duties, and regard the person deprived of his rights as a criminal receiving his just punishment. However, when agents of the therapeutic state deprive us of our right to our bodies, we view ourselves neither as victims nor as criminals, but as patients.<sup>101</sup>

- **The Right to Cognitive Liberty: A Potential Legal Basis**

At the core of these questions, and of this paper, is the notion that we have a right to cognitive liberty.<sup>102</sup> Richard Glen Boire explains, “Essential to the most elementary concepts of human freedom, dignity,

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<sup>98</sup>Thomas Szasz, Our Right to Use Drugs, p. 5.

<sup>99</sup>Thomas Szasz, Our Right to Drugs, p. 30.

<sup>100</sup>Thomas Szasz, Our Right to Drugs, p. 6.

<sup>102</sup>The concept of cognitive liberty, as applied to the right to do drugs, was coined, at least most recently and prominently, by Richard Glen Boire. Richard Boire has a Doctorate in Jurisprudence from Boalt Law School. He is the founder and director of the Center for Cognitive Liberty & Ethics (CCLE), “an independent nonprofit law and policy 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.” Richard Glen Boire, Esq., Application for Leave to File Amicus Curiae brief in United States of American v. Dr. Charles Thomas Sell, D.D.S., Appeal from the United States District court for the Eastern District of Missouri, Crim. No. 01-1862, p. 3.

and self-determination, a person has a fundamental right to cognitive liberty—a right to freedom of thought, to independent thinking, to autonomy over his or her own mind and brain chemistry, and the right to experience the full spectrum of possible thought and consciousness.”<sup>103</sup>

According to Boire, cognitive liberty, while not explicitly enumerated in the Constitution, is implicit in the spirit of the doctrine. In essence, cognitive liberty is the right upon which all other explicitly enumerated rights are premised. Cognitive liberty is really no more than the freedom to think, i.e., the freedom to stimulate the mind as one chooses. It is the freedom to explore one’s mind, to do something to create a thought that would not otherwise be created without the antecedent action, e.g. taking drugs.

This section of the paper will lay out the legal basis for cognitive liberty, as developed by Richard Boire. This paper adopts all of the following legal premises, excepted where noted, as potential constitutional bases for protecting the right to do psychoactive drugs.

To support his conception of cognitive liberty as a fundamental right, Boire marshals case law to buttress the following points: I. Cognitive liberty is a fundamental right, and II. Drug Prohibition violates the Fundamental Right to Cognitive Liberty.

As Boire explains, if cognitive liberty can be established as a fundamental right, courts will have to employ the “strict scrutiny” as opposed to the rational basis test. Ultimately, the government will have to prove that (1) the law is justified as supporting a ‘compelling state interest’ and (2) that the law is the ‘least restrict means’ of supporting that compelling state interest. The burden to show (1) and (2) will be on the government because under the strict scrutiny test, once it is shown that a law substantially burdens a fundamental right, the burden shifts to the government. <sup>104</sup>

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<sup>103</sup>Boire, Application for Leave to File Amicus Curiae brief in United States of American v. Dr. Charles Thomas Sell, D.D.S., Appeal from the United States District court for the Eastern District of Missouri, Crim. No. 01-1862, p. 6.

<sup>104</sup>Boire, Draft Outline, p. 5

In Support of Point I. (cognitive liberty is a fundamental right), Boire argues A. that Cognitive Liberty is protected by the first Amendment. As Boire contends, “freedom of speech and expression depend upon an underlying free consciousness.”<sup>105</sup> In support for this point, Boire alludes the protection the Courts have given to the First Amendment’s protection of obscene matter. See Stanley v. Georgia, 394 U.S. 557 (1968) (holding that “the mere private possession of obscene matter cannot be made a crime”) 394 U.S. 557 at 559. Boire also references the “marketplace of ideas” concept, and contends that “[a] true laissez-faire marketplace of ideas would permit entry of the entire range of ideas spawned by the full spectrum of consciousness.”<sup>106</sup> Also in support of A (cognitive liberty is supported by the First Amendment) Boire argue that the Free Exercise clause protects cognitive liberty in that “[t]he free exercise clause protects the individual’s right to his or her own belief system about the world and his or her place in it.”<sup>107</sup> Boire maintains that the definition of religion given by the United States Supreme Court in United States v. Seeger, 380 U.S. 163 (1965). In that decision, the Court (interpreting the meaning of the word “religion” in the Selective Service statute at issue in the case) defined religion as “any sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by God of those admittedly qualifying for the [religious] exemption.”<sup>108</sup> As Boire explains, “The essence of a psychoactive drug is its effect *on and within the mind* —not the ancillary ‘action’ of ingesting the drug. Thus, it should be protected as ‘belief.’”<sup>109</sup> As Boire suggests, then, the use of psychoactive drugs should be thought of as a sort of belief, not as an action. As a belief, the right is protected by the Constitution. As the Supreme Court wrote in Cantwell v. Connecticut, 310 U.S. 296 (1940), discussing the Free Exercise Clause, the Constitution “embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.”<sup>110</sup> Boire is

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<sup>105</sup>Boire, Draft Outline, p. 1.

<sup>106</sup>Boire, Draft Outline, p. 1.

<sup>107</sup>Boire, Draft Outline, p.

<sup>108</sup>United States v. Seeger, 380 U.S. 163, 176 (1965), quoted in Boire, Draft Outline, p. 2.

<sup>109</sup>Boire, Draft Outline, p. 3.

<sup>110</sup>Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)

essentially arguing that doing drugs is protected by Cantwell because the activity is more similar to a belief than a criminalizable act.

In addition to his Free Speech arguments in support of Point I (cognitive liberty is a fundamental right), Boire also argues B. that the penumbral right to privacy protects cognitive liberty. As he writes, “One aspect of the right to privacy is all about protecting interiors . . . the inside of homes, of envelopes, of sealed containers, of women’s wombs. The same principle surely ought to apply to the most interior area of them all —the human mind.”<sup>111</sup> He says that cognitive liberty is found in the “zone of privacy” laid out by the Supreme Court in two doctrines, obscenity and reproductive rights. With respect to obscenity, Boire again cites Stanley v. Georgia, 394 U.S. 557 (1968), for the proposition that the state “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”<sup>112</sup> With respect to the latter area, reproductive rights, Boire cites Griswold v. Connecticut, 381 U.S. 479 (1965) (holding unconstitutional a Connecticut law prohibiting the use of “any drug, medicinal article or instrument for the purpose of preventing conception”) to argue that the prohibition on drug use infringes on the constitutionally protected ‘zone of privacy’ laid out in that case.<sup>113</sup> Boire also cites Roe v. Wade, 410 U.S. 113 (1973) for its reference to the ‘zone of privacy.’ Finally, Boire alludes to Justice Stevens’s concurrence in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), for the proposition that “the concept of privacy embodies the ‘moral fact that a person belongs to himself and not others nor to society as a whole.’”<sup>114</sup>

As Point C. in support of Proposition I (cognitive liberty is a fundamental right), Boire alleges that the Fifth Amendment’s protection of the right not to testify against oneself in a criminal case buttresses the notion that cognitive liberty is also supported by the constitution. As Point C. in support of Proposition I

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<sup>111</sup>Boire, Draft Outline, p. 3.

<sup>112</sup>Stanley v. Georgia, 394 U.S. 557 at 566 (1968), quoted in Boire, Draft Outline, p.

<sup>113</sup>Boire, Draft Outline, p. 3.

<sup>114</sup>Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 at 777, n.5 (1986) (Stevens, J., concurring), quoting Fried, Correspondence, 6 Phil. & Public Affairs 288-289 (1977), quoted in Boire, Draft Outline, p. 3.



(cognitive liberty is a fundamental right), Boire alleges that the Fifth Amendment’s protection of the right not to testify against oneself in a criminal case buttresses the conception of cognitive liberty as a fundamental right. Boire explains the Fifth Amendment argument when he writes, “This, in effect, is a protection of a person’s own *interiority* —prohibiting the government from forcing any given person to reveal what is inside his head.”<sup>115</sup>

As Point D in support of Proposition I (cognitive liberty is a fundamental right), Boire makes a Ninth Amendment argument, contending that “the fundamental right to freedom and autonomy over one’s own consciousness is reserved to the people under the Ninth Amendment.”<sup>116</sup> While cognitive liberty is not specifically discussed in the Bill of Rights, it is no less protected by the Constitution, as the Ninth Amendment clearly indicates that other fundamental rights exist, even if they are not explicated by the other Amendments. Citing Griswold v. Connecticut, 381 U.S. 479, 4888, 491, 492, Boire writes, “Rather the Ninth Amendment shows a belief of the constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.”<sup>117</sup>

As Point E in support of Proposition I (cognitive liberty is a fundamental right), Boire cites international law as supportive of the right to cognitive liberty. As Boire claims, such documents as the United Nations International Covenant on Civil and Political Rights (ratified by the United States Congress in 1992) support not only the notion of cognitive liberty but the right to manifest that liberty, e.g. through the use of drugs.

As Article 18 (1) of the covenant reads:

Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in the community of others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching. <sup>118</sup>

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<sup>115</sup>Boire, Draft Outline, p. 4.

<sup>116</sup>Boire, Draft Outline, p. 4.

<sup>117</sup>Boire, Draft Outline, p. 4.

The protection of worship and other means of “manifesting” religion support the notion that using drugs is worthy of protection; doing drugs is a way of manifesting a belief.

After Points A-E, Boire launches into his Second Proposition, “Drug prohibition violates the fundamental right to cognitive liberty.”<sup>119</sup> As Boire explains in the outline, supporting this proposition is necessary to shift the burden to the government to defend its encroachment on the right to cognitive liberty. Essentially, in Proposition I, Boire has established a basis for cognitive liberty as a fundamental right. In Proposition II, claiming that drug prohibition violates that right, Boire is providing the second part of an argument that he hopes will ultimately shift the burden to the government. Essentially, he is arguing that the courts must apply strict scrutiny because using drugs is a fundamental right infringed upon by drug prohibition.

In Support of Proposition II, Boire argues in Point A that “drug prohibition substantially burdens the fundamental right to cognitive liberty.”<sup>120</sup> Essentially, as the discussion infra on the benefits of drugs to the users suggest, drugs do provide ways for users to access ways of thinking otherwise inaccessible. As Boire writes, “[m]aking a person a criminal for experiencing these modes of thinking and perceiving is a clear and substantial burden on cognitive liberty.”<sup>121</sup>

As Point (B), Boire argues that “no compelling state interest justifies the substantial burden on cognitive liberty caused by criminalizing the responsible *use* of drugs by adults.”<sup>122</sup> Boire argues that 1) the state does not have a compelling state interest to protect a person from himself (the claimed premise for disallowing drugs)<sup>123</sup> and 2) drug use, per se, is not a major problem. In support of this proposition, Boire says that the harmful consequences of illicit drug use pale in comparison to those caused by legal drugs like tobacco and alcohol.<sup>124</sup>

Finally, in Point (C), Boire argues, “assuming *arguendo* that a compelling state interest does exist (protecting harm to others), the government has not adopted the least restrictive means of securing its interest.”<sup>125</sup> Elaborating on Boire’s argument, this paper argues that simply because a drug may contribute to a person acting violently, given a particular set and setting, does not mean that the government has any more right to criminalize the drug than it has to criminalize any other activity—like arguing— that might contribute to violence. As Boire writes, “Current drug prohibition is analogous to outlawing all automobiles because some people drive irresponsibly and cause accidents.”<sup>126</sup> Boire also analogizes drug prohibition to prior restraint on speech, “an attempt to censure an action before it occurs, rather than apply liability for an actual offense.”<sup>127</sup> Boire argues furthermore that the government could use less restrictive means to secure its interest. He argues that the government could use a drug use enhancement similar to what is used with guns, for example. Boire says that sentencing guidelines could call for sentencing enhancements for people who commit other crimes while still “high” from the drug.

- **On the Need for My Paper, Critiquing Boire’s Argument**

Whereas Boire seems to have come up with a solid legal basis for conceiving of cognitive liberty as a fundamental right, his latter argument (that drug prohibition violates the fundamental right to cognitive liberty) has holes some of which this paper will hopefully fill. These holes occur in Boire’s argument II. B., in the section where he argues, “no compelling state interest justifies the substantial burden on cognitive liberty caused by criminalizing<sup>42</sup> the responsible *use* of drugs by adults.”<sup>128</sup> Boire has not developed a firm argument in support of his notion that the government has no compelling interest in protecting people) from themselves (“harm to the individual”<sup>129</sup>) and 2) prohibiting drug use is not protecting people from “harm to others”.

As suggested supra, this paper fills in the “harm to the individual” theory by dealing head on with notion that prohibiting drugs is not necessary to protect people from themselves. This paper argues that 1) there is nothing about drugs that justifies the government’s selective attention to them and to their users. Some people become addicted to drugs; but addiction to drugs is simply one form of addiction and not necessarily any worse than other objects, activities, or people that can also constitute the manifestation of an addiction; 2) It is not appropriate, on moral grounds, for the government to prohibit an activity that inherently causes no harm to anyone other than the individual based on the theory that drug addiction deprives people of free will, and should therefore be prevented. This paper argues that in a universe where no one can even prove the existence of a thing called “free will,” it is unjustifiable to criminalize an activity solely because that activity, like so many others, might have a psychological control over an individual. I maintain this position unless the government can show 1) that free will exists beyond the way our brain chemistry interacts with our external stimuli and 2) that the illicit drugs necessarily exert more emotional control over an individual than any other manifestation of addiction. As this paper’s section on addiction reveals, it is doubtful whether the government will ever be able to prove 2) because drug addiction is not necessarily more forceful than any other, and because set and setting are so important in the way one experiences a drug.

- **The Law of Attempt**

This paper also adds to Boire’s concept of cognitive liberty by suggesting that the realm of attempt law provides support for the notion that drug prohibition departs radically from the American legal tradition by virtue of prohibition’s denial of the right to cognitive liberty.

Like the zone of privacy cases marshaled by Boire, the law of attempt throughout the United States reveals that the American legal tradition is loathe to criminalize contemplation of a crime, let alone thinking in general. Throughout the United States, states criminalize attempted crimes. However, in order to charge, let alone obtain a conviction for attempt, the prosecution must show an “overt act.” Black’s Law Dictionary defines attempt, as it is used in criminal law, as “An overt act that is done with the intent to commit a crime but that falls short of completing the crime.”<sup>130</sup> The “overt act requirement” is found throughout the country.<sup>131</sup> Moreover, even where an overt act in connection with a crime is committed, the law does not punish acts that “are too remote from the completed offence to give rise to criminal liability.”<sup>132</sup> The following elaborations on the concept of attempt in American law suggests that the law is so loathe to criminalize thinking, that the overt act must have a certain proximity to the criminal act in order for it to be punished.

An attempt to commit an indictable offence is itself a crime. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is the essence of the attempt.... [Yet] [a]lthough every attempt is an act done with intent to commit a crime, the converse is not true. Every act done with this intent is not an attempt, for it may be too remote from the completed offence to give rise to criminal liability, notwithstanding the criminal purpose of the doer. I may buy matches with intent to burn a haystack, and yet be clear of attempted arson; but if I go to the stack and there light one of the matches, my intent has developed into a criminal attempt.<sup>133</sup>

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<sup>130</sup> “attempt,” Black’s Law Dictionary, 7th ed. 1999, www.westlaw.com.

<sup>131</sup> In *State v. Smith*, 300 N.C. 71 (1980), the North Carolina Supreme Court gave a good synopsis of the relevance of an “overt act” to attempt law. The two elements of an attempt to commit a crime are: first, the intent to commit the substantive offense; and, second, an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. 300 N.C. 71 (1980).

The following state statutes are offered as examples of the presence of an overt act to the concept of attempted crime. The Alabama attempt statute reads in part: “A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense.” Ala.Code Section 13-A-42, (a), Code of Alabama, Title 13A. Criminal Code, Chapter 4 Inchoate Crimes, Current through End of 2001 Regular Session. The Western states, as exemplified by California’s statute on attempt, maintain the same overt act requirement, even where particular statutes fail to use the specific wording, “overt act.” As the California statute on attempt reads, “An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.”

<sup>132</sup> John Salmond, *Jurisprudence* 387 (Glanville L. Williams ed., 10<sup>th</sup> Edition) 1947, quoted in Black’s Law Dictionary, “attempt.”

Explaining the physical proximity test often employed by courts to determine if a particular overt act constitutes an attempt, J.W. Cecil wrote the following in Kenny's Outlines of Criminal Law:

Attempt... is the most common of the preliminary crimes. It consists of steps taken in furtherance of an indictable offence which the person attempting intends to carry out if he can. As we have seen there can be a long chain of such steps and it is necessary to have some test by which to decide that the particular link in the chain has been reached at which the crime of attempt has been achieved; that link will represent the actus reus of attempt....<sup>134</sup>

The latter explanation of attempt supports the notion that the law is especially sensitive to the notion of punishing only those acts that directly lead to a crime. It is clear that the impetus underlying this sensitivity is the respect the law generally has for its citizens' freedom to think. Attempt law, and the proximity test employed, reveal that American law is usually cognizant of the danger of criminalizing activities that may infringe on the right to free thinking. Attempt law reveals this awareness in the effort to distinguish criminal acts, those directly related to the underlying offense, from acts that may simply reveal a criminal thinking.

## *CONCLUSION*

The grounds the FDA [Food and Drug Administration] uses to put drugs into different schedules is illegitimate on scientific and philosophical grounds. The most contemporary developments in the study of the relationships people form with drugs, undermine the legitimacy of the FDA scheme (as embodied in the Controlled Substances Act of 1970); these developments suggest that the addiction to a drug is a result, not a cause, of the psychological difficulties a person may be experiencing while using the drug(s). What is known about drugs suggests that the way a drug is experienced, including whether someone has an addictive

relationship with a drug, depends on the” set” and “setting.” Therefore, it is far more than the pharmacological properties of a drug, and those properties’ impact on the neurochemistry of an individual, that are responsible for the way a drug is experienced. The FDA scheme ignores “set” and “setting;” it magnifies the property of a drug in the drug experience and conflates physical and psychological addiction. The FDA scheme is illegitimate, and through its use in controlling drugs, violates the right animating the spirit of the Constitution and our laws: the right to control and manipulate one’s own brain and body.

### **Prologue, Final Thoughts, and Loose Ends**

Underlying the arguments made in this paper is the following premise: defining a drug as a psychoactive substance with no caloric value is a quite circumscribed definition. If you accept the premise of this paper, then you realize that everyone does drugs, if we re-define drugs as being anything that can have a psychoactive effect on us. I am suggesting that there is no difference in kind that distinguishes the non-caloric but consumable substances we know as drugs from either caloric substances like food that we know to have effects on our bodies and minds, or from the non-caloric but non-consumable actions and experiences we have. So why is it that we criminalize the very thing that everyone seems to participate in?

Thomas Szasz, author of Our Right to Drugs : The Case for a Free Market, postulates that scapegoating is the “basis for our union as a people.” As he writes:

“I submit that, lacking the usual grounds on which people congregate as a nation, we habitually fall back on the most primitive yet most enduring basis for enduring group

cohesion, namely scapegoating.”<sup>135</sup>

Szasz therefore posits that drugs provide people with an easy means of scapegoating. But why? While there are many explanations, I contend that the following is perhaps what lies at the heart of the scapegoating: By criminalizing certain substances, i.e. certain psychoactive states, the government is identifying those people who do not put automatic faith and trust in the government. But the truth is that the criminalization of psychoactive states may have less to do with the government’s collective unconscious than with a variety of political forces and momentum, and the age-old proclivity of government to control its citizenry through creating fear of an unknown the government defines as such.

- **On Children**

One issue this paper has not dealt with is the question of the age at which one should have the right to do drugs. While I do not think that anyone should be punished by the criminal law for doing drugs, no matter what age, I have not considered the issue enough to come to any conclusions on it. In order to discuss the issue of children and their rights to do drugs, one would have to delve into a number of sticky areas such as at what age, if one exists at all, people leave childhood and enter adulthood, whether there is an age at which children seem to develop different types of cognition, whether that age is relevant to determining if they should be able to use drugs if they so choose, etc.

It is interesting to note a few interesting but little-known pieces of information on the subject of children and drug use. The reality about drug use among children is that many people younger than eighteen are and

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<sup>135</sup>Thomas Szasz, Our Right to Drugs The Case for the Free Market (New York: Praeger), 1992.



have tried psychoactive substances; some have obtained the drug from their doctors (such as is the case with the ever-popular Ritalin©), others have gotten in on the street. Moreover, “[it] may well be that children are more susceptible to the adverse effects of psychoactive drugs, but there is little hard evidence on this point.”<sup>136</sup>

- **On Addiction**

Throughout this paper, I have made efforts to not discount the experiences of those physically addicted to drugs, such as heroin or cigarettes. As I have never experienced such an addiction, and have not been intimately involved with anyone who has a physical addiction (at least that I know of), I feel slightly presumptuous to be talking about them. The only way I have tried to deal with my lack of personal experience in the area is through reading accounts of others who have experienced these addictions and through talking with people who have experienced them.

- **On a Regulatory Scheme**

This paper has not dealt with the issue of how to regulate drugs once it is established and accepted that we have a right to use them. However, it is appropriate for a prologue to this paper to raise issues whose resolution would be necessary to formulating any mechanism for regulating drugs in a way that would provide those with the desire to procure the drugs with a way to get them that would have more advantages than the “street.”

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<sup>136</sup>Weil, M.D. and Rosen, p. 165.

One of the more pragmatic and problematic issues is exemplified in the following questions: would doctors give out heroin to anyone who wants it? Many doctors would not want to give heroin, for example, to someone who has never used it before. However, I think it is true that people will seek out a drug illegally if they want to try it. So how do we resolve these competing interests?

The medical industry—doctors and pharmaceutical companies—have been intimately involved in the regulation of drugs at least since the 1914 Harrison Narcotics Act. It may be time to foster the development of another universe of medical professions or other persons trained in the pharmacology of drugs, who are willing to distribute any drug to a person, regardless of that person's drug history. It would seem unfair to compel doctors to prescribe physically addicting drugs to patients who have never taken them. However, as the problems with the current regulation of drugs has illustrated, those who want drugs (even for the first time) will seek out whatever avenues are available to procure them. While difficulty in accessing drugs may deter some from obtaining them, it obviously does not deter everyone; and it is those who are not deterred, more than any other segment of the population, that we should try to assist. The goal of any regulation mechanism should be to maximize choice, give respect to an individual's ability to determine the way they use and manipulate their bodies and mind, while at the same time trying to ensure that those who use substances which have been known to create physical withdrawal as much information as possible. At the same time, above all else, it is important to insure that a person will always prefer to get the pharmaceuticals in a legitimate way, in order to ensure purity and the knowledge of purity.

Making a class of criminals out of those who wish to have psychoactive experiences automatically leads people who would not otherwise be anti-social to become so simply by virtue of the nature of the drugs they ingest.

- **What Would It Require For Me To Reconsider the Issue**

I would be open to reconsidering my position on the illegitimacy of drug prohibition if there was a drug someone could take whose taking of it inherently caused them to act violently. I would have to be convinced that there was a mechanism in the brain for everyone that makes people feel the desire to physically hurt another, and to actualize that desire. I doubt that there is such a drug. I have never read about a drug that produces this reaction, and even those who claim that drugs such as alcohol or cocaine or marijuana, even, make people prone to violence, do not contend that there is a mechanism in the drug that inherently turns on some violent portion of the brain.

Someone might be able to ask me, however, what I would do if it were discovered that a certain drug led people who already have shown themselves to be capable and willing to commit violence upon others. At that point, I would have to reconsider my position.

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