

Raich v. Ashcroft, USA v. Chong:
The Relative Instability of Marijuana Prohibition*

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“Californians are higher than ever on medical marijuana,” begins a January 30, 2004 article in the San Francisco Chronicle (Egelko 2004:A1). 74% of Californians now support Proposition 215, the article claims, up from the 56% support Proposition 215 received when passed in 1996. Proposition 215, residing in the law books as California Health and Safety Code §11362.5 and now referred to as the Compassionate Use Act of 1996, gave patients whose “health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief” the right to possess and cultivate marijuana legally on the recommendation of a physician. Proposition 215 also encouraged state and local governments to set up distribution arrangements to ensure safe access to medicine for medical marijuana patients. The intent of Proposition 215 was that patients with a legal recommendation from a licensed physician, or their caregivers, would be allowed to possess and cultivate marijuana without fear of arrest and imprisonment.

Seriously ill Californians who use marijuana for medical reasons acquired legal shelter under CA Health and Safety Code §11362.5 on November 6, 1996. Challenges to California’s medical cannabis law have come primarily from the federal government, Egelko (2004:A1) notes, which has “fought its implementation with raids and shutdowns of pot clubs, and by prosecuting suppliers and growers.” Although originally charged to the Treasury Department, federal enforcement of drug prohibition in the United States is now carried out by the Drug Enforcement Administration (DEA), established as an enforcement arm of the US Department of Justice in 1973. The DEA is now leading the

medical cannabis crackdown, sending patients and health care providers to prison, often for long, drug-war fueled mandatory minimum sentences. In fact, the establishment of the Drug Enforcement Administration by President Nixon on July 1, 1973 (Executive Order 11727, 38 F.R. 18357) coincides with the birth of the modern ‘drug-war’: it marks the first use of that term to describe America’s drug policy as Nixon (1973) declares an “all-out, global war on the drug menace.”¹ The Drug Enforcement Administration has justified its attacks by maintaining that marijuana laws have no medical exception because federal law supercedes state law – Congress placed marijuana in the category of Schedule I. There are three criteria that Congress sets out for a drug to be placed in Schedule I, the most restrictive category. They are: “(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” (Controlled Substances Act § 812 (b) (1)). In Section 812 (c) (c) of the Controlled Substances Act, Congress placed marijuana in Schedule I, by including all “tetrahydrocannabinols.”

Diane Monson

Diane Monson, a longtime resident of Oroville, California, suffers from chronic, debilitating back pain and spasms from a diagnosis of “degenerative disease of the spine”

¹ The Federal Bureau of Prisons’ (2004) website’s “Quick Facts” section gives us a breakdown of the percentage of incarcerated individuals in federal prison for drug offenses by year. These statistics show the effect of the ‘drug war’ on the composition of the federal prison population through time. In 1970, drug offenders make up only 16.3% of the federal prison population. In 1973, Nixon’s ‘all-out global war on the drug menace’ begins and the percentage of drug prohibition violators in the federal prison system swells to 25.6%; in 1974, 28.4%. The inmate population stays at roughly one-quarter drug offenders until about the 1980s, when America reached new heights of racially motivated prohibitionist fervor. Driven by the great ‘crack’ scare, new mandatory minimum sentencing laws were passed for all drugs, including marijuana; and the percentage of federal prison inmates who were serving time for violations of drug law increased to 44.7% by 1988. In 1994, this number peaked at all-time high, 61.3% (Federal Bureau of Prisons 2004).

(Rose 2002:2). Monson's (2002:3) medical progress with cannabis is remarkable: "from the moment I began using medical cannabis my spasms decreased in frequency about 75 percent." No other medications provide the relief and quality of life Monson derives from cannabis. Her physician, Dr. John Rose (2002:2), made the following statement about Monson's medical cannabis use:

In 1999, pursuant to California State law, medical cannabis was recommended for Diane as treatment of her medical conditions, including Chronic Back Pain and Spasms. I have determined that Diane's health benefits from such a recommendation, that medical cannabis use is deemed appropriate for Diane Monson, and that medical cannabis provides relief for Diane's pain and suffering.

Dr. Rose serves as Monson's family practitioner and is familiar with her treatment history. With her doctor's recommendation protecting her under California state law, Monson cultivated a small garden to supply her medical needs, six plants being carefully within her local guidelines. Yet one day, as Diane was baking granola in her kitchen (Smith 2002), her garden and medical well-being became a military target in the all-out, global war on the drug menace:

On August 15, 2002, deputies from the Butte County Sheriff's Department and DEA agents visited our home. After a discussion with them, the sheriff's deputies agreed that my cultivation and possession of six cannabis plants was lawful under the Compassionate Use Act of the State of California. The DEA agents insisted on

seizing and destroying my plants. For three hours we talked with them, reasoned with them, and finally pleaded with them to leave the plants alone. The local District Attorney, Mike Ramsey, also fought for my right to keep my medicine by calling John K. Vincent, the U.S. Attorney for the Eastern District of California, to plead with him to keep the DEA agents from destroying my medicine. All of the efforts by my local law enforcement agents and the Butte County District Attorney were to no avail. As I stood and watched, the DEA agents chopped down my medical plants. I was crying and my back began to tighten up; for the rest of the week I experienced debilitating back spasms. I have not had a good night's sleep since the actions of the DEA in destroying my plants. My 20-year marriage is suffering as well because my wonderful husband also has to deal with all the repercussions of this action. We do not feel safe; we have had our civil rights and our rights under California state law taken from us in our own backyard. I must now find a way to get my medicine from another source. To do so will be very expensive and I have no idea what the quality of the medicine I receive will be (Monson 2002:4).

Butte County District Attorney Ramsey's conversation with U.S. Attorney Vincent during the standoff shows the irreconcilability of the two legal standards in conflict. While on the phone with Vincent, Ramsey (in Smith 2002) claims he "was using words like 'wrong-headed' and 'stupid' and 'high-handed'" to describe the destruction of Monson's garden. "I was very angry about it, when [Monson] was squarely within 215."

And District Attorney Ramsey is no marijuana activist: he opposes marijuana legalization and sees “irony” in his role in defending access to medical marijuana (Indar 2003).

Although ultimately no charges were filed, Diane Monson certainly had reason to worry. Victims of the federal backlash against California’s medical marijuana patients were receiving lengthy prison sentences. Bryan Epis, of nearby Chico, California, received a 10-year mandatory minimum sentence after a federal jury was instructed to disregard defense arguments that Epis’ marijuana plants were for medicinal use, and therefore legal in the state of California (Walsh 2002:B1). After her tiny garden had been uprooted by the DEA, Diane Monson was now living in fear even possessing the medication that allowed her to function.

Angel McClary Raich

Another patient, Angel McClary Raich (2002:3), expressed well the fear that medical marijuana patients and their caregivers felt as a result of the DEA raids:

The Drug Enforcement Administration (DEA) is attacking sick, disabled, and dying Americans. Since September 11, 2001, the DEA has continued raids on the California medical cannabis community. The DEA has been terrorizing and doing harm to other patients using cannabis. This is creating great fear for me and my husband. I am just fighting for my life. I promised my children I would fight to stay alive and I am not about to go back on that promise.

Angel McClary Raich is a ‘medical necessity’ cannabis patient, in other words, it is highly probable that she would no longer be alive without cannabis, as no other medicine works to control even her pain, let alone her dozen or so chronic, life-threatening medical conditions. Even with cannabis, the fact that she is no longer in a wheelchair is nothing short of miraculous, given her state in 1997 when she first turned to marijuana as a last resort.

Raich is the type of patient that usually stumps most doctors. She suffers from post-traumatic stress disorder (PTSD) as the result of years of sexual abuse, torture, and imprisonment that she experienced as a child. The spectre of DEA raids, mandatory minimum sentences, and federal trials where evidence of medical use is excluded all led to a recurrence of PTSD symptoms for Raich (2002:4):

Since the Federal Government escalated its raids on California medical cannabis patients, I have been experiencing more intense P.T.S.D. symptoms. I find myself overwhelmed, feeling suddenly in danger, and I have become consumed with feelings of fear, helplessness, and horror. The constant threat I feel is making me re-experience my past traumas. It is causing me to feel the same mental, physical, and emotional experiences that occurred during the past traumas. This includes thinking about my past trauma and the threat of losing my life. For the past year I have been experiencing the following symptoms due to the threats and attacks from the United States of America’s war against cannabis patients: I get bad dreams and nightmares of being attacked and killed by the federal government. I am also having flashbacks and nightmares of being unsafe and unprotected. Every

time another patient or provider is raided, I am overwhelmed with anxiety and fear of being in danger, wondering if I will be the next patient to be attacked. I am deeply concerned about my own health and safety. ... I feel the trauma is happening again, only now it is the federal government abusing me. I feel as if I am in danger. I experience sensations of panic, and trying to escape, and of thinking about attacking first, yet I am too sick and my body is too weak.

Post-traumatic stress disorder is unfortunately only the first and oldest of many chronic illnesses from which Raich suffers, and treats using cannabis. She was also diagnosed early in life with scoliosis, or curvature of the spine, and spent three years in a back brace. Raich (2002:5) speaks of her time in the back brace as her “first experience with chronic pain.” Scoliosis is still one of her major sources of chronic pain. Another is endometriosis, for which she has undergone numerous surgeries, including the removal of uterine cysts. Violent emesis always occurred after these surgeries due to her allergies to nearly all pharmaceutical materials, until kind hospital staff allowed the administration of cannabis as Raich returned to consciousness from the anesthetic. Her quick recovery from the surgery (even compared to normal patients, who would be administered opiates) and complete lack of emesis astounded the hospital staff. She was then allowed to recover from surgery in the oncology ward, where medicating with cannabis is common².

Scoliosis is not the only damage to Raich’s spine, she also suffered three spinal injuries in one year, during 1991. As well as the three spinal injuries, Raich also has

² Doblin and Kleiman (1991) found that 44% of 1,035 oncologists who responded to their survey had recommended marijuana to at least one patient for emesis due to chemotherapy, five years before Proposition 215. This means that the oncologists in the survey who recommended marijuana were doing so in violation of the law.

rotator cuff syndrome which causes her right shoulder severe pain. It almost goes without saying that she is often in the most severe pain imaginable, but severe chronic pain is also a truly salient, discrete diagnosis in addition to the others.

Raich also suffers from muscle spasms, chronic headaches, fibromyalgia, severe temporomandibular joint dysfunction and bruxism, starvation/cachexia, and non-epileptic seizures. Every single one of these ailments is compounded by chemical allergies to virtually all pharmaceuticals, rendering conventional pharmacological treatment not only useless, but a health threat in its own right. The drugs that could normally help someone in her situation, for example Vicodin, provoke an allergic response from Raich's body that is potentially life-threatening. Raich's doctor (Lucido 2002:3) lists 35 medications that have been prescribed to treat one or more of her conditions, "which all resulted in unacceptable adverse side effects." The example she gives the Court in her declaration we find under the subheading "Two Demulen tablets":

In September 1995, three days before I lost feeling from the waist down, I went to a new doctor regarding my severe endometriosis pain and complications. It was really time for me to have surgery again for my endometriosis. The doctor did not want to give me surgery, instead she wanted to put me on birth control pills to control some of the symptoms. I explained to her that I was allergic to all forms of birth control pills. The doctor told me that just because I was allergic to a drug when I was a teenager and in my early twenties did not mean I was still allergic [to] it. I took the pills on the advice of my doctor and I have been paying for that

ever since. After taking just two Demulen pills, my health was taken away forever (Raich 2002:10).

Raich became permanently disabled as a result of her reaction to the birth control pills and the corresponding aggravation of her other conditions, and had to have another endometriosis surgery anyway. She suffered paralysis on the right side of her body and was confined to a wheelchair after September 1995. Her steady deterioration culminated in a suicide attempt in August 1997.

As close to throwing in the towel as anyone has likely ever been, Angel hadn't quite given up fighting for her life just yet. She explains how medical cannabis was introduced to her:

... [a] nurse who had been watching me suffer asked me if I had ever thought about using medical cannabis. I was offended because I was not in support of marijuana use. My doctors could not figure out what had been wrong with me for over two years. At the time I was in a wheelchair and partially paralyzed on the entire right side of my body. I wanted my suffering to end as soon as possible. I was becoming sicker and sicker from the prescription drugs the doctors were pumping into me, only to vomit the pills up prescription after prescription, until the cure was worse [sic] than the disease (Raich 2002:11-12).

It was not long before Raich tried cannabis out of desperation. Where other medicines had failed, medical marijuana opened doors she thought closed forever. At first

she was forced to purchase marijuana on the street. This put her tremendously fragile health in what could only be described as the wrong hands: “I was robbed, ripped off, and taken advantage of by the people selling the marijuana to me or to a friend on the street” (Raich 2002:19). The marijuana she purchased on the street was also of questionable quality, not to mention contaminated with pesticides or other chemicals to which she could have an allergic response. It is also a fact that different strains of marijuana have far different healing properties – marijuana is by no means a single medicine, it is actually many. Some types of cannabis may exhibit potent anti-emetic properties, others might have, for example, an anti-depressant effect with no corresponding anti-nausea properties. Raich credits the stable supply of medicinal-grade cannabis she received from the Oakland Cannabis Buyers Cooperative with restoring function to her right side; even allowing her to walk again after years in a wheelchair.

The Oakland Cannabis Buyers Cooperative’s mission was to provide a safe, secure, and affordable source of medicinal marijuana for eligible patients. On January 9, 1998, the federal government asked the U.S. District Court for the Northern District of California for an injunction against the Coop, arguing that as a Schedule I substance under the Controlled Substances Act, marijuana by legal definition is without any valid medical use. The federal government was granted an injunction barring the OCBC from violating the Controlled Substances Act on May 19, 1998 (*U.S. v. Cannabis Cultivators Club* 1998). The OCBC kept right on violating the Controlled Substances Act to provide patients like Raich with their medicine:

Jeff Jones, Executive Director of the Oakland Cannabis Buyers Cooperative, reacted [to the Court's injunction] by calling a press conference for today at which he'll openly dispense medical marijuana to four seriously ill patients. "For these four patients, and others like them, medical marijuana is a medical necessity," Jones said in a written statement. "To deny them access would be unjust and inhumane" (Richman 1998).

The City of Oakland decided to show its support for the OCBC in a big way. The City made the Buyers Coop a city agency and deputized the dispensary workers as officers on August 13, 1998; granting them immunity under, of all things, the federal Controlled Substances Act. A provision of the CSA grants immunity to officers who enforce drug laws and transport illegal drugs in the course of their duties, included to protect undercover drug enforcement officers (Mecoy and Maxwell 1998:A1).

First the U.S. District Court found Oakland Cannabis Buyers Cooperative in contempt for continuing to dispense medical cannabis to patients; then the 9th Circuit U.S. Court of Appeals reversed this decision. Ultimately the case was decided by the U.S. Supreme Court (*U.S. v. Oakland Cannabis Buyers Cooperative* 2001a). The U.S. Supreme Court (*U.S. v. Oakland Cannabis Buyers Cooperative* 2001b:1) sided with the Justice Department, ruling that "[t]here is no medical necessity exception to the Controlled Substances Act' prohibitions on manufacturing and distributing marijuana." In this narrow 8-0 ruling, they found that cannabis dispensaries are prohibited by the Controlled Substances Act. While it was clear now that the federal government could prohibit the actual sale or distribution of cannabis, the Supreme Court did not rule on the

issue of whether or not the non-economic possession and cultivation for medical use could be prohibited constitutionally by the federal government – which now became the primary concern for patients like Diane Monson and Angel McClary Raich.

At the same time the Oakland Cannabis Buyers Cooperative was in the courts defending its right to dispense medical cannabis to fourteen medical necessity patients, including Angel Raich, Raich was diagnosed with another chronic medical condition: an inoperable (deep) brain tumor, approximately one-centimeter in diameter. Disappointed with the standard of care she has received in the past and the difficulty physicians have had in treating her multiple, chronic, compound medical conditions, Raich sought a new doctor. Frank Henry Lucido, M.D., voted Best Doctor in Berkeley in the 1993 Daily Californian newspaper, now serves as Raich’s primary care physician.

Dr. Lucido (2002) is convinced that cannabis is responsible for Raich’s livelihood, and states in his declaration to the U.S. District Court for the Northern District of California that “[i]t could very well be fatal for Angel to forego cannabis treatments.” According to journalist Raymond Cushing (2000a; 2000b), there is evidence that the government has known since 1974 that marijuana shrinks tumors. In March of 2000, researchers in Madrid published evidence that rats given fatal tumors survived significantly longer when treated with cannabinoids (Galve-Roperh, Sanchez, Cortez, Gomez del Pulgar, Izquierdo, and y Guzman 2000). Three of the rats’ tumors even shrank away to nonexistence. All of the control rats, untreated with delta-9-tetrahydrocannabinol, died at a uniform rate from their tumors in 12-18 days.

Cushing (2000a; 2000b) sees a darker side to this story: in 1974, a University of Virginia study found the same undeniable tumor-shrinking properties of THC

administered to tumor-rich rats, citing Jack Herer's (1998:46) claims that this study was shut down by the DEA after it was clear the evidence was going the wrong way. Cushing (2000a; 2000b) went on to locate the original, suppressed 1974 University of Virginia study. He argues that the government has, in effect, known about and actively suppressed knowledge of delta-9-tetrahydrocannabinol's possibility as a much safer cancer treatment than radiation therapy or chemotherapy – both of which are themselves carcinogenic – for three decades now. Even Cushing's article detailing the cover-up was somehow ignored by the media. In fact, the article made Project Censored's (2001) list, "Censored 2001: The Top 25 Censored Media Stories of 2000". The federal government has invested an enormous amount of time in making this potential cancer treatment unavailable to physicians, researchers, and patients, even after the DEA's own Judge, Francis Young (1988) concluded that marijuana "in its natural form is one of the safest therapeutically active substances known to man."

Given the fractured state of modern medicine that has resulted from the stranglehold of drug war politics and pharmaceutical-only drug policy, it seems Angel McClary Raich may already be using the most non-toxic, natural cancer treatment possible for brain tumors, and her doctor (Lucido 2002) made note of the research on THC and brain tumors in his declaration.

Shrinking tumors is only one of the many therapeutic uses medical cannabis exhibits. The U.S. Academy of Sciences' Institute of Medicine (Joy, Watson, and Benson 1999:3) report on the state of cannabinoid research found that the evidence was most clear for marijuana's therapeutic potential for "pain relief, control of nausea and vomiting, and

appetite stimulation.” The IOM report also cited studies showing that the neuroprotective effects of cannabis have been helpful in treating movement disorders, such as spasticity.

Inspired by the healing power of medical cannabis, and outraged at the injustice of denying the medicine even to those who have demonstrated medical necessity³, Angel Raich took on a fight that was much greater than her own. By asking for an injunction to bar the Drug Enforcement Administration and U.S. Department of Justice from raiding and arresting medical marijuana patients, Angel Raich and Diane Monson, as well as John Doe No. 1 and No. 2 (the two anonymous caregivers⁴ who supply Raich with the 2.5 ounces of medicinal-grade cannabis she requires per week free of charge) stood up not just for themselves, but for all medical cannabis patients and their caregivers under the law. And they won.

Raich v. Ashcroft

Raich v. Ashcroft (2003a) establishes protection for medical marijuana patients from the federal government, with two qualifications. First, the ruling affects only the Ninth Circuit: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. Second, while the U.S. Court of Appeals for the Ninth Circuit unanimously denied *en banc* review of *Raich v. Ashcroft* on February 25, 2004, within 90 days of that date the federal government may petition the Supreme Court to hear the case on appeal.

³ With the exception of the remaining federal IND (Investigational New Drug program) patients. This program was closed to new applicants in 1992 after a flood of applications from AIDS sufferers.

⁴ The two caregivers grow marijuana with different growing cycles, as Raich’s different ailments respond differently to different varieties of cannabis. She truly uses medical cannabis as not one medicine but as multiple medicines for her different ailments, each with its own growing requirements. She has testified that one grower could not grow all of her medicine because of the different light cycles and harvest timing involved.

Congress based its authority to regulate cannabis on the Commerce Clause of the United States Constitution. The Controlled Substances Act (2002a), like all federal legislation, includes language specifying how the Constitution grants Congress the authority to regulate the activity in question. Section 801 of the CSA (2002b) sets forth “findings and declarations” which are intended to establish the constitutional basis for the regulation of controlled substances by the federal government, including the following: “[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.”

The Ninth Circuit Court, however, found that medical cannabis patients have a constitutional right to protection from the federal government’s intrusion into what is essentially a noncommercial, intrastate affair. The Court held that because the marijuana was given free of charge to Raich, as the only medicine she may safely use on the recommendation of a physician, the activity was wholly non-economic in character. No marijuana was sold, purchased, or in any way distributed except from caregiver to patient without remuneration. In addition, the activity was wholly intrastate: all of the materials used in growing the marijuana (the soil, nutrients, lumber, etc.) came from within the state’s borders. Applying *United States v. McCoy*, 323 F.3d 1114 (2003), the Ninth Circuit ruled that the intrastate, non-economic use of marijuana by a patient under the care of a physician and consistent with state law constituted a “separate class of activity” distinguishable from non-medical use of controlled substances (*Raich v. Ashcroft* 2003a:17922). The Court has previously held that non-medical possession of marijuana with a *de minimis* contribution to interstate traffic *could still* be considered to contribute to the ‘swelling of interstate traffic’ in controlled substances. The activity engaged in by

aich, Monson, and their caregivers, however, was found to be different in kind from interstate trafficking.

Under *United States v. Lopez*, 514 U.S. 549 (1995:558-9; in *Raich v. Ashcroft* 2003a:17923), Raich and Monson's medical cannabis use would have to be considered an activity "having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce" in order for the federal government to have the constitutional authority to prohibit such activity. The *Raich* Court applied the four-factor test of whether an activity "substantially affects" interstate commerce in *United States v. Morrison*, 529 U.S. 598 (2000) to this separate and distinct class of activities, medical marijuana use. The Court found that as applied to the defendants, the Controlled Substances Act was an unconstitutional overreach of federal regulatory power.

Justice C. Arlen Beam, visiting from the 8th Circuit, dissented from the majority in *Raich v. Ashcroft* (2003a), and his dissent can provide clues as to what avenues the Supreme Court are offered should they be petitioned and decide to grant a writ of certiorari. Beam makes two arguments against the majority opinion. The first of these, which I have termed the weak argument as it does not confront the majority's logic head on, instead claims that the plaintiffs lack standing because Beam (2003:17937) "doubt[s] whether anyone can or will seriously argue that the DEA intends to prosecute these two seriously ill individuals." Beam (2003:17937) argues that while their plants may be seized, he also argues that Raich and Monson "do not show there is a threat of future prosecution or history of past prosecutions, at least as applied to their unique factual situations." Therefore, he argues that "plaintiffs simply use this action to seek an advance judicial ruling on government actions that may never be applied to them or to similarly

situated individuals, if any such persons presently exist in California” (Beam 2003:17938).

Justice Beam’s second argument rests almost entirely in taking issue with the majority’s characterization of medical cannabis use as “non-economic”. Beam (2003:17941) argues that “[p]laintiffs are growing and/or using a fungible crop which *could* be sold in the marketplace, and which is also being used for medicinal purposes in place of other drugs which would have to be purchased in the marketplace.” Beam cites *Wickard v. Filburn*, 317 U.S. 111 (1942:128), in which the regulation of wheat grown for personal consumption under the Agricultural Act was held to be constitutional because “the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices.” Because of this, the *Wickard* court argued, “home-consumed wheat would have a substantial influence on price and market conditions,” and “[h]ome-grown wheat in this sense competes with wheat in commerce” (*Wickard v. Filburn* 1942:128). Because the marijuana used by Raich and Monson is *not* being bought on the illegal street market, Beam argues, it still affects commerce and is therefore reachable under the Commerce Clause.

It is interesting to note that Beam is essentially advocating for the continuance of the conflict between state and federal medical marijuana law. On the one hand, Beam claims that the DEA will never prosecute Raich and Monson, maybe just cut down their plants, so they lack standing for protection from prosecution. On the other hand, Beam argues that the federal government does indeed have the right to prosecute them.

USA v. Chong

The ‘hippie’ counterculture produced few heroes more well-known than Cheech and Chong. With his “man” character, the stoner dude persona he cultivated as one-half of Cheech and Chong, his role as “Leo” on television’s *That 70s Show*, and as the “Squirrel Master” in the movie *Half-Baked*, Tommy Chong has already left us an unequaled legacy of marijuana humor.

The character may unfortunately also have contributed to stereotypes about marijuana users. Those who take the caricature seriously (and certainly some have) might think that those under the influence of marijuana actually act like Tommy Chong’s “man”. Even further, expectations of the drug experience heavily influence the subjective experience of the user, as Zinberg (1984) notes. That means a lot of people probably *have* acted that way as a result of Tommy’s act, thinking they were acting that way because of marijuana. But Tommy Chong was conducting no social experiment, he simply found a way to make other people laugh and turned it into a successful career. In addition to his entertainment career, he is also a family man, with wife Shelby, and five children including Precious, Paris, and Rae Dawn with careers of their own. At 65, enjoys woodworking and puttering around the house.

Tommy Chong has also allowed his character to be used to market products that would usually be sold in stores labeled ‘headshops’. Urine Luck, a synthetic urine replacement that is constantly updating its formula to elude drug testers, was one of Tommy Chong’s early marketing successes. According to Paris Chong, Tommy’s son, “[a] lot of glass blowers were approaching my family to use their names to start a company. I thought, [w]hy not do this myself?” (quoted in Mikulan 2003).

Paris Chong used his father's character and financial backing to market glass pipes and bongs under the name Chong Glass⁵ and Nice Dreams Enterprises. The company operated for three years, expanding to twenty-five glassblowers. The company never turned a profit, but according to Tommy Chong, was just about to when the federal government raided his family's home with "helicopters... loaded automatic weapons, flak jackets, helmets, visors, about 20 agents" (Tommy Chong, quoted in Kulpers 2003). That day, February 24, 2003, John Ashcroft's Department of Justice raided 55 homes and stores all told, in the first ever federal drug paraphernalia dragnet, dubbed Operation Pipe Dreams and Operation Head Hunter.

Attorney General John Ashcroft (Drug Enforcement Administration 2003) and Acting DEA Administrator John B. Brown, III made the announcement: "Quite simply, the illegal drug paraphernalia industry has invaded the homes of families across the country without their knowledge [via the Internet]. This illegal billion-dollar industry will no longer be ignored by law enforcement." Brown (DEA 2003) added "[p]eople selling drug paraphernalia are in essence no different than drug dealers. They are as much a part of drug trafficking as silencers are a part of criminal homicide." The latest drug czar, John P. Walters (DEA 2003), joined the men at the podium in their rhetoric, justifying the raids: "Today's actions send a clear and unambiguous message to those who would poison our children: We will bring you to justice, and we will act decisively to protect our young people from the harms of illegal drugs."

It seems an obscure and never previously enforced federal statute makes selling drug paraphernalia across state lines a federal crime. And Tommy Chong was caught on

⁵ The website has been removed by the federal government, but is preserved as of this writing at <http://www.thememoryhole.org/drugs/pipe-sites/chong-glass.htm>

tape by DEA agents who asked if a pipe was good for smoking marijuana, to which Chong replied that it was. Much of the evidence in the case was brought in with similar proof of its connection to marijuana use, such as bongs adorned with marijuana leaves.

Tommy Chong was not charged at the time of the raid, though police took a lot of glassware with them when they left his home. A few months later he was charged and ultimately, Tommy Chong was one of only a handful of the 55 defendants who received federal prison sentences. Tommy Chong and his family believe Ashcroft et. al. prosecuted him because of his movie character: “They came after me because of the movies,” Tommy states (in Kulpers 2003). One of the prosecutors at Chong’s trial, Mary Houghton, argued that Tommy Chong was guilty of “glamorizing the illegal use and distribution of marijuana and trivializing law-enforcement efforts to combat drug use” (quoted in Mikulan 2003).

Tommy Chong further contends he was “ambushed” by the prosecution. As we’ve already seen, Chong would do just about anything for his family. And it seems he went to prison for them as well. Tommy Chong plead guilty to charges, he says, because the DEA threatened to go after his family if he didn’t. He says they told him nothing would happen if he just plead guilty and gave himself up. But that isn’t at all what happened. In fact, U.S. Attorney Buchanan (quoted in Kulpers 2003) argued that “[i]t’s inaccurate for him to state that he was singled out, because what’s different about the Chong case are that his charges were by ‘information’ – which means that the matter wasn’t presented to a grand jury. Thomas Chong waived indictment to a grand jury and pleaded guilty to the charges. So he came forward and admitted his guilt.” Chong says that if he had known a

federal prison sentence was part of the bargain, he would not have pleaded guilty so quickly.

It is possible to view the case as a form of entrapment. Tommy Chong's character was largely about marijuana use, and if the character is making public appearances and the audience gets involved, it's obvious that pro-marijuana statements will be made in response. Because Tommy Chong the character *had* to say the pipes were good for smoking pot, the police would simply have to catch him 'in the act', so to speak.

As of this writing, Tommy Chong has three months left in prison, and is rumored to be planning a reunion with Cheech Marin in another Cheech and Chong movie upon release. Chong Glass never turned a profit, but it remains clear to those who do not take moral offense to the sale of glass marijuana pipes that Tommy Chong's motives were as noble as any other aging father who would do anything for his children: start a business, invest his own money, promote the company's product using his life's work, and when John Ashcroft's Department of Justice demands, go to prison for nine months – so long as his family is spared, the only condition he made.

Analysis

These two cases form a picture of marijuana prohibition in the United States. In the first case, patients are asserting rights and winning concessions from the Ninth Circuit. *Raich v. Ashcroft* places a restriction on federal enforcement of marijuana prohibition, a restriction the executive branch of the federal government is now asking the Supreme Court to remove. The significance of *Raich v. Ashcroft* was instantly recognized by Gieringer (2003), who authored a press release the day of the Ninth Circuit

ruling with the byline “Prop 215 Effectively Federal Law in California.” In this case, two women struggled with pain, suffering, and the failure of modern medicine to effectively treat their illnesses, and the U.S. Court of Appeals for the Ninth Circuit found that they have the right to use medicine that their doctor recommends in accordance with state law. The Court found it an unconstitutional overreach of the federal government’s enumerated power under Article I, §8 of the United States Constitution (the “Commerce Clause”) to attempt to interfere with the exercise of this right to choose a natural, non-toxic⁶ medicine.

Opponents of medical marijuana argue most often that the movement for medical marijuana “exploit[s] the public's sympathy for seriously ill patients,” according to the principal investigators in the Academy of Sciences’ Institute of Medicine report on the state of medical marijuana research (Joy *et. al* 1999:18). This is exactly the case, yet it is not quite so sinister to the sociologist. The sick and dying are not seen as people we wish to imprison because the medical marijuana movement makes it possible to portray them as human beings rather than criminals with no rights. In fact, once we agree that humans have a fundamental *right* to use cannabis prescribed by their physician, then and only then is it possible for the majority of medical marijuana users (not just the exceptionally brave, like Raich and Monson) to ‘come out of the closet’. Then and only then is collective action centered around group identity possible, with fully recognized legitimacy of the group identity, the ultimate goal. The ‘medical’ frame that has been attached to marijuana use is highly resonant.

⁶ No recorded ‘overdose’ from marijuana exists, because THC is not a toxic substance in the body. The smoking of any vegetable matter results in the burning of plant resins, cellulose, chlorophyll, etc., however. This author recommends the use of a vaporizer such as the Volcano, which has been tested on a gas chromatograph mass spectrometer (GCMS): the resulting vapor contained no carcinogens or toxins and was measured at 95% delta-9-tetrahydrocannabinol, or THC (California NORML 2003).

The medical marijuana movement has fairly successfully converted marijuana use to in-group behavior for the majority of the dominant social group in America, where there is demonstrated medical need recognized by a physician. More and more Americans turn to marijuana for cancer, AIDS, depression, anorexia, glaucoma, menstrual cramps, anxiety, or other ailments, and feel accepted in doing so. No, we are not so comfortable with putting people in jail who are sick and dying for marijuana use any longer – in fact, it becomes increasingly easier to imagine circumstances where any one of us might turn to marijuana for help as we learn about others' experiences. *Mothering* magazine even published an article by a mother with severe morning sickness who found marijuana to be the safest *and* most effective medicine to treat her nausea (Hildebrandt 2004).

Raich v. Ashcroft (2003a) curbed of the power of the federal government with respect to raiding and arresting medical marijuana patients, as a precedent set by patients at the Court of Appeals level. In *USA v. Chong*, however, we see an expansion of federal marijuana enforcement beyond established boundaries, initiated by enforcement agencies. *USA v. Chong* is a “mere” trial court case, one in which Thomas Kin “Tommy” Chong , a celebrity, is sentenced to nine months in a federal private prison after the U.S. Department of Justice succeeds in prosecuting him and 54 others for selling glass pipes. *USA v. Chong* does *not* establish binding precedent; it is simply a fluke of the legal system's trial courts exploited to political advantage by Ashcroft et. al. This case could be seen as a throwback to the days of Harry J. Anslinger, as when he made an example of actor Robert Mitchum in a ‘big’ marijuana bust. In fact, it was Harry J. Anslinger's dream to arrest all of the jazz musicians in America that he could, on a single day.

Luckily for American music history, Anslinger was not successful in achieving his ultimate goal.

When a moral entrepreneur like John Ashcroft or Harry Anslinger uses the arrest of a celebrity for shock value, it belies the essentially symbolic nature of marijuana prohibition in modern society. Joseph Gusfield argued in his book *Symbolic Crusade* (1963) that alcohol prohibition was *status* legislation. That is, the function of alcohol prohibition was to distinguish the middle class Protestants from the newer waves of immigrants (who also found themselves moving into the middle classes) through means of a *status movement*, the Temperance movement. To Gusfield, these status movements functioned as a symbolic attempt to preserve a social hierarchy that was on its way out. The real purpose of alcohol prohibition, then, was not instrumental in that it was not designed to achieve any sort of realizable goal. Alcohol prohibition served to place one group over another group in terms of status by means of purely *symbolic* gestures. In fact, alcohol was readily available to those who had the means to procure it. State alcohol prohibitions only *drastically* reduced alcohol consumption for the most impoverished groups in society, such as African Americans in the south; while whites could have shipment after shipment of spirituous liquor sent in, so long as they didn't purchase the liquor from a local vendor (such as the dreaded "saloon"). Throughout national alcohol prohibition, enough alcohol was certainly available for those who wished to purchase it and had the means to do so.

Marijuana prohibition has served this same purpose as status legislation, but the groups in conflict with the dominant social group have not always been the same. In the early days of marijuana prohibition, race divided America. When the first Texas city

ordinances prohibiting marijuana in El Paso, Brownsville, and others were passed beginning in 1914 and 1915 at the community level, these laws acted as a proxy for targeting Mexican workers and their families. Mexican workers were lured in by large farm employers, and many heeded the call of good pay and traveled north. But when the Depression hit, America suddenly had little use for the Mexican immigrants, David Musto, M.D. argues:

. . . the American Federation of Labor understandably favored strict bars against foreign labor. But another group which worked for an end to Mexican immigration as energetically as those with economic reasons did so for social reasons, afraid that mixture with an “inferior race” was causing “race suicide.” Citizens anxious to preserve what they believed valuable in American life banded together into “Allied Patriotic Societies,” “Key Men of America,” or the group which united many of these associations, the “American Coalition” whose goal was to “Keep America American.”

The origins of marijuana prohibition in racial conflict between Mexican Americans and the expanding ‘white’ dominant group are discussed at greater length in Chapter 5, Race and the Origins of Drug Prohibition.

The enforcement of marijuana prohibition today may be seen as similarly symbolic, especially in a case as obviously ‘for the camera’ as Tommy Chong’s. But what moral agenda does this arrest serve? National Alcohol Prohibition was united with the dominant middle class push for temperance, but when the widespread and pervasive use of alcohol throughout all classes was acknowledged, repeal was not long in coming. While in the past, marijuana served as a surrogate for a dominant middle-class united

against Vietnam War protesters and a youth culture they perceived as out of control, the dominant middle-class in America is no longer so united. Attorney General John Ashcroft represents the portion of the dominant social group in America which still wants to imprison every marijuana smoker, indeed everyone in any way associated with the use of marijuana. This analysis seems to lend credence to Tommy Chong's characterization of his arrest:

They came after me because of my movies, *Up in Smoke*, *Cheech and Chong*, and because of my act since 1968. They took my character to be my real persona. . . . Everybody knows that the real Cheech isn't the Cheech from *Up in Smoke*, and the real Tommy Chong isn't the Tommy Chong from the 'Hey man' dude. . . . But I was selling bong with my picture on 'em. . . . But I was like Christopher Reeve doing a Superman promotion. They never saw it that way. And they wanted to make an example of me. Really, what they wanted to do was *shut down the whole culture* (in Kulpers 2003, emphasis added).

Tommy Chong: model family man, and stoner character. As such, his family represents an amalgamation one might call the 'new' American middle class family, represented in the media by shows like "The Osbournes." Tommy Chong's family, like many aging Baby Boomer families, has incorporated values into their family culture which were previously associated with the rebellious counterculture of America's 1960s and 70s. This family became part of a new industry that operated near the edges of the law – but making money around the edges of the law is also a resonant American idea. This new middle-class American family represents the morality that is eroding the religious morality that Ashcroft is attempting to enforce. In Ashcroft's mini-status

movement, the sale of glass pipes and bongs in a legal store legitimizes such sale and thereby *legitimizes also the customer who would make such purchases*, and *this* is what cannot be tolerated. The attack on Tommy Chong is part of this cultural war. Just as in the repeal of alcohol prohibition, we see a dying, out-of-place morality-at-law being replaced by a law more in line with the norms of the society it governs. Ashcroft's attempt at stopping the flow of glass pipes throughout the nation is a *symbolic* gesture designed to preserve the higher social status of those who adhere to his higher morality, and to denigrate the social status of those who represent the new American family, with Tommy Chong as the primary example.

The two cases seem to be victories for opposing ideological perspectives: on the one hand, a victory for medical marijuana; on the other, a victory for those would “escalate” the drug war⁷. These court decisions also mimic the contradictory attitudes toward marijuana that exists in American culture – we sometimes condemn, sometimes tentatively accept, and sometimes enthusiastically recommend marijuana. Yet my argument is that the opposing victories found in these cases illustrate two sides of the same phenomenon: a lessening of group conflict surrounding marijuana use⁸ and a corresponding increase in the level of institutionalized moral enterprise needed to maintain the prohibition.

The question of which social groups are predominantly targeted by a given prohibition is most salient in determining the continuing stability of that prohibition. Penalties and police practices concerning marijuana vary widely across different populations and locations. Where marijuana use begins to be seen as in-group behavior

⁷ John Ashcroft (2001) made the following statement on Larry King Live, February 7th 2001: “I want to escalate the war on drugs. I want to renew it. I want to refresh it, relaunch it, if you will.”

⁸ Using the ‘Components of Prohibition’ framework developed in Chapter 3.

by the dominant group, the intergroup conflict necessary for prohibition is eroded – unless the dominant group is effectively protected from most harmful effects of the prohibition, while minority groups bear the brunt of enforcement. But where marijuana use is perceived as behavior outside the social norms of the dominant group, then those within the dominant group who adopt the use of the prohibited intoxicant would be considered outsiders. Where this is the case the enforcement of marijuana prohibition would likely not offend the conscience of the majority.

The Erosion of Intergroup Conflict Over Marijuana Use

I argue that the condition of marijuana prohibition today is one where the intergroup conflict necessary to sustain this prohibition is waning. Marijuana prohibition in the United States, as a result, is no longer a stable social phenomenon and is likely to be repealed.

Marijuana use is widespread and pervasive throughout American society in virtually every demographic category. As Baby Boomers move into middle age we see more individuals who view marijuana use as in-group behavior moving into social locations of increasing power. Because the effects of marijuana prohibition are concentrated along race and class lines (see Chapters 1 and 5), the elite are the least likely to suffer hardship as a result of marijuana prohibition, but no group is truly protected. Most drug laws are built on a dichotomy between possession vs. sale: obviously those with the money to purchase the drugs outright do not need to sell drugs in order to support their habit. Social class could be seen as the basis for greater punishment, with the sale/possession sentencing guidelines acting as a proxy. There are some new developments, such as the seizure of houses and cars by law enforcement, which are

more likely to be used against those with means. But while asset forfeiture laws may make upper middle-class targets increasingly more attractive to law enforcement, the effects of marijuana prohibition are concentrated along lines of race and class and have been since the beginning.

The key element in reducing intergroup conflict regarding marijuana use, however, remains the continuing spread of use throughout dominant society. This is use that is only rarely prosecuted. Marijuana prohibition exists for the dominant social group alone, as a symbolic attack on a minority group's status. The culture of marijuana use has begun to pervade the dominant social group, however, and a symbolic attack on the *status* of such large numbers of one's own group is inherently unstable given the ideas like civil rights, cognitive liberty, and equal protection under the laws which also infuse dominant American culture. However, it is the dominant social group alone which has the power to repeal marijuana prohibition.

The heavyweight foes of ending marijuana prohibition are government officials (institutionalized moral enterprise), pharmaceutical companies (the largest contributors to Partnership for a Drug-Free America), liquor and tobacco companies, law enforcement and the prison industrial complex, and the addiction and drug testing industries. Outside of circles with a vested interest in maintaining marijuana prohibition, however, I would argue that the biggest force maintaining marijuana prohibition is misinformation spread by the drug war establishment that is believed by the public at large⁹.

Alcohol prohibition was also thought unrepealable – it was enshrined in the 18th Constitutional Amendment, after all. But repeal came quickly indeed once the majority was solidly behind it; and once marijuana use has become fully accepted as in-group

⁹ For example, the gateway theory, the increased potency myth, or 1 joint = 20 cigarettes worth of tar.

behavior by the dominant social group in America, marijuana prohibition will end just as quickly.

Once this occurs, those who continue to espouse prohibitionist rhetoric about marijuana will of course be treated with the same contempt that the still-active members of the Women's Christian Temperance Union experienced after the repeal of alcohol prohibition:

“It isn't popular you know. The public thinks of us – let's face it- as a bunch of old women, as frowzy fanatics. I've been viewed as queer, as an old fogey, for belonging to the WCTU . . . This attitude was not true thirty years ago.” (in Gusfield 1963:129).

According to Gusfield, this is what those in power fear most from the repeal of a prohibition: a repudiation of the values of their once-dominant culture. “Coercive reform is a reaction to a sense of declining dominance. The violaters of norms are now enemies, who have repudiated the validity of the reformer's culture” (Gusfield 1963:87).

This is why Tommy Chong was such an appropriate target: he is a cultural icon that everyone agrees can stand for the 'marijuana culture.' The arrest of Tommy Chong is an attack on values, values that his character represented to John Ashcroft. As Allen St. Pierre (in Kulpers 2003) of the National Organization for the Reform of Marijuana Laws (NORML) observed:

“If you have to think of one individual that would represent the government's efforts to enforce prohibition, or a representative of the negative stereotype, then, out of a country of almost 300 million Americans, there's really only about three

or four people who fit that bill: Willie Nelson, Woody Harrelson, and Tommy Chong.”

Identity Politics and Medical Marijuana

In *Raich v. Ashcroft* (2003a), the language used by the Ninth Circuit shows a willingness to ‘take on the role of the other’ – to identify with Angel McClary Raich and Diane Monson as real human beings with rights, rather than criminals flaunting the law. The Court is adopting a perspective already shared by the majority of Americans¹⁰: marijuana is a medicine. What this implies is that humans have a right to use what is available in nature as a medicine without interference by the government (as noted marijuana’s popularity as a medical remedy is not scientifically unwarranted). The adoption of the view that marijuana use is not only acceptable but appropriate in-group behavior under some circumstances in the American collective conscience is another factor in the erosion of intergroup conflict. The actual medical utility of the use of marijuana is irrelevant to the sociologist except that it coincides with our society’s norms governing *acceptable* substance use. When a substance is viewed as medically useful, our society has demonstrated a tendency to make access to that drug relatively simple, or at least possible under the law. People who use marijuana for medical benefit are therefore engaging in solidly understandable behavior given the American value system: in fact, taking drugs to solve problems could be considered an American cultural obsession.

Coinciding with an interest in herbal remedies as non-toxic alternatives to the ever-expanding plethora of pharmaceutical wizardry doctors are compelled under the law

¹⁰ Voters or their representatives in ten states have passed medical marijuana legislation despite federal opposition. Support for medical marijuana in America typically polls between 60-80%.

to use as a first line of defense, the medical marijuana movement in America could also be viewed as part of a larger movement to reclaim health care from corporate interests. The various medical associations have competing viewpoints on the issue of medical marijuana – for example, state medical associations like the California Medical Association and the California Nurses Association (who joined as amici curiae in *Raich v. Ashcroft* 2003k) have endorsed medical marijuana emphatically, while the American Medical Association (2001) continues to offer only limited support, urging “further adequate and well-controlled studies of marijuana and related cannabinoids” while “marijuana be retained in Schedule I of the Controlled Substances Act pending the outcome of such studies”.

Tactics of Desperation

Evidence for the erosion of intergroup conflict surrounding marijuana use is also evident in the use of what I have decided to render linguistically as ‘tactics of desperation’ by the drug war establishment. The arrest of Tommy Chong is exactly this type of desperate tactic. Attacks on headshops at the federal level are a sign of desperation at the universal availability of marijuana, the ineffectiveness and unpopularity of marijuana law enforcement, and the dwindling support for pulling resources away from what the public is beginning to feel are more critical law enforcement matters (like preventing terrorism). Headshops are an easy target because they operate barely within the law by maintaining the fiction that the merchandise they sell is not for marijuana use. But because they operate publicly, Ashcroft and friends

were able to find them and bust them – unlike the millions of Americans who use marijuana on a daily basis without detection.

Other desperate tactics include the latest round of ONDCP television commercials around the theme “Marijuana. Harmless?” A multi-million dollar Super Bowl ad linked marijuana and alcohol use, for example. Others have charged marijuana with causing vehicular manslaughter, teen pregnancy, and most truthfully, trouble with the authorities. During 2002, the government connected drug use with funding terrorism, introducing the word “narcoterrorism” into the lexicon. Marijuana, however, has been largely a domestic crop for two decades in America as smugglers shifted to bringing in cocaine for higher profits during the 1980s (Weisheit 1992).

Conclusion

The pervasiveness of use, willingness to identify marijuana users as in-group individuals, and the desperate tactics on the part of moral entrepreneurs involved, all lead to the conclusion that the intergroup conflict necessary for marijuana prohibition is being eroded. Just as with alcohol prohibition, the lack of intergroup conflict will also cause marijuana prohibition necessarily to come to an end.

State medical marijuana legislation has created a class of individuals whose right to possess and use marijuana medically goes basically unchallenged by law enforcement in many areas. Now that federal protection has been granted under *Raich v. Ashcroft*, even more individuals are willing to publicly identify as medical marijuana users, and more individuals find out about medical uses for marijuana from these public ‘patient-activists’. The federal government, I believe, has already lost the battle for the hearts and

minds of the public on the issue. Were *Raich v. Ashcroft* to be reversed by the Supreme Court, and a new federal crackdown launched against simple possession or cultivation of medical marijuana in states like California, it is my prediction we would see a new level of collective action centered around ideas like human rights or political and social equality for medical marijuana users. When we look at marijuana prohibition, we see all the evidence of a prohibition in the process of decline.

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