

CENTER FOR
COGNITIVE LIBERTY & ETHICS

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Report on AB 1416:

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

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AB 1416 was introduced on February 23, 2001, by Assemblywoman Lynne C. Leach. This report provides an analysis of the bill, concluding that:

1. MDMA does not meet the criteria for inclusion in Schedule I; and
2. Imposing a 90-day mandatory minimum sentence is ill-considered and unjust.

I. Summary of AB 1416

Section 1 of AB 1416 will classify the drug 3,4-Methylenedioxymethamphetamine (MDMA) within Schedule I of California's controlled substances law.

Section 2 of AB 1416 will modify Section 11550 of the Health & Safety Code to make it a misdemeanor for any person to use or be under the influence of MDMA.

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

II. Analysis

MDMA Does Not Meet The Criteria For Inclusion in Schedule I

Section 1 of AB 1416 would make MDMA a Schedule I substance under California law. MDMA, however, does not meet the criteria for inclusion in Schedule I.¹

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

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

In a comprehensive opinion, Judge Francis Young, who presided over the hearings, found that MDMA did not satisfy the three criteria necessary for placement in Schedule I.³ Judge Young found that MDMA has a safe and accepted medical use in the U.S. under medical supervision. Furthermore, he

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

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

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision. (21 USC Sec. 812.)

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

found that the evidence failed to establish that MDMA had a high potential for abuse.

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

Research conducted since the DEA hearing in 1985 continues to confirm MDMA’s medicinal potential. Just recently, for example, it was discovered that MDMA may have utility in treating patients with Parkinson’s disease.⁴ Longstanding evidence suggests that MDMA is a beneficial adjunct to psychotherapy.⁵

Placing MDMA in California’s Schedule I will not only make all such medical use a crime, it will also make it all but impossible for scientists in California to conduct new research on MDMA’s medicinal potential.

In conclusion, MDMA does not meet the criteria for inclusion in Schedule I. Placing the drug in Schedule I is not only legally erroneous, it effectively blocks further research on the medicinal potential of this drug.

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

Section 2 of AB 1416 will make it a misdemeanor offense for any person to use, or be under the influence of, MDMA. Those convicted will receive a **mandatory minimum** sentence of 90 days in county jail, (and up to a maximum sentence of 1 year in county jail).

Before enacting Section 2 of AB 1416, legislators should ask themselves *how* Section 2 will be enforced.

Section 2 of AB 1416 is Fraught with Enforcement Problems.

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

MDMA is orally ingested. It is not injected, and thus there is no visible mark indicating recent use. MDMA is odorless, so unlike alcohol or marijuana, there is aromatic indication of recent use. As a

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

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

result, police officers will be forced to rely on unconstitutional “suspect profiling,” and invasive testing.

With regard to profiling, will there be reason to detain or arrest a young person dancing at a “rave,” holding a light stick in one hand and a water bottle in the other? Will young people who hug each other at a rave be detained? What about a young adult who returns from a rave dance and tells her parents that she loves them?

With regard to invasive drug testing, will young people be rounded up at raves and forced to submit to blood tests on site, or forced to urinate in bottles?

These enforcement problems indicate that the law would be extremely difficult to enforce, and would likely require unconstitutional or highly invasive enforcement tactics. Likewise, the lack of enforcement guidance leaves the police with almost unbridled discretion, and thus encourages selective enforcement. As one prosecutor glibly commented: “If there are young people around, Ecstasy will be there.”⁶

The 90-day Mandatory Minimum Sentence is Ill-considered and Unjust.

Section 2 would impose a 90-day mandatory minimum sentence on any person convicted of using or being under the influence of MDMA. This provision targets low-level users, and mandates a harsh sentence that bars judges from fashioning an appropriate punishment.⁷

MDMA is nonaddicting, and almost universally occasions a state of mind that is accepting, empathetic, and insight-oriented.⁸ Placing an MDMA user in jail for 90-days is not only unjust, it serves no benefit to society.

Michael Tonry, a Professor of Law and Public Policy at the University of Minnesota has extensively researched the effects of mandatory minimum sentences and concluded that “[a]s instruments of public policy, they do little good and much harm.”⁹ Likewise, the Federal Judicial Center examined whether mandatory minimums for drug offenses help reduce crime, and concluded:

... mandatory minimums have not proven effective at reducing crime or reducing drug availability.¹⁰

⁶ New Jersey Prosecutor Terrence Farley, quoted in, Jason Laughlin, “State Cracks Down on Club Drugs,” *Cherry Hill Courier-Post*, New Jersey, August 28, 2000.

⁷ In the strict terms of Section 2 of AB 1416 “...in no event shall the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 90 days in confinement in the county jail.” (AB 1416, Sec. 2.)

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

⁹ Michael Tonry, “Mandatory Penalties,” 16 *Crime & Justice: A Review of Research*, (Michael Tonry ed., 1990), pp. 243–44.

¹⁰ Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Term*, Federal Judicial Center, (1994), p. 14.

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

The above critiques of mandatory minimum sentences are especially well leveled at Section 2 of AB 1416. Inasmuch as AB1416 will largely be applied to otherwise law-abiding young adults, legislators should ask themselves what good is done by sending a young adult to county jail for three months, disrupting his or her schooling, employment, and family life?

This analysis was prepared by Richard Glen Boire, J.D., Director, Center for Cognitive Liberty & Ethics.

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¹¹ *Id.* p. 1.