United States District Court
Western District of New York

United States of America,	*Plaintiff*	**Lumni Zhuta's Motion to Dismiss**
v.		
Lumni Zhuta, *et al.*,	*Defendants*	Indictment _ **09-Cr-357 A**
Lumni Zhuta,	*Defendant*	

The accused, Lumni Zhuta, by his undersigned counsel, hereby moves this Court for Dismissal of the Indictment on the following grounds:

1. The classification of marijuana as a Schedule I substance in the Federal Controlled Substance Act ("CSA"), 21 U.S.C. § 801 et seq., is arbitrary and irrational;

2. The Attorney General has failed to abide by the procedures required by the CSA in refusing to reclassify marijuana from Schedule I, and therefore, is violative of the accused's right to due process and equal protection of the law as guaranteed by the Fifth Amendment to the United States Constitution. The accused requests an evidentiary hearing on this motion.

3. The Ninth Amendment requires this Court to declare the statutes invoked in this case unconstitutional as they apply to conduct relating to marijuana, as a denial and disparagement of a right retained by the People which the government has no authority under the Tenth Amendment to infringe.

June 29, 2010

Respectfully submitted,

/s/ Mark J. Mahoney

Mark J. Mahoney
HARRINGTON & MAHONEY
70 Niagara St., 3rd Floor
Buffalo, NY 14202-3407
Tel: 716-853-3700
Facs: 716-853-3710
(Attorney for Lumni Zhuta)

To: Mary C. Baumgarten, AUSA

Contents

United States District Court
Western District of New York

United States of America, Plaintiff v. Lumni Zhuta, Defendant	**Affirmation in Support of Motion to Dismiss** Indictment _ 09-Cr-357-A

Mark J. Mahoney affirms to be true and states under penalty of perjury as follows:

1. I am the attorney for the accused, Lumni Zhuta, and I make this affidavit in support of the foregoing pretrial motions.

Misclassification of Marijuana, and the Attorney General's Failure to Follow CSA Procedure for Classification

1. The basis for this motion is set forth in the memorandum of law submitted in support of this motion, which is incorporated herein by reference.

This prosecution is in violation of the defendant's rights pursuant to the Ninth and Tenth Amendments to the U.S. Constitution

2. This section of this affidavit is in support of the defendant's second grounds for dismissal, based on the Ninth and Tenth Amendments. Here we set forth historical facts in the legal history of the Ninth and Tenth Amendments as background and context for our argument, which is contained in our separate memorandum which is incorporated herein. We have made every effort, but the natural overlap between the factual history, and the

precedential declarations of principle on which we rely in our argument

2. The historical foundation and legislative history of the Ninth and Tenth Amendments, as well as rules of statutory interpretation, support the proposition that they were included in the Constitution to afford substantive protection for unenumerated rights which are retained by the people

3. Since the latest scientific evidence establishes that marijuana is a relatively harmless substances having no detrimental effects on the individual users or society, the right to possess marijuana, regardless of one's intent, is a right retained by the people under the Ninth and Tenth Amendments.

4. The historical foundation and legislative history of the Ninth and Tenth Amendments, as well as rules of statutory interpretation, support the proposition that they were included in the Constitution to afford substantive protection for unenumerated rights which are retained by the people

5. Since the latest scientific evidence establishes that marijuana is a relatively harmless substances having no detrimental effects on the individual users or society, the right to possess marijuana, regardless of one's intent, is a right retained by the people under the Ninth and Tenth Amendments.

I. The historical foundation of the Ninth and Tenth Amendments

3. The historical foundation of the Ninth and Tenth Amendments supports the proposition that they were included in

the constitution to afford substantive protection for unenumerated rights which are retained by the People.

Punishment of victimless crimes is a holdover from the enforcement of religious morality prevalent in the pre-Revolutionary colonial period.

4. In pre-Revolutionary colonial America, religion and religious moral values were a way of life and all of the colonies' institutions reflected those rigorous standards. The foundations for the strict moral principles of the colonists lay in the Puritan beginnings of New England. "Because Puritanism was a way of life, it had social and political implications of great magnitude. It assumed that its disciples would regulate not only their own conduct, but that of others, so that the world could be refashioned into the society ordained by God in the Bible." G.L. Haskins, *Law and Authority in Early Massachusetts* 16 (1968). Thus, the early settlers "adopted the Judicial Laws of Moses which were given to the Israelites of Old . . . (and) punished Adultery . . . (and) Blasphemy, with Death . . ." Grand Jury charge by Hutchinson, C.D. Suffolk Super. (T., March 1768) in J. Quincy, *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, at 258-59 (S. Quincy, ed. 1865). "The close bond that existed between religious and political thought in the seventeenth century . . . was not by any means restricted to Puritan thinking." The Puritans believed that God had instituted government to save men from their own depravity, and hence that civil rulers must be obeyed. "More importantly, they believed that the welfare of the

whole was more significant than individual advantage, that society was an organism in which each part was subordinate to the whole . . . At the same time they accepted the principles of contemporary political philosophy which prescribed that religion and politics were one. Orthodoxy in matters of religion and politics was accepted as axiomatic, and hence there was no room for diversity of belief or toleration, which was viewed nearly everywhere . . . as subversive to morals, to national independence, and to the compulsory uniformity essential to preserve both church and state. Individual liberty, therefore, was viewed as permissible only within the limits of conformity as prescribed by civil and ecclesiastical authority." Haskins, *supra* at 17-18.

6. The criminal law was thus concerned primarily with protecting community religious and moral values:

> [T]he criminal law of pre-revolutionary Massachusetts was remarkably similar to that of the Puritan era. The old Puritan ethic remained strong enough in the 1750's so that crime was still looked upon as sin; the criminal as a sinner; and criminal law, as the earthly arm of God. Criminal law surely was not the tool of the royal government in Boston, which was unconcerned with the outcome of most cases and, in any event, had little power to influence that outcome. As a result, the chief function of the courts, the primary law-enforcement agencies, remained, as in the early colonial era, the identification and punishment of sinners.

Nelson, "Emerging Notion of Modern Criminal Law in the Revolutionary Era: An Historical Perspective," 42 *N.Y.U. L. Rev.* at 450, 451 (1967).

7. While no scheme for the classification of crimes was developed in colonial America, most lawyers in Massachusetts and elsewhere were familiar with Blackstone's classification scheme in England. It included offenses against God and religion, offenses against government, offenses against public justice, offenses against public trade and health, homicide, offenses against

the person, and offenses against habitations and other private property. 4 Blackstone, *Commentaries on the Laws of England,* Table of Contents, (Oxford 1765-1769).

8. The majority of all criminal prosecutions fell within the category of "offenses against God and Religion." Of 2,784 prosecutions in the Superior and General Sessions Court of Massachusetts between 1760 and 1774, 1,074, or 38%, were for sexual offenses, including adultery, cohabitation, indecent exposure, lewdness and prostitution. The great bulk of sexual offenses - over 95% - were for fornication. Nelson, *Americanization of Common Law* 37 (1975).

9. A detailed study of the laws has shown that Virginia "did not differ radically from Episcopal England or even Puritan Massachusetts so far as legislation against vice and profaneness were concerned; nor were earnest efforts at the enforcement of laws entirely lacking." Arthur P. Scott, *Criminal Law in Colonial Virginia* (1930). Historian Scott notes that:

> The earliest records of the civil court show that they regularly dealt with many offenses which in England would have gone preferably before church courts . . . The beginnings of a similar movement can be traced in the English county courts, but it was greatly hastened in Virginia. In dealing with various forms of immorality, the Virginia Magistrates frequently imposed penances which were substantially the same as those employed in the ecclesiastical courts at home, notably appearing in church in a white sheet, carrying a wand, and there making a confession. After about 1650 these disappear, and while the laws still speak of the displeasure which certain offenses give to God, and the records refer to the "sin" of fornication, for example, the penalties are those provided by civil and not ecclesiastical law.

Scott, *supra*, at 254.

10. In summarizing the situation in colonial Virginia, Scott draws the following general conclusions:

1. Jurisdiction over public morals, which in England was divided between the civil and ecclesiastical court, in Virginia was entirely in civil courts, although the churchwardens in many cases were required to present offenders.

2. Several English statutes and a few common-law provisions were in force in the colony, and other English laws were re-enacted by title only.

3. The assembly passed many more laws dealing with public moral than with offenses against the state, or religion, or the person or property. But in numerous instances the language of the Virginia statute was largely copied from a corresponding English law.

4. In general, the same kind of offenses was singled out for punishment in England. There was little difference in the severity of the penalties inflicted at home and in the colony.

Scott, *supra,* at 291.

11. The historical record is thus clear that the sole rationale for the criminalization of acts which have no harmful effect on persons other than the actor, i.e., victimless, was the enforcement of the societal majority's religious and moral values. That these acts are still subject to criminal sanctions today - 200 years later - is testimony to the fact that they are anachronistic vestiges of a concept of governmental authority which has no place in today's society and was not intended to have a place in a new nation founded on the concept of maximum individual liberty and minimum governmental interference.

Legal developments in the American Colonies at the time of the adoption of the Ninth and Tenth Amendments indicates that the intention to remove government from the enforcement of personal morality.

5. The American Revolution and the years following brought profound changes in attitudes toward crime and the criminal. Prosecutions for various sorts of immorality nearly

ceased, while economically motivated crimes and prosecutions therefor greatly increased. 42 *N.Y.U. L. Rev., supra*, at 455. As noted by Historian William E. Nelson:

> During the fifteen years before the Revolution . . . there had been an average of seventy-two prosecutions per year for sexual offenses, nearly all for fornication. The first ten years after independence produced only a slight decline to fifty-eight cases each year. However, in 1786 the General Court enacted a new statute for the punishment of fornication, permitting a woman guilty of the crime to confess her guilt before a justice of the peace, pay an approximate fine, and thereby avoid prosecution by way of indictment in the court of sessions. The number of prosecutions for sexual offenses immediately declined to an average of eleven per year during 1786-1790 and to less than five per year during the four decades thereafter.
>
> Prosecutions for religious offenses also continued near the prewar rate of twenty-four per year until the mid-1780's. But by the 1790's the number of cases had declined to about ten per year . . . The decrease is explained by the fact that after the 1780's prosecutions continued only for the offenses of working and traveling on Sunday. Even the Sunday work and travel laws were less rigidly enforced, with the result that by the 1810's "the Laws . . . against profanations of the Sabbath, had fallen into general neglect . . . (and) thousands of violations occurred every year, with scarcely a single instance of punishment."
>
> The law's attitude toward adultery was also changing, although the number of prosecutions remained relatively constant. In 1793 the Supreme Judicial Court began regularly to grant divorces on the ground of adultery, yet prosecutions for the crime remained rare.
>
> To many contemporaries the de-emphasis of prosecution for sin appeared to be a decline in morals. President Timothy Dwight of Yale traced the decline to the French and Indian War and especially to the Revolution, which, he said, has added . . . "to the depravation still remaining (from the French War) . . . a long train of immoral doctrines and practices, which spread into every corner of the country. The profanation of the Sabbath, before unusual, profaneness of language, drunkenness, gambling and lewdness were exceedingly increased . . ." Others also alluded to habits of card playing and gambling and to instances of social vice and illegitimacy. Chief Justice William Cushing, for example, feared that . . . "some men ha(d) been so liberal in thinking as to religion as to shake off all religion, and while they ha(d) labored to set up heathen above Christian morals, ha(d) shown themselves destitute of all morality . . ."
>
> Notwithstanding these complaints, it does not appear that there was any deep-seated coarseness or general immorality during the closing years of the eighteenth century. *What was beginning to occur after the*

Revolution was not significantly more immoral but an abandonment of the pre-revolutionary notion that government should act to enforce morality. Over time, however, the abandonment by government of its enforcement role would impair the notion that there was any one set of ethical standards that all men ought to obey.

Nelson, *supra*, at 110-111 (emphasis added) (footnotes omitted).

12. Thus, men at the time of the adoption of the Constitution and Bill of Rights were taking a step toward a modern view of criminal law - the view that its purpose is to protect men and women from unwanted invasions of their rights. 42 *N.Y.U. L. Rev., supra,* at 465.

13. It was within this context and spirit that James Madison and the framers of the Ninth Amendment were concerned that . . . "(unenumerated) rights . . . retained by the people" not be denied or disparaged.

The limits of the police power

6. Historically it has been, since the Revolution, the purpose of the "police power" of the government to promote and protect the health, safety, morals and welfare of the people But this does not grant the government, and was not intended to grant the government, the power to regulate the private moral values and behavior of the people.

14. Where the government is empowered to act is in the area of "public" morals. The legitimate use of the police power is necessarily limited to *public* practices and behavior and not to private, individual acts having no effect on the community.

15. The "regulation" of private moral behavior and values is a power which was, by definition, never intended to be

granted to the federal or state governments when the Constitution was established, and the use of the State's police power to enforce particular moral values is an usurpation of a right which was intended to be retained by the people within the meaning of the Ninth and Tenth Amendments.

The legislative history of the Ninth Amendment

7. The legislative history of the Ninth Amendment supports an interpretation of the Amendment as providing substantive protection for unenumerated rights.

16. In the process of the ratification of the Constitution, the defect most successfully attacked by its critics was the absence of a bill of rights. Supporters of the Constitution argued that any enumeration of rights would necessarily be imperfect and would create the inference that no rights existed except those itemized. The new government being created was to be one of enumerated powers, and as long as no contrary inferences prevailed, it would have no claim of power to interfere with the exercise of the citizen's rights. James Wilson, speaking at the Pennsylvania Ratifying Convention in 1788, gave the strongest expression of this thesis:

> ... in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgement, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that

means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the power of government is neither so dangerous nor important as the omission in the enumeration of the rights of the people. To every suggestion concerning a bill of rights, the citizens of the United States may always say, We reserve the right to do what we please.

2 Elliot's Debates, 436-37 (2d ed. 1836).

17. Hamilton, in the *Federalist No. 84*, likewise voiced this argument:

I go further, and affirm, that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it, was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

8. James Madison, the primary draftsman of the Constitution and its leading advocate, had also expressed his personal opposition to the numeration of a bill of rights. However, he gave in at the Virginia ratifying convention and promised to take affirmative action in proposing the adoption of a bill of rights.

18. Upon ratification by the states of the Constitution in their respective conventions, several adopted certain resolutions to be affixed to their ratification. These resolutions formed the basis for Madison when he drafted the amendments for submission to the First Congress. The resolutions adopted by Virginia and New

York formed the nucleus for what was later to become the Ninth Amendment, and reflected the concern of the states with the dangers inherent in the enumeration of a bill of rights, as espoused by Wilson and Hamilton:

> From the amendments proposed by Virginia:
> 17th. That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they be construed as either making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.

The Debates in the Federal Convention of 1787, 665 (Hunt and Scott Ed. 1920) (No. 18 in the North Carolina propositions).

> From the New York Act of Ratification:
> . . . That those clauses in the said Constitution which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution, but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater caution.

Id. at 666 (Part of the third Article of the Rhode Island Declaration).

19. On June 8, 1789, Madison moved in the House of Representatives that the House resolve itself into a committee of the whole so as to consider his proposed amendments. A select Committee of eleven members, Madison among them, was appointed for this purpose, and Madison proceeded to state his proposed amendments with extensive analysis. *1 Annals of Congress* 424 (1834). During the weeks when Congress had been meeting, Madison had assiduously studied the proposals for a bill of rights made by various state ratifying conventions.

20. Primarily influenced by the proposals of his own state, Virginia, Madison's proposals took the form of nine resolutions. It was Madison's intention that the proposals appear

not as an appendage to the Constitution in the form of amendments, but that they be woven into the very text of the Constitution. Madison's Fourth resolution contained ten sections which he desired to be inserted between Clause 3, prohibiting bills of attainder and ex post facto laws, and Clause 4, prohibiting direct taxation, of Article I, Section 9, of the Constitution. This Fourth resolution contained substantially the same rights as are now included in the First through the Fourth, Sixth, Eighth and Ninth Amendments. The last of the ten sections of this Fourth resolution provided:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution: but either actual limitations of such powers, or was inserted merely for greater caution.

1 *Annals* 435.

21. The language of Madison's proposal 4(10) is similar to Virginia's proposed Amendment 17, which by inference served as Madison's model -- with one essential difference. Both amendments express a rule of construction, i.e., the expression of certain enumerated rights shall not be construed to enlarge the powers delegated by the Constitution to the federal government. Madison's amendment presented to the First Congress contained a second meaning, absent, or at least unexpressed, in Virginia proposed Amendment number 17. To quote for purposes of emphasis from Madison's proposed 4(10):

> The exceptions . . . shall not be construed as to diminish the just importance of other rights retained *by the people* . . .

(Emphasis added).

22. The following is Madison's explanation of the

purpose of Resolution 4, Section 10:

> It has been objected also against the Bill of Rights, that, by enumerating particular exceptions to the grant of powers, it would disparage *those rights which were not placed in that enumeration*; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but as I conceive, that it may be guarded against, I have attempted it, as gentlemen may see, by turning to the last clause of the Fourth Resolution.

1 *Annals* 439 (emphasis added).

23. Madison's reasoning suggests the dual import of the Amendment as originally proposed. First, the canon of statutory construction, the expression of one is the exclusion of all others, i.e., the expression of certain rights is the exclusion of rights not expressed, is not to be applied in construing the Constitution, the result being a reaffirmation of the common belief that the federal government was to be a government of limited powers. Second, important human rights are retained by the people which remained unexpressed in the Constitution or its first eight amendments. The crucial language of Madison's proposed amendment is the language, "other rights retained by the people," language which was absent from Virginia's proposed Fourteenth Resolution.

24. Thus, as submitted by Madison, Resolution Four, Section 10, is a rule of construction limiting the encroachment of governmental power, as was Virginia's Fourteenth Resolution, as well as an affirmative assertion of the remaining natural rights of man which are not expressly guaranteed by the Constitution or by the first eight amendments.

25. On July 28, the select committee, four of whose membership had originally subscribed to the Constitution at

Philadelphia, proposed the following be adopted as a replacement for Resolution Four, Section 10:

> The enumeration in this Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people.

1 *Annals* 754.

26. The words "this Constitution" were then changed to "the Constitution," a comma added after the word "Constitution," and the Ninth Amendment was adopted in its final form.

27. On August 18, 1789, the House of Representatives, as a committee of the whole, commenced debate on the proposed amendments. The House voted at this time to change Madison's proposed method of incorporating the Amendments into the Body of the Constitution and decided that they would be added by appending them to the Constitution. On August 24, 1789, the House adopted the Articles of Amendment, designating Resolution 4(10) as Article 15 of seventeen articles. 1 *Annals* 767.

28. No records were maintained on the Senate debates on the adoption of the Amendments but House Article Fifteen was adopted without alteration. Both Houses concurred on twelve amendments which were submitted to the states for ratification. Madison's Resolution 4(10) had become Article Eleven of the proposed amendments. Two proposed amendments failed to obtain ratification by three-fourths of the states, and the Eleventh proposed amendment was finally adopted as the Ninth Amendment to the Constitution.

29. Thus, the Ninth Amendment was intended by the First Congress to affirmatively embody substantive and complete protection for each and every unenumerated right of the people.

The Tenth Amendment

9. The Tenth Amendment, by reserving to the States or to the people, powers not delegated to the Federal Government, supports the substantive interpretation of the Ninth Amendment and establishes that the creation of crimes without victims is a usurpation of the power reserved to the people.

30. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Const. Amend. X. What is now the Tenth Amendment was Madison's Eighth Resolution, which he intended to be inserted after Article VI, which contains the supremacy clause of the Constitution. As initially proposed by Madison, Resolution Eight did not include the final clause "or to the people." 1 *Annals* 433-436. The absence of this final clause accounts for Madison's oral analysis of the Eighth Resolution when the resolutions were proposed:

> Proposition Eight may be considered superfluous . . . I admit they may be deemed unnecessary; there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated.
> 1 *Annals* 459.

31. The Senate added the words "or to the people," after it was determined by the House that the Resolutions would be appended to the Constitution rather than integrated into the document. The Senate kept no record of their debates, and the House accepted the Senate version without further debate.

32. Madison's initial proposal was a self-proclaimed

truism which defined the division of powers between the Federal Government and the states, thus emphasizing the commonly held proposition that the Federal government was a government of limited powers. House debates antedating the Senate addition, "or to the people" concerned the manner of limiting the powers of the Federal government, specifically, whether it should be phrased as powers not "expressly" delegated are reserved to the states. 1 *Annals* 790.

33. The addition of the final clause of the Tenth Amendment obviated an obvious inconsistency with the Ninth Amendment. If, as provided by the Ninth Amendment, certain rights were retained by the people, an express limitation on the scope of federal power, it would have been inconsistent to provide in the Tenth amendment that all powers were reserved to either the federal government or the states. The Senate addition, consented to by the House without debate, harmonized and in effect made mutual the purpose of the Ninth and Ten Amendments to reaffirm the principle that there are unenumerated rights retained by the people and that for this very reason, there were powers which neither the federal government nor the states possessed. Although the Senate kept no copy of debate, the inclusion of this final clause "or to the people," indicates their degree of solicitude for upholding "other rights retained by the people," as expressed in the Ninth Amendment.

34. The view was assumed by A.H. Kelly, constitutional theorist:

> To admit a given federal power as a matter of convenience would go far to impair the validity of the Tenth Amendment. The doctrine that the federal government was one of the enumerated powers would then be replaced by the theory that federal authority could encompass any matter

of sufficient importance to the national welfare. The whole Jeffersonian conception of the union would be subtly altered, even destroyed

A. H. Kelly, *The American Constitution*, 220 (3d Ed. 1963)

35. The import of the final clause of the Tenth Amendment is inaccurately reflected by its contemporary disregard. The last clause of the Tenth Amendment has never been subjected to careful Supreme Court analysis, nor has any case been argued or decided on its merits. In the first forty years of this century, the Tenth Amendment was often invoked by litigants who claimed that certain federal laws invaded the powers "reserved to the States." The Supreme Court, in three major cases (*Hamman v. Dagenhart*, 247 U.S. 251, 62 L. Ed. 1101 (1981) (commerce clause), *Schecter v. United States*, 295 U.S. 495 (1935) (commerce clause), and *United States v. Butler*, 247 U.S. 1 (1936) (taxation)), guided by its view as to where the dividing line between the state and the Federal jurisdiction should be drawn, restricted delegated federal powers. In these decisions, it was determined that the asserted federal power was not within the purview of the commerce clause or the power of taxation.

36. In the 1941 decision of *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451 (1941), the Supreme Court expressly reversed the earlier interpretation of the commerce clause in *Hamman v. Dagenhart*, stating as follows:

Our conclusion is unaffected by the Tenth Amendment . . . The amendment states but a truism that *all is retained which has not been surrendered*. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the Amendment, or that its purpose was other than to allay fears that a new government might seek to exercise power not granted, and that the states might not be able to exercise fully their reserved powers.

312 U.S. at 123-124 (emphasis added).

37. The decision of the Court in *Darby* was limited exclusively to the issue of the relationship between the national and state governments so as to resolve the question of federal versus state authority and impose a proper interpretation of the commerce clause of the Constitution. As applied to the relationship between the states and the federal government, the Tenth Amendment may be viewed as a "truism," as was pointed out by both the Court in Darby and Madison when his Eighth Proposal was submitted. However, the Tenth Amendment is not a truism with its final clause; viewed in conjunction with the Ninth Amendment, it is properly conceived as delineating powers possessed by neither the federal government nor the states, *but by the people*. The meaning of "the people" here is dramatically demonstrated in *District of Columbia v. Heller*, 554 U. S. ___.

38. Thus, the basic principle embodied in the Ninth Amendment may be stated as follows: As the rights of the people of the United States are not created by government, so they are not to be diminished by government, unless by the appropriate exercise of an express power.

39. The power to punish victimless crimes was not granted to the federal government by the Constitution. Indeed, the social and legal history of the time indicates that it was the intention of the framers to remove the government from the enforcement of such "moral" crimes. Consequently, the criminalization of those acts by Congress and the State legislatures was an unconstitutional assumption of power reserved to the people under the Tenth Amendment and a denial and disparagement of other rights retained by the people under the Ninth Amendment.

II. Application of the Ninth Amendment since its enactment support a substantive interpretation

40. Precedent establishes that the Ninth Amendment provides substantive protection.

Supreme Court History and the Ninth Amendment

10. Until Justice Goldberg's concurrence on Ninth Amendment grounds in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510 (1965), the Ninth Amendment had been discussed by the Supreme Court in only three decisions: *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936); *Tennessee Electric Power Company v. T.V.A.*, 306 U.S. 118, 59 S. Ct. 366 (1939); *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556 (1947). In the T.V.A. cases of 1936 and 1939, the Supreme Court rejected allegations by opponents of T.V.A. that by engaging in production and sale of electrical power, the federal government had prevented private individuals from using their property and earning a livelihood. The Court found no violation of the Ninth Amendment as had been urged, stating the Ninth Amendment does not withdraw rights "expressly granted to the central government." 287 U.S. at 330.

41. In *United Public Workers v. Mitchell*, employees of the executive branch of the federal government asserted that citizens have a fundamental right to engage in political activity and

express their views. Not found to be violative of the First, Ninth and Tenth Amendment were provisions of the Hatch Act which forbid civil service employees from active participation in management of political campaigns. In rejecting the employees' arguments, the Supreme Court accepted their contentions that the nature of political rights reserved to the people by the Ninth and Tenth Amendments were involved:

> The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act in the rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments . . . Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes . . . The powers granted by the Constitution to the federal government are subtracted from the totality of sovereignty originally in the state and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the grant of power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

330 U. S. at 94-96.

42. These three cases, although they reject the particular rights contended, uphold in principal, that the Ninth and Tenth Amendments are a proper mechanism for retaining, or regaining, "those rights reserved by the Ninth and Tenth Amendments" which are not "granted to the federal government."

43. Two historical trends in Supreme Court decisions antedating *Griswold* are relevant to the Ninth Amendment and our claim here First, there exists an extensive body of decisions which although they do not mention the Ninth Amendment, express the view that the American Constitutional system of government is based on the concept of natural law, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 30 L. Ed. 220 (1886); *Gulf, Colorado and Sante Fe*

Railway v. Ellis, 165 U.S. 150, 159, 41 L. Ed. 666 (1897), and that the individual has certain natural inalienable rights, which a government of limited powers must not infringe upon:

> It must be conceded that there are such rights in every free government beyond the control of the States. A government which recognized no such rights, which held the lives, the liberty and the property of its citizen subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nonetheless a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.
>
> The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.
>
> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to name.

Savings and Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 662, 22 S. Ct. 455, 461 (1875). *See also Kent v. Dulles*, 357 U.S. 116, 125, 78 S. Ct. 1113 (1958).

44. These values have been transmuted into concepts of due process, as typified by the language which appears in *Rochin v. California*:

> Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession . . . due process of law thus conceived is not to be derided as resort to a revival of natural law . . . They are only instances of the general requirement that states, in their prosecutions, respect decencies of civilized conduct. Due process of law, as a historic and generative principle, precluded the defining, and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

342 U.S. 165, 170-173, 72 S. Ct. 205, 208-210 (1951).

45. Or similarly, in *Poe v. Ullman*:

> "[T]he full scope of the liberty guaranteed by the Due Process clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points priced out in terms of the taking of property; the freedom of speech, press and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement." (Harlan, J.)

367 U. S. 497, 543, 81 S. Ct. 1752, 1776, 6 L. Ed. 2d. 289 (1961).

46. The second trend in Supreme Court decisions enunciated as fundamental and protected from infringement by governmental interference, rights unenumerated in the original constitution or the first eight amendments. Viewed as rights fundamental to the functioning of a free society, and occasionally held as concomitant to the proper functioning of an already established right, e.g. *Aptheker v. Secretary of State*, 378 U.S. 500, 521, 84 S. Ct. 1659, 12 L. Ed.2d 992 (1963), these rights are frequently articulated as within the due process clauses of the Fifth or Fourteenth Amendments. Rights unexpressed in the Constitution but advanced by the Supreme Court by finding unconstitutional a state or federal statute without relying on the Ninth Amendment, have included: the right to earn a livelihood, *Traux v. Raich*, 239 U.S. 33, 60 L. Ed. 131 (1915); the right of parents to send their children to private school, *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 69 L. Ed. 1070 (1925); the right of privacy, *Olmstead v. United States*, 277 U.S. 438, 72 L. Ed. 944 (1928), (Brandeis, J., dissenting); the right of employees to self-organization and chosen

representation, *N.L.R.B. v. Jones and Laughlin Steel Corp*, 301 U.S. 1, 57 S. Ct. 334 (1937); right of marriage and procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110 (1941), *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 1010 (1967); freedom of association and privacy in one's association, *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1957); freedom to travel within frontiers, *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113 (1958); right to advice concerning what lawyer a union member could confidently reply upon, *Railroad Trainmen v. Virginia Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed.2d 169 (1966); the right to vote in federal elections, *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed.2d 272 (1970). It should suffice to merely comment that by advancing as fundamental, individual rights which lack enumeration in the federal Constitution, the Supreme Court has reaffirmed the principle set forth by the Ninth Amendment and the final clause of the Tenth Amendment that other rights are retained by the people.

47. In *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); the Supreme Court in a series of separate decisions and by a seven-to-two majority, held unconstitutional a Connecticut state statute prohibiting the use of contraceptives by married couples. In an opinion by Justice Douglas, expressing the views of five members of the Court, the statute was held invalid as an unconstitutional invasion of the right to privacy of married persons. Justice Douglas' opinion represented a departure from customary constitutional terminology. He expressed the view that there exist unenumerated "peripheral rights" without which "specific rights would be less secure." 381 U.S. at 483. After brief discussion of several cases in

which the Supreme Court held as fundamental to due process, rights unenumerated in the Constitution or its Amendments, Justice Douglas stated:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

381 U.S. at 484.

48. Guarantees which Douglas felt gave substance to the right of marital privacy appear in the First Amendment, the Third Amendment's prohibition against quartering soldiers "in any house" in time of peace, the Fourth Amendment's express affirmation of the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures," the Fifth Amendment's self-incrimination clause, and the provisions of the Ninth Amendment, which he quoted in full. For the first time since its ratification, the Supreme Court held a right was retained by the people under the Ninth Amendment.

49. Mr. Justice Goldberg, in a separate concurring opinion in which Chief Justice Warren and Justice Brennan joined, extensively analyzed the meaning of the Ninth Amendment. Although he agreed that the due process concept of liberty protects personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights, Goldberg expressly clarified that the purpose of his separate opinion was "to emphasize the relevance of that Amendment (the Ninth) to the Court's holding." 381 U.S. at 487. Justice Goldberg briefly discussed the legislative history of the Ninth Amendment, quoting from Madison's statements before the First Congress, Hamilton in *Federalist Paper Number 84* and from Justice Story's *Commentaries on the*

Constitution, each supportive of a new and important role for the Ninth Amendment. He concluded:

> The statements of Madison and Story make clear that the framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.

381 U.S. at 490.

50. Justice Goldberg, after discussion and citations of decisions in which the Supreme Court asserted as fundamental rights unenumerated in the Constitution, reached the conclusion that the Ninth Amendment did not broaden the authority of the Supreme Court, but rather, served "to support what this Court has been doing in protecting fundamental rights." 381 U. S. at 493. It is clear that Justice Goldberg intended greater reliance upon the provisions of the Ninth Amendment in furthering unenumerated human rights:

> While the Ninth Amendment -- and indeed the entire Bill of Rights -- originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the State as well from abridging fundamental personal liberties. And, the Ninth Amendment, indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from states, as well as federal, infringement.

381 U.S. at 493.

51. He concluded by saying:

> In sum, I believe that the right of privacy in the marital relation is fundamental and basic -- a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right which is protected by the Fourteenth Amendment from infringement by the States.

381 U.S. at 499.

52. More recently, the Supreme Court again relied upon the Ninth Amendment as the basis for judicial protection of rights

not explicitly listed in the Constitution. In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 578, 579 (1980) (plurality opinion), the State argued that the public had no right to attend trials since this right could not be found in the text of the Constitution. Chief Justice Burger, writing for the plurality, dismissed this argument based on the Ninth Amendment and its historical underpinnings. *Id.* at 579-80. The State's argument, said the Court:

> did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. *See, e.g., The Federalist No. 84* (A. Hamilton). . . . But arguments such as the State makes have not precluded recognition of important rights not enumerated.

Id. at 579.

53. The Court noted that James Madison perceived the:

> need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. *See 1 Annals of Cong*. 438-440 (1789). *See also, e.g.,* 2 J. Story, *Commentaries on the Constitution of the United States* 651 (5th ed. 1891). Madison's effort's, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

Id. at 579 n. 15.

54. The Court ultimately held that the right of the public and the press to attend criminal trials is implicit in the guarantees of the First Amendment. *Id.* at 580.

55. Thus, the Supreme Court has done enough and said enough to make it clear that the Ninth Amendment provides substantive protection of unenumerated rights. In the words of Justice Harlan in *Poe v. Ullman*:

> In a constitution for free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

Poe v. Ullman, supra, at 522, 1765. *See Board of Regents v. Roth*, 408 U. S. 564, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Lower Court Treatment

11. Review of the decisions of the district courts displays the willingness of the judiciary to adopt the Ninth Amendment as a substantive source of unenumerated rights. In *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970), vacated on other grounds, 402 U.S. 903 (1971), the court, after detailed analysis of *Griswold* and the alternatives of the Fourteenth Amendment due process or Ninth Amendment reasoning declared the state statute an unconstitutional violation of a woman's Ninth Amendment private right to refuse to carry an unquickened embryo during her early months of pregnancy. In doing so, the District Court quoted from *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250, 35 L. Ed. 734 (1891), a decision which the Supreme Court in *Roe v. Wade* followed with favor. The Supreme Court in *Union Pacific*, as quoted in Babbitz, stated:

> No right is more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."

141 U.S. at 251.

56. The Court in *Babbitz* chose language strikingly similar to that used by former Justice Clark, one of the members of the Court that decided *Griswold.* In his essay -- *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 Loy. L. Rev. 1 (1969), Clark stated that since 1965, an entire "zone of individual

privacy" exists around "marriage, home, children and day-to-day living habits," protected by the Ninth Amendment in the absence of a clearly demonstrable compelling state interest. "This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." 2 Loy. L. Rev. at 8.

57. The district court in *Roe v. Wade* held the Texas abortion statute prima facie unconstitutional for infringing upon the Ninth Amendment right of "choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." 314 F. Supp. 1217, 1331 (N.D. Tex. 1970). And the Supreme Court continued, quoting Mr. Justice Holmes:

> The Constitution is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. (O. W. Holmes, J., dissenting)

Lochner v. New York, 198 U. S. 45, 76, 25 S. Ct. 539, 49 L. Ed. 937 (1905). *See Roe v. Wade*, 410 U. S. 113, 117, 93 S. Ct. 705, 709 (1973).

58. In numerous state and federal decisions, the right of personal privacy and the integrity of individual private expression has been developed and fully articulated as a Ninth Amendment right of the individual against arbitrary or unlawful interference. Examples of its application include: the termination of employment of a postal employee because of his cohabitation with a woman with whom he was not married was held in violation of one's Ninth Amendment right to privacy, *Mindel v. U.S. Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970); dismissal of a teacher charged with immorality for sending a letter to a

former student containing profane language was held unconstitutional and the letter to be a private communication under the Ninth Amendment, and the teacher reinstated, *Jarvella v. Willoughby-Eastlake School District*, 233 N.E.2d 143 (Ohio 1967); where evidence is to be presented at a preliminary hearing which will not be admissible at trial, and where publicity will make it unlikely that an impartial jury may be selected, or would adversely affect the reputations of defendants, failure to close such a hearing for the purpose of determining probable cause would constitute a violation of defendant's Ninth Amendment right to privacy, *Hooper v. Gooding*, 282 F. Supp. 624 (D.C. Ariz. 1968).

59. In 1969, the United States Supreme Court, in Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed.2d 542 (1969) held that the categorization of films as obscene was insufficient justification for a drastic invasion of the privacy of one's home for mere possession. The Court stated:

> If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds...*The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw,* if indeed such a line can be drawn at all.

394 U.S. at 565-566 (emphasis added).

60. Although not a trace of Ninth Amendment consideration by the Court may be inferred by this decision, the federal district court in *United States v. B & H Distributing Corp.*, 319 F. Supp. 1231 (W.D. Wisc. 1970) held unconstitutional as violative of the First (speech) and Ninth (privacy) Amendments, a state statute prohibiting unlawful transportation of obscene materials in interstate commerce by means of common carriers.

The Court viewed its decision to be mandated by Stanley v. Georgia. The Supreme Court vacated judgment and remanded for reconsideration in light of its decisions in *United States v. Reidel*, 402 U.S. 351, 91 S. Ct. 1410, 28 L. Ed.2d 813 (1971) and *United States v. Thirty-Seven Photos*, 402 U.S. 363, 91 S. Ct. 1400, 28 L Ed. 2d 822 (1971). *See United States v. B & H Distributing Corp.*, 403 U.S. 924, 91 S. Ct. 2248, 29 L. Ed.2d 705 (1971). These two decisions were companion cases in which the Supreme Court held that the right of private possession in the privacy of one's home of contraband obscene movies neither gave a commercial operation the right to use the mails for delivery of obscene material nor an individual the right to import through customs in his own luggage thirty-seven photographs of nudes. Nonetheless, the decision of the District Court indicates the willingness of members of the judiciary to apply the Ninth Amendment as the protector of individual rights.

61. In the case of *Manfredonia v. Barry*, 401 F. Supp. 762 (E.D.N.Y. 1975), the court awarded damages to the plaintiffs arising out of the illegal arrest and jailing of the plaintiffs, a lecturer on birth control and an audience member, who were charged with the misdemeanor of endangering the welfare of the audience member's child. The court held that the plaintiff audience member "was clearly exercising her parental right under the Ninth Amendment to have her own child with her regardless of its age." 401 F. Supp. at 767.

62. In *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971), the court upheld the right of the individual to govern his personal appearance, stating that the acceptance of the dress code by the majority of students and the community does not justify the

infringement. The court continued, emphasizing that "toleration of individual differences, is basic to our democracy, whether those differences be in religion, politics, or life-style." 450 F.2d at 1077. The court appears to have adopted the standard that the activity need not be engaged in by the majority, that it may in fact be offensive to the majority, but so long as its impact upon the fundamental rights of others is de minimis, the burden of proof is upon the state to show an evident need of the community (compelling state interest) to justify its infringement. This standard was likewise professed by the Court in *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970) in which the issue of whether a right need be fundamental to fall within the protection of the due process clause was discussed. Although the court declined to adopt a Ninth Amendment rationale and chose instead a due process basis for overruling the actions of the school board, the issue is of equal importance to Ninth Amendment analysis and depicts the solicitude of the court to protect an individual's daily activities:

> We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty" assurance of due process, requiring a compelling showing of the state before it may be impaired. *Yet, "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on ability of others to enjoy their liberty*...we think the founding fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people.
>
> 424 F.2d at 1284-85 (emphasis added).

63. The sampling of case law presented serves to indicate the concern of the Supreme Court to protect the citizenry from unauthorized infringement of unenumerated personal or

human rights. The Ninth Amendment contains discrete relevancy and meaning of its own, unshared and unnecessarily clouded by due process analysis.

III. Rules of statutory interpretation support a substantive reading of the Ninth Amendment.

12. As a general rule, a statute should not be read so as to deprive any of its words of meaning. The Ninth Amendment states that there are other unenumerated rights "retained by the people." Thus, the Court needs to immediately brush aside any argument that a right does note exist because it cannot be expressly found in the constitution, or because the state or federal government has acted as though it does not exist.

IV. Truly victimless activity is protected by the Ninth and Tenth Amendments

13. The history of the American constitutional law indicates that truly victimless behavior, should not be the subject of criminal statutes, especially to enforce the purely moral sensibilities of the legislature or executive.

64. Victimless crimes have been defined as:

> Those nonforceful offenses where the conduct subjected to control is committed by adult participants who are not willing to complain about their participation in the conduct, and where no direct injury is inflicted upon other persons not participating in the proscribed conduct.

Decker, *The Case for Recognition of an Absolute Defense or*

Mitigation in Crimes Without Victims, 5 St. Mary's L.J. 40, 41 (1973).

65. The major political theorist of the American colonial period, James Otis, in his pamphlet, *The Rights of the British Colonies Asserted and Proved*, enunciated the natural rights of man concept, and in doing so, formulated a standard with the following guidelines:

> The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but only to have the law of nature for his rule. The colonists being men, have a right to be considered as equally entitled to all the rights of nature with the Europeans, and they are *not to be restrained, in the exercise of any of these rights, but for the evident good of the community*. By being or becoming members of society, they have not renounced their natural liberty in any greater degree than other good citizens, and if 'tis taken from them without their consent they are enslaved...

(Emphasis added).

66. The assertion of the existence of natural rights "not to be restrained but for the evident good of the community" approaches closely the compelling state interest requirement adopted by Goldberg in *Griswold*:

> In a long series of cases this court has held that where fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. Where there is significant encroachment upon personal liberty the State may prevail only upon showing a subordinating interest which is compelling.

381 U.S. at 497.

67. Professor William Marnell, in his book *Manmade Morals: Four Philosophies That Shaped America*, discussed Alexander Hamilton's view of society as the protector of personal liberties, and stated that Hamilton was fond of quoting from Blackstone that "the principle aim of society is to protect

individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature; that the first and primary end of laws is to maintain and regulate these absolute rights of individuals." *Id.* at 158. Hamilton, in *Federalist No. 78* extends the protective authority of the judiciary to encroachments by the majority upon rights which a minority intended to express:

> *This independence of the judges is equally requisite to guard the Constitution and the rights of individuals* from the effects of those ill humors which the acts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion *dangerous innovations in the government, and serious oppressions of the minor party in the community.*

The Federalist Papers 469 (Rossiter Ed. 1961) (emphasis added).

68. On the basis of views expressed by Hamilton and Otis, for a right to fall within the parameters of Ninth Amendment protection, an activity need not be engaged in by the majority, but so long as an individual's expression of the asserted right does not infringe upon the fundamental rights of others or endanger the "evident good of the community," the asserted right would remain within the ambit of unenumerated protected rights. Stated differently, but with the same result, the less the likelihood that an expression of the asserted right will interfere with the fundamental rights of others, the greater the likelihood that the right falls within the protection of the Ninth Amendment.

69. Such a standard coincides with the principle enunciated by the brilliant Nineteenth-Century English political philosopher and libertarian, John Stuart Mill, for the application of governmental power in controlling the behavior of its citizens:

> The object of this Essay is to assert one very simple principle, as entitled

to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the *only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others.* His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only party of the conduct of anyone, but which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

* * * * *

No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

J. S. Mill, *On Liberty* at 13, 16-17 (Liberal Arts Ed. 1956) (emphasis added).

70. It should be made clear that Mill's philosophy is not offered as an absolute or exclusive criterion for the determination of Ninth Amendment rights. It is offered rather as a standard which will raise a presumption that an interest is protected.

71. It is Mill's lack of originality which renders his work a useful tool in that determination. The Court is not asked to adopt a philosophy more desirable than that of the authors of the Constitution but rather to apply a very clear statement of the

philosophy which prompted the Ninth Amendment. Russell Kirk refers to *On Liberty* as follows:

> Some books form the character of their age; others reflect it; and Mill's *Liberty* is the latter order ...as Mill himself was the last of the distinguished line of British empiricists, so his *Liberty*, with its foreboding remarks on the despotism of the masses was more an epilogue to middle-class liberalism than a rallying cry.

Kirk, *Introduction to J. Mill, On Liberty* vii (Gateway Ed. 1959).

72. Mill was born in 1806 and published his essay *On Liberty* in 1859. Obviously Mill himself did not influence the writers of the Constitution. However, he did elaborate on many of the concepts of political freedom which had evolved in the century before him. It is in this sense that Mill was one of the most eloquent spokesmen of these concepts. *See Note, Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. Chi. L. Rev. 605, N. 3 (1970).

73. While Mr. Justice Black's objection in *Griswold v. Connecticut* to the application of standards based on "natural justice," 381 U.S. at 522 (Black, J., dissenting), might appeal to an age which does not accept that concept, it does not obviate the fact that the men who authored the Constitution did believe in it.

James Otis spoke of "natural inherent and inseparable rights" that would remain even if the charter privileges of the colonies were disregarded or revoked. C. P. Patterson, *The Constitutional Principles of Thomas Jefferson*, 49-50 (1953). John Adams, Vice-President and presiding officer of the Senate when the Bill of Rights was passed, had written some years earlier:

> I say *RIGHTS*, for such (the poor people) have, undoubtedly, antecedent to all earthly government *Rights*, that cannot be repealed or restrained by human laws--Rights, derived from the great Legislator of the universe.

3 *Adams, Works* 449 (1851) (Emphasis in original).

74. Thomas Jefferson declared in 1774 that the rights of Americans were "derived from the laws of nature." Jefferson, *Summary View* (1774) quoted in C. P. Patterson, *supra,* at 52. In summarizing the philosophical background to the American Revolution, Patterson stated:

> Natural rights, in conclusion, was a juristic conception regarded as embodied in immutable law. Violations of natural rights by the English Parliament were null and void since contrary to natural justice. To the forefathers, these rights were not merely moral beatitudes, abstractions of the Age of Reason, but irrevocable rights conferred by the "law of nature and nature's God"--the basis of all law, to which man-made law must conform in order to be law.

C. P. Patterson, *supra*, at 49.

75. "The ruling principle of (Mill's) essay on Liberty...is similar in some respects to the ancient theory of natural rights." *Anschutz, The Philosophy of J.S. Mill*, 58 (1953). If Courts are going to protect rights which the framers of the Constitution meant to be protected, they must deal with "natural" or "inherent" rights no matter how difficult it might be in the modern era. It is this modern inability to treat natural law concepts that makes Mill's work particularly valuable. He provides a workable criterion for determining which rights were considered protectable by the authors of the Constitution.

76. Although the factual situation in Mill's time (1850's) was not the same as the framers' time or the same as today, his concepts have retained their vitality:

> (T)here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance; for whatever affects himself, may affect others through himself ... this, then, is the appropriate region of human liberty.

> It comprises, first the inward domain of *consciousness;* demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, oral, or theological ... Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, *follows the liberty,* within the same limits, *of combination among individuals;* freedom to unite, *for any purpose not involving harm to others;* the persons combining being supposed to be of full age, and not forced or deceived.

Mill, *supra,* at 15-16 (emphasis added).

77. Mill was quick to point out, however, that his principle applied only to adults of competent age and understanding:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.

Mill, *supra,* at 13.

78. The courts have also recognized this necessary exception. The United States District Court for the Middle District of Pennsylvania, in upholding a juvenile curfew ordinance, recognized that the constitutional rights of adults and juveniles are not co-extensive, and that the conduct of minors may be constitutionally regulated to a greater extent than that of adults, with the age of a minor a significant factor in assessing whether a minor has the requisite capacity for individual choice. *Bykofsky v. Borough of Middletown,* 401 F. Supp. 1242 (M.D. Pa. 1975).

79. Thus, John Stuart Mill has provided us with a workable standard by which to determine whether the Ninth

Amendment provides protection for those acts committed by adults which the state has determined to denominate as criminal but which do not involve the infliction of harm upon other persons.

Application of the Standard

14. Encapsulized, Mill's philosophy is that a person of sound mind and proper age is free to do what he will either individually or in concert with others, short of harming another. Mill, however, did not offer this criterion as solely a simplistic measure of rights. He was aware that liberty could only be preserved by balancing collective rights with individual rights.

> I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him, and, in a minor degree, society at large. When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class and becomes amenable to moral disapprobation in the proper sense of the term. If, for example, a man, through intemperance or extravagance, becomes unable to pay his debts, or having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated and might be justly punished; but it is for the breach of duty to his family or creditors, not for the extravagance. If the resources which ought to have been devoted to them had been diverted from them for the most prudent investment, the moral culpability would have been the same. George Barnwell murdered his uncle to get money for his mistress, but if he had done it to set himself up in business, he would equally have been hanged. Again, in the frequent case of a man who causes grief to his family by addiction to bad habits, he deserves reproach for his unkindness or ingratitude; but so he may for cultivating habits not in themselves vicious, if they are painful to those with whom he passes his life, or who from personal ties are dependent on him for their comfort. Whoever fails in the consideration generally due to the interests and feelings of others, not being compelled by some more imperative duty, or justified by allowable self-preference, is a subject of moral disapprobation for that failure, but not for the cause of it, nor for the errors, merely personal to himself, which may have remotely led to it.

In like manner, when a person disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offense. No person ought to be punished simply for being drunk; but a soldier or a policeman would be punished for being drunk on duty. *Whenever*, in short, *there is a definite damage, or a definite risk of damage, either to an individual, or to the public, the case is taken out of the province of liberty and placed in that of morality or law.*

Mill, *supra*, at 98-100 (emphasis added).

80. Since there is little behavior which is either purely collective or purely individual, the preservation of liberty is dependent on the establishment of a wise balance between the competing interests. It is this balancing process which the Ninth Amendment requires.

81. In applying this standard, the court must progress through three major steps:

1. It must be determined that the right advanced is neither protected nor prohibited by another provision of the Constitution. If it is found to be neither protected nor prohibited by another provision, the asserted right may be an activity which lies within the ambit of Ninth Amendment protection as a right to be retained by the people. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556 (1947).

2. It must be shown that the activity asserted as a protected right neither infringes upon another's asserted or constitutionally protected right, nor endangers the evident good of the community. The fact that it is a personal right which only the minority upholds as essential neither denies nor disparages Ninth Amendment protection. In analyzing the "evident good of the community" the following sub-questions must be answered:

a. Does the challenged regulation affect the behavior of competent adults?

b. Does the law limit the ability of the individual to shape his conscience or plan his lifestyle?

c. Does the behavior which the law attempts to modify affect persons other than the actor?

3. Once a prima facie showing is made that the asserted right is an "individual liberty," not an "economic liberty," and that the liberty espoused does not interfere with the rights of another or do harm to another person, the presumption of constitutionality of the statute falls and the burden then shifts to the state to prove that infringement of the

asserted Ninth Amendment right, by applying criminal sanctions, is justified by a compelling state interest.

15. As the Supreme Court has noted in a similar context:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the (flag-saluting) ceremony does not interfere with or deny rights of others to do so. Nor is there any question ... that their behavior is peaceable and orderly. The sole conflict is between authority and the rights of the individual.

W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 630, 63 S. Ct. 1178 (1943).

82. "There may be narrower scope for operation of the presumption of the constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced with the Fourteenth." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S. Ct. 778 (1938). Thus, a law which infringes upon a right protected by the Ninth Amendment would undergo the same judicial scrutiny as one violative of a First Amendment right.

83. As one District Court has very cogently expressed it, with respect to the freedom to choose in the matter of education:

> Whether that liberty is a corollary of the free exercise clause of the First Amendment or is *one of the rights retained by the people to which the Ninth Amendment refers*, or is one of those rights deemed fundamental but not the subject of an express guarantee, is of little moment. If the personal liberty of choice in education is constitutionally protected, the state must show a *compelling state interest* for restricting it, and the restriction may go no further in restricting it than is required for the protection of that interest.

Meek v. Pittenger, 374 F. Supp. 639, 652 (E.D. Pa. 1974), *modified*, 421 U.S. 349, 55 L. Ed.2d 217, 95 S. Ct. 1753 (1975),

reh'g denied, 422 U.S. 1049 (1975). (Emphasis added).

84. Application of this standard to victimless crimes would, of course, require a sifting of the facts in each case. However, in principle, victimless crimes, as defined supra, clearly fall into the parameters of Ninth Amendment protection. Statutes making such victimless behavior criminal thus must be justified by a compelling state interest. What interest does the state and society have in controlling behavior which does not adversely affect persons other than the actor?

85. One of the most cogent applications of Mill's standard was made by the Court of Appeals in Kentucky in striking down a statute prohibiting the private possession of liquor for individual use:

> Man in his natural state has a right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulation, he surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires. Therefore, the question of what man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.

Commonwealth v. Campbell, 117 S.W. 383, 385 (Ky. 1909).

86. That the police power of the state is limited to controlling conduct which harms persons other than the actor was recognized by the Supreme Court over a hundred years ago in *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 24 L. Ed. 77 (1877):

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations

to others, he might retain. “A body politic...is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.” *This does not confer power upon the whole people to control rights which are purely and exclusively private* ... but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as *not unnecessarily to injure another*.

94 U.S. at 124. (Emphasis added).

87. The Court in *Munn* was merely recognizing the principle enunciated by Mill only a few years before:

Acts, of whatever kind, which without justifiable cause do harm to others, may be, and in the more important cases absolutely are required to be, controlled by the unfavorable sentiments, and, when needful, by the active interference to mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, *the same reasons which show that opinion should be free prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.*

Mill, *supra*, at 68 (Emphasis added).

88. Mill's principle has retained its vitality to the present day; “At the core of (the concept of liberty) is the notion of total personal immunity from governmental control: the right ‘to be let alone.’ That right is not absolute, however ... (T)his ‘liberty’ must yield where it 'intrude(s) upon the freedom of others.’” *Ravin v. State*, 537 P.2d 494, 500 (Alaska 1975) (citing *Breese v. Smith*, 501 P.2d 159 (Alaska 1972); and *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971)).

V. The harmfulness of any activity must be established in an empirical, not mythical fashion

16. In a scientific age, principles of jurisprudential and constitutional reasonableness necessarily involve a requirement of data and evidence to support a determination that an activity presents a danger which requires intervention under the police power. Patterson, *Law in a Scientific Age* (1963). This is of particular importance when the intervention takes the character of criminalization. For the criminal sanction, unlike civil regulatory measures furthering health and safety, carries with it the peculiar stigma that heightens the potentially repressive effect of such restrictions on individual behavior and choice. Empirical justifications for the exercise of the coercive power of the state are particularly difficult to ascertain where the power exercised is broadly defined by such terms as public health, safety, welfare and morals.

89. Defining the limits of the police power in terms of "rational" versus the "arbitrary" exercise of governmental authority does not readily enable us to draw with precision a manageable and predictable standard for both legislative action and judicial review that would neither preclude an examination of the legislative facts or render legislative decision-making susceptible to the excessive application of judicial prejudices and values.

90. If legislatures are to act responsibly, and courts are to be neutral and objective in their review of legislation under the broad police power, then the capacity to draw distinctions between the permissible and impermissible exercise of the criminal sanction becomes crucial. To say, as did the Supreme Court of Washington in *City of Spokane v. Bostrom*, 12 Wash. App. 114, 528 P.2d 500 (1974), that there is no requirement that the Court find facts

justifying the ordinance is to abdicate, in practice, any review of legislation. *It is the right of the people, in a scientific age, to insist upon a rational basis for governmental action.* No branch of government is immune from that demand. And when the legislative department fails in its duty, the courts must respond. *See Marbury v. Madison*, 2 L. Ed. 66 (1803). But Goodpaster has artfully shown how a modicum of judicial review under the reasonable relationship test has suffered an attenuation to a "rational-relationship" or minimum-rationality test. "We have gone by this route from a modest measure of judicial review to no review at all." Goodpaster, *The Constitution and Fundamental Rights*. 15 Ariz. L. Rev. 479 (1975).

91. Our process of judicial review has much relied upon the principle of presumptive constitutionality. The motivation for this limitation upon review resides largely in a commitment to "neutrality" in judicial review. "The Constitution," Justice Holmes wrote, "was not intended to embody any particular economic theory. It is to be preserved for many fundamentally differing social views." *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (Holmes, J., dissenting). The important corollary to the analysis of the nature of American constitutionalism so eloquently expressed by Holmes in *Lochner* is that government can and should be able to meet the needs of a changing society.

92. It was the fear of legislative and majoritarian abuse of individual rights that was the primary concern of the Founding Fathers in building limits into our system of constitutional government. The Bill of Rights specifies certain rights of the people. The Ninth Amendment is an iteration of the principle that

other individual interests may not be abridged by implication. A dangerous increase in legislative power and abuse would result if it were concluded that only the enumerated rights were protected from arbitrary government encroachment.

93. Presumptive constitutionality should not be relied upon for complete abdication of the task of review with regard to laws made under the power to protect "public morality and public welfare." The total rejection by state or federal authorities of the need to show facts justifying the interference in the life and choices of the individual cannot be tolerated under responsible government. The review of factual and empirical evidence justifying a legislative enactment and establishing its actual, rather than "presumed" rationality, is implicit in a society of limited and responsible government. Such government must scrutinize amorphous power which is subject to abuse. We have inherited from the common law the concept of police power. The police power, largely in implied or "residuary" power, is, when proclaimed in its broadest sense, a great challenge to the concept of limited government. Increasingly, our courts have been concluding that criminal sanctions long tolerated under the claim of police power in earlier times are no longer tenable. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed.2d (1970) (vagrancy laws).

94. Regardless of the nature of the right involved, or the importance to the individual of the activity being prohibited, the question of the appropriate exercise of the police power centers on the requirement of legislative facts. The accuracy and probity of the legislative findings of fact become, therefore, the real test of "rationality." Rationally exercised power avoids unnecessary

criminalization. The role of scientific evidence in determining whether criminal intervention is empirically justified has been treated by Chief Justice Burger in *Paris Adult Theatre v. Slayton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed.2d 446 (1973). There, the appellant argues that no scientific data was available which conclusively demonstrated that exposure to obscene material adversely affected men and women or their society. The appellant urged that absent such a demonstration, any kind of state regulation was "impermissible." The court, with Justice Burger writing for the majority, rejected this argument. "It is not for us to resolve empirical uncertainties underlying state legislation, *save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself."* 413 U.S. at 60 (emphasis added).

95. By the Supreme Court's own admission, empirical or scientific support is to be expected for legislation which infringes a constitutionally protected right (such as those under the Ninth Amendment). It is only because obscene materials had been previously and specifically determined to be devoid of all redeeming social value and outside any constitutional protection that the court in Paris could proclaim its support for the principle of presumptive constitutionality.

96. The importance of scientific evidence has been recognized in the context of several constitutional challenges to statutes which make possession of assertedly "harmless" drugs criminal, as the defendant does here. In many of these cases, the courts concluded that absent a showing of harm, the criminalization of such conduct was constitutionally prohibited. In *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972), a

possession of marijuana case, Justice Kavanaugh (concurring) wrote:

> I find that our statute violated the Federal and State Constitution in that it is an impermissible intrusion on the fundamental rights to liberty and the pursuit of happiness, and is an unwarranted interference with the right to possess and use private property.

Id. at 896.

97. Writing the majority opinion in the case of *State v. Kantor*, 493 P.2d 306 (Haw. 1972), Justice Evinson similarly observed the absence of scientific proof of harm of marijuana. Accordingly, the court upheld the "right to privacy" which is "more than freedom from governmental surveillance." It guarantees to the individual the full measure of control over his own personality consistent with the security of himself and others:

> Moreover, marijuana produces experiences affecting the thought, emotions and sensations of the user - these experiences being mental in nature are thus among the most personal and private experiences possible.

493 P.2d at 315.

98. Justice Evinson thus expanded upon the interpretation of "privacy" given by previous decisions of the Supreme Court. He held to be arbitrary and unconstitutional the law making possession of marijuana illegal because it invades personal rights and liberty of the individual citizen without meeting the burden of establishing a reasonable relation to some purpose within the competence of the state.

99. Whether the exercise of legislative power is "rational" or "arbitrary" can only be determined in light of the evidence (legislative facts) upon which the legislature based its findings. These legislative facts must cast light upon the following questions:

(a) The nature of the social problem and the extent of the harm to be eradicated; and

(b) The actual effect of the law in contributing to an eradication of the harm alleged. [1]

---

[1]Cannabis control policy to date has operated in the assumption that whatever the cost to criminalized individuals, the discouragement of use in the population-at-large is sufficiently great to justify the prohibition. In fact, however, numerous studies show that there is little or no deterrent effect in criminalization and that increasing the severity of penalties does not decrease use nor does relaxation of restrictions significantly increase use, but that the social harms created by the cannabis prohibition are far more damaging than any potential dangers inherent in the drug itself and more than outweigh any potential benefits. *See* Exhibits 1-23. *See also* scientific studies pp. 39-48.

"Over time, there has been no detectable relationship between marijuana use rates and the degree of enforcement or the severity of punishment. Since 1990, despite the increase in civil and criminal sanctions - and higher rates of arrest and imprisonment for marijuana offenses than ever before in American history-adolescent marijuana use has been rising and adult marijuana use has remained steady." L. Zimmer, PhD. and J. Morgan, M.D., *Marijuana Myths, Marijuana Facts: A Review of the Scientific Evidence,* The Lindesmith Center: New York (1997) at 46, citing L.D. Johnston, et al., *National Survey Results on Drug Use From the Monitoring the Future Study, 1975-1994, Volume 1: Secondary School Students*, U.S. Department of Health and Human Services: Rockville, MD. (1995) at 247; and the Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse: Main Findings 1994*, U.S. Department of Health and Human Services: Rockville, MD (1996).

17. Both factors need to be balanced against the infringement of the individual interest which is jeopardized. The criminalization of marijuana cannot survive such scrutiny.

VI. Since marijuana is a substance having no harmful effects on other persons, its possession and use is a right retained by the people under the Ninth and Tenth Amendments.

18. We incorporate here by reference all of the materials, facts, and arguments made in support of our motion to dismiss based on the misclassification of Marijuana. The latest scientific evidence establishes that marijuana is a relatively harmless drug having no detrimental effects on individual users or society.

100. Historically also there are a number of major scientific studies and government reports on marijuana and other drugs have been published establishing that the effects of marijuana are relatively innocuous, particularly when compared with the effects of other controlled substances such as narcotics and barbiturates or uncontrolled ones such as alcohol and tobacco. These studies and reports also confirm that marijuana presents no substantial danger to public safety, health or welfare. The major findings of these studies and reports will be summarized below:

Indian Hemp Drugs Commission - Report of the Indian Hemp Drugs Commission, Simla, India: Government Central Printing Office (1894)

The commission has come to the conclusion that moderate use of hemp drugs is practically attended by no evil results at all.

Canal Zone Committee - The Panama Canal Zone Military Investigations (1925)

The influence of [marihuana]... has apparently been greatly exaggerated...There is no evidence ... that it has any appreciably deleterious influence on the individual using it.

Canal Zone Study (1929) - Siler Committee, Canal Zone Papers, Washington, DC: U.S. Government Printing Office (1931)

... use of the drug is not widespread and ... its effects upon military efficiency and upon discipline are not great.

Canal Zone Study (June 1931) - Ibid.

No link was found between cannabis use and any delinquency or morale problems.

Mayor's Committee on Marihuana - The Marihuana Problem in the City of New York: Sociological, Medical, Psychological, and Pharmacological Studies, Lancaster, PA: Jacques Cattel Press (1944)

There [is] no direct relationship between the commission of crimes of violence and marihuana ... and marihuana itself has no specific stimulant effect in regard to sexual desires. The use of marihuana does not lead to morphine or cocaine or heroin addiction.

Hallucinogens Subcommittee of the British Advisory Committee on Drug Dependence - Report on Cannabis, London: Her Majesty's Stationary Office (1969) (The British Wooton Report) Baroness

Barbara Wooton, Chairman

We think that the dangers of [marihuana] use as commonly accepted in the past ... have been overstated .... There is no evidence that in Western society serious physical dangers are directly associated with the smoking of cannabis .... The association in legislation of cannabis and heroin ... is inappropriate and new legislation to deal specifically and separately with cannabis ... should be introduced as soon as possible .... Possession of a small amount of cannabis ... should not be punished by imprisonment .... Sale or supply of cannabis should be punishable ... with a fine not exceeding £100, or imprisonment for a term not exceeding four months.

Report of the Canadian Commission of Inquiry - The Non-Medical Use of Drugs, Ottawa, Canada: Information Canada (1970) (The Ledain Commission)[33]

19. The Canadian Commission of Inquiry into the Non-Medical Use of Drugs published its report on marijuana, *Cannabis*, in 1972. The Canadian Commission reached similar conclusions to those reached by the U.S. National Commission. The Canadian Commission stated:

Physical dependence to cannabis has not been demonstrated and it would appear that there are normally no adverse physiological effects ... occurring with abstinence from the drug, even in regular users .... Since cannabis is clearly not a narcotic we recommend that the control of cannabis be removed from the Narcotic Control Act .... The Commission is of the opinion that no one should be liable to imprisonment for simple possession.

In summary, at typical doses of cannabis use, few acute physiological effects have been detected. Those which have been identified generally seem to have little clinical significance. Even at relatively high doses, few substantial physiological changes occur.

Id. at 114.

National Commission on Marihuana and Drug Abuse -

[33] *See Exhibits Affidavits*

Marihuana: A Signal of Misunderstanding, Washington, DC: U.S. Government Printing Office (1972) (The Shafer Commission)

20. The National Commission was created by Congress in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 et seq., and given a broad mandate to study marijuana and other drugs, and then issue two reports to Congress and the President, the first on marijuana alone, and the second on all other drugs. *See* 21 U.S.C. §801 note.

101. The National Commission investigated many aspects of marijuana use, held hearings, both formal and informal, reviewed the research which had been done on marijuana in this country and in other countries and commissioned more than 50 research projects in areas where additional information was needed. In March 1972, the National Commission on Marijuana and Drug Abuse published its report, entitled *Marijuana: A Signal of Misunderstanding* (1972). Among the significant findings of the report were the following:

> A large amount of research has been performed on man and animals regarding the immediate effect of marijuana on bodily processes. No conclusive evidence exists of any physical damage, disturbances of bodily processes or proven human fatalities attributable solely to even very high doses of marijuana.
>
> These few consistently observed transient effects on the bodily function seem to suggest that marijuana is a rather unexciting compound of negligible immediate toxicity at the doses usually consumed in this country. The substance is predominantly a psychoactive drug. The feelings and state of consciousness described by the intoxicated seem to be far more interesting that the objective state noted by an observer.
>
> [In a study of very heavy marijuana use in Jamaica, no] significant physical or mental abnormalities could be attributed to marijuana use, according to an evaluation of medical history, complete physical examination, chest x-ray, electrocardiogram, blood cell and chemistry tests, lung, liver or kidney function tests, selected hormone evaluation, and psychological testing. There was no evidence to indicate that the drug as commonly used was responsible for producing birth defects in

offspring of users.

> There is little proven danger of physical or psychological harm from the experimental or intermittent use of natural preparations of cannabis .... Existing social and legal policy is out of proportion to the individual and social harm engendered by the drug .... Marihuana's relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it.

Id., *supra*, at 56-57, 63.

Both the Canadian Commission and the National Commission found that marijuana does not cause criminal or violent behavior, Canadian Commission Report at 110, National Commission Report at 73; does not lead to the use of other drugs, Canadian Commission report at 130, National Commission Report at 88-89; is not a narcotic or addicting drug, Canadian Commission Report at 123, National Commission Report at 87; and posed no danger of death from overdose, Canadian Commission Report at 113-114, National Commission Report at 56-57.

102. The National Commission further concluded that use of marijuana generally does not cause any significant psychological disturbance or aberration. *Id.* at 59. When study subjects were given high doses of marijuana over several weeks, "no harmful effects were observed on general bodily functions, motor functions, mental functions, personal or social behavior or work performance." *Id.* at 60. Nor is there evidence that long-term use of marijuana directly causes alienation, "dropping out," or loss of motivation, or behavioral changes between even very heavy, very long-term users of cannabis preparations and the non-using population. *Id.* at 63-64.

103. The National Commission recommended that the possession of marijuana for personal use no longer be a criminal

offense. *Id.* at 152-154. After studying other drugs, the Commission then published its second and final report, entitled *Drug Use in America: Problem in Perspective* (1973). In this report, the Commission reaffirmed its recommendations concerning marijuana as set out in the first report (*Id.* at 467), and further recommended that: "The United States take the necessary steps to remove cannabis from the *Single Convention on Narcotic Drugs* (1961), since this drug does not pose the same social and public health problems associated with the opiates and coca leaf products." *Id.* at 235.

Werkgroep Verdovende Middelen - Background and Risks of Drug Use, The Hague: Staatsuitgeverij (1972) (The Dutch Baan Commission)

> Cannabis does not produce tolerance or physical dependence. The physiological effects of the use of cannabis are of a relatively harmless nature .... The current law does not respect the fact that the risks of the use of cannabis cannot be equaled to the risks of the use of substances that are pharmacologically much more potent .... This hurts the credibility of the drug law, and the prevention efforts based on the law are made untrustworthy.

The Jamaica Study - V. Rubin and L. Comitas, Ganja in Jamaica: A Medical Anthropological Study of Chronic Marihuana Use, The Hague: Mouton (1975)

21. In 1970, the National Institute of Mental Health's Center for Studies of Narcotic and Drug Abuse sponsored a very carefully controlled medical anthropology project that became "the first intensive, multidisciplinary study of cannabis use and users to

be published." The study examined the legislation, ethnohistory, and social complex of ganja, and the acute effects of smoking in a natural setting. The subjects were thirty males who had smoked an average of seven marijuana cigarettes of relatively high potency each day for an average of *seventeen years*, and thirty controls. Clinical studies evaluated respiratory function and hematology, electroencephalography, and the psychiatric condition. Finally, psychological assessments were made of the subjects. The results of the study support the findings of the National and Canadian Commissions; no significant physiological or psychological differences were found between long-term smokers and non-smokers, there was no evidence of physical dependency (addiction), severe overdose reactions, insanity, cerebral atrophy, brain damage, personality deterioration, or "amotivational syndrome." *Id.* at 83-84, 150-151, 165-166 (1975). Governor Raymond Shafer wrote the foreword to the report:

> While Americans are concerned with the alleged "amotivational" and drug-escalation effects of marihuana, ganja in Jamaica serves to fulfill values of the work ethic; for example, the primary use of ganja by working-class males is as an energizer. Furthermore, there is no problem of drug escalation in the Jamaican working class; as a multipurpose plant, ganja is used medicinally, even by nonsmokers, and is taken in teas by women and children for prophylatic and therapeutic purposed. For such users, there is no reliance even on patent medications, amphetamines, or barbiturates, let alone heroin and LSD. Further, the use of ganja appears to be a "benevolent alternative" to heavy consumption of alcohol by the working class. Admissions to the mental hospital in Jamaica for alcoholism account for less than one percent annually, in contrast to other Caribbean areas where ganja use is not pervasive and admission rates for alcoholism are as high as fifty-five percent.
>
> This study indicates that there is little correlation between use of ganja and crime, except insofar as the possession and cultivation of ganja are technically crimes. There were no indications of organic brain damage or chromosome damage among the subjects and no significant clinical (psychiatric, psychological or medical) differences between the smokers and controls...

Despite it illegality, ganja use is pervasive, and duration and frequence are very high; it is smoked over a longer period in greater quantities with greater THC potency than in the United States, without deleterious social or psychological consequences. The major difference is that both ganja use and expected behaviors are culturally conditioned and controlled by well-established tradition. The findings throw new light on the cannabis question, particularly that the relationship between man and marihuana is not simply pharmaceutical, and indicate the need for new approaches.

Report of the Domestic Council, Drug Abuse Task Force

22. The Domestic Council Abuse Task Force submitted a report to the President entitled "White Paper on Drug Abuse" in September, 1975. The Task Force, which consisted of the federal government's chief officials involved with drugs and drug abuse, made a number of significant recommendations. The report urged that marijuana possession offenses be "de-emphasized" because they posed the least risk of harm to the individual and to society of the drugs commonly used in the United States. *Id* at 33. The report called for "better targeting of limited resources...on the basis of priorities which reflect current conditions and current knowledge." *Id.* at 34.

104. Additional studies have been published which indicate that even very heavy use of cannabis over long periods of time does not have deleterious physiological or psychological effects. *See, e.g.,* Mendelson, *Behavioral and Biological Concomitants of Chronic Marihuana Use* (U.S. Army Medical Research and Development Command - 1974) [released to public in November 1975] (finding no significant adverse effects on physiological, cognitive or neurological functioning following chronic marijuana smoking, including no changes in testosterone levels following chronic marijuana smoking).

The Greek Study - C. Stefanis and M. Issodorides, Science 191, no. 4233 (1976): 1217; C. Stefanis, et al., Hashish, A Study of Long-Term Use, New York: Raven Press (1977)

23. In a 1975 study of hashish smokers in Greece, Stefanis and Issodorides presented microphotographs of damaged human sperm and suggested that the low arginine content in the sperm nuclei indicated "deviant maturation." It was later discovered that the photographs had been doctored and Stefanis and Issodorides were forced to issue a "correction of misinformation"in the *Science* journal.

105. The main finding of the study, which was sponsored by the U.S. government's National Institute on Drug Abuse, was that, even after 25 years of use, the acute effects of hashish were qualitatively similar to those in less experienced users, indicating no long-term buildup of tolerance.

Senate Standing Committee on Social Welfare - Drug Problems in Australia - An Intoxicated Society? Canberra: Australian Commonwealth Government Printing Office (1977)

One of the most striking facts concerning cannabis is that its acute toxicity is low compared with that of any other drugs...No major health effects have manifested themselves in the community...Legal controls [should] not [be] of such a nature as to... cause more social damage than use of the drug...Cannabis legislation should be enacted that recognizes the significant differences between...narcotics and cannabis in their health effects...Possession of marihuana for personal use should no longer be a criminal offence.

The Costa Rica Study - W. Carter and P. Doughty, Annals of the New York Academy of Sciences 282 (1976) pp. 2-16; W. Carter, ed., Cannabis in Costa Rica: A Study in Chronic Marijuana Use, Philadelphia, PA: Institute for the Study of Man (1980)

24. In 1971, the National Institutes of Health and the University of Florida cooperated in a study led by William Carter to examine chronic cannabis use is Costa Rica. Eighty-four cannabis smokers and 156 control subjects (who had never smoked ganja) were given a battery of sophisticated medical and psychological tests. The similarities between the users and non-users outweighed the differences and the cannabis smokers generally enjoyed longer-lasting relationships with their mates. The study found no significant health consequences to the chronic smokers.

106. The NIH refused to accept the final report for publication and demanded that it be rewritten three times. Still not satisfied, they had it rewritten again by another editor and ultimately printed only 300 copies. A copy of the original version was leaked to the National Organization for the Reform of Marijuana Laws.

Report of the National Research Council of the National Academy of Sciences - An Analysis of Marijuana Policy, Washington, DC: National Academy Press (1982)

25. In 1982, the National Research Council's Committee on Substance Abuse and Habitual Behavior published its report, entitled *An Analysis of Marijuana Policy* (1982). The Committee was composed of 18 experts in several relevant

disciplines. After evaluating the available data regarding marijuana, the Committee recommended the immediate decriminalization of marijuana, and in the long run, its regulation and taxation. The Committee found no clear evidence that marijuana use leads to any long-term health consequences. *Id.* at 5. In addition, the Committee concluded that no casual relationship had been established between marijuana use and undesirable behavior. *Id.* at 4. The potential effects on the development of adolescents, the Committee's primary concern, are not at issue because the right advocated herein applies strictly to adults. *Id.* at 5. In the final analysis, any potential danger associated with marijuana use was not seen as serious enough to override the factors weighing in favor of decriminalization. *Id.* at 6.

> Over the past forty years, marijuana has been accused of causing an array of anti-social effects including...provoking crime and violence,...leading to heroin addiction,...and destroying the American work ethic in young people. [These] beliefs...have not been substantiated by scientific evidence...The advantages of a policy of regulation include...the savings in economic and social costs of law enforcement,...better controls over the quality and safety of the product, and, possibly, increased credibility of warnings about risks,...persuasion rather than prosecution...[Enforcement] on the edge of constitutional limitations...[will foster] disrespect for all law and the system in general.

The Expert Group - Advisory Council on the Misuse of Drugs, Report of the Expert Group on the Effects of Cannabis Use, United Kingdom Home Office (1982)

In 1982, the British Advisory Council released their Report, which stated:

> ...there is insufficient evidence to enable us to reach incontestable

conclusions as to the effects on the human body of the use of cannabis...There is evidence to suggest that the therapeutic use of cannabis or of substances derived from it for the treatment of certain medical conditions may, after further research, prove to be beneficial.

The Coptic Study - NewsBank (1983): LAW 67: E14

26. In 1981, two UCLA psychologists, Drs. Ungerleider and Schaeffer, tested the physical and mental health of ten members of the Jamaica-based Ethiopian Zion Coptic Church. The church, which has official recognition from governments in Jamaica and the U.S., believes the use of ganja to be a "spiritual, integral act," and claims that the burning bush in the Biblical Moses epic symbolizes cannabis. The study's subjects believed that smoking 16 high-potency spliffs (each one equal to five average-size cannabis cigarettes) every day for 10 years had improved their minds. The study showed absolutely no brain differences between the subjects and non-smokers - nor did it confirm the increase in IQs claimed by the Coptics.

In The Matter of Marijuana Rescheduling Petition (1988)

27. In *In the Matter of Marijuana Rescheduling*, No. 86-22 (A.L.J. Young, Sept. 6, 1988), various agencies petitioned to have marijuana reclassified from a Schedule I to a Schedule II substance under the Controlled Substance Act. In addition to finding that there were valid and accepted medical uses for marijuana, and recommending that marijuana be reclassified so that it might be available by prescription, Judge Young made the following findings of fact:

4. Nearly all medicines have toxic, potentially lethal effects. But

marijuana is not such a substance. There is no record in the extensive medical literature describing a proven, documented cannabis-induced fatality.

5. This is a remarkable statement. First, the record on marijuana encompasses 5,000 years of human experience. Second, marijuana is now used daily by enormous numbers of people throughout the world. Estimates suggest that from twenty million to fifty million Americans routinely, albeit illegally, smoke marijuana without the benefit of medical supervision. Yet, despite this long history of use and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that consuming marijuana has caused a single death

6. By contrast, aspirin, a commonly used, over-the-counter medicine, caused hundreds of deaths each year.

7. Drugs used in medicine are routinely given what is called an LD-50. The LD-50 rating indicates at what dosage fifty percent of test animals receiving a drug will die as a result of drug induced toxicity. A number of researches have attempted to determine marijuana's LD-50 rating in test animals, without success. Simply stated, researches have been unable to give animals enough marijuana to induce death.

15. In strict medical terms marijuana is far safer than many foods we commonly consume. For example, eating ten raw potatoes can result in a toxic response. By comparison, it is physically impossible to eat enough marijuana to induce death.

16. Marijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis marijuana can be safely used within a supervised routine of medical care.

Id at 56-59.

Australian National Drug Strategy Committee - McDonald, D. et al., Legislative Options for Cannabis in Australia, Report of the National Task Force on Cannabis, Canberra: Australian Government Publishing Service (1994)

Australia experiences more harm ... from maintaining cannabis prohibition policy than it experiences from the use of the drug .... We conclude that cannabis law reform is required in this country....Any social policy should be reviewed when there is reason to believe that the costs of administering it outweigh the harms reduced.

Ministry of Health, Welfare and Sport - Drug Policy in the Netherlands: Continuity and Change, The Netherlands (1995)

Cannabis is not very physically toxic ....Everything that we now know....leads to the conclusion that the risks of cannabis use cannot ... be described as 'unacceptable'....It has been demonstrated that the more or less free sale of ... [marihuana] for personal use in the Netherlands has not given rise to levels of use significantly higher than in countries which pursue a highly repressive policy .... Dutch policy on drugs over the last twenty years...can be considered to have been successful.

Institute of Medicine - National Academy of Sciences - Marijuana and Medicine: Assessing the Science Base, Division of Neuroscience and Behavioral Health, Washington, DC: National Academy Press (1999)

The potential therapeutic value of cannabinoids is extremely broad...Scientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation...The psychological effects of cannabinoids, such as anxiety reduction, sedation, and euphoria can influence their potential therapeutic value ... Marijuana plants have been used since antiquity for both herbal medication and intoxication...

In general population, marijuana use is not associated with increased mortality... There is no conclusive evidence that marijuana causes cancer in humans, including cancers usually related to tobacco use .... the adverse effects of marijuana use are within the range tolerated for other medications...Few marijuana users develop dependence,...[are] less likely to do so than users of others drugs (including alcohol and nicotine) and marijuana dependence...[is] less severe than dependence on other drugs...Marijuana and THC withdrawal...is mild and subtle compared with the profound physical syndrome of alcohol or heroin withdrawal.....

Cannabinoids are an interesting group of compounds with potentially far-reaching therapeutic applications ... but the road to market....is expensive ... and studded with scientific, regulatory, and commercial obstacles...There is no evidence that marijuana serves as a stepping stone on the basis of its particular physiological effect...Instead, the legal status of marijuana makes it a gateway drug.

107. The U.S. Government's response to the overwhelming evidence from all the studies attesting to the beneficial qualities of cannabis is typified by remarks made by James O. Mason, head of the U.S. Public Health Service. Mason was the administrator of the Investigational New Drug (IND) program which provided legal cannabis on an experimental basis to patients suffering from cancer, AIDS, and glaucoma.

108. In 1976, Robert Randall became the first person to receive a Compassionate IND permit for the use of cannabis and, over the next 13 years, the government reluctantly issued a half-dozen more. In 1989, the FDA was deluged with applications from AIDS victims and the number of Compassionate IND permits rose to 34 in one year.

109. In early June 1991, the Deputy Director of National Drug Control Policy, Herbert D. Kleber, assured a national television audience that anyone with a legitimate medical need for cannabis would be able to obtain a permit. A few weeks later, however, Mason announced that the program would be suspended because it undercut the Bush administration's "War on Drugs:"

> If it is perceived that the Public Health Service is going around giving marihuana to folks, there would be a perception that this stuff can't be so bad. It gives a bad signal. I don't mind helping these people ... but there is not a shred of evidence that smoking marihuana assists a person with AIDS.

28. The program was discontinued in March 1992, and 28 patients whose applications had already been approved were denied the promised relief. The few patients who were already receiving legal cannabis continued to be supplied with the drug. As of 1996, only eight people are allowed what is for all others a forbidden medicine. In spite of the latest study, by the Institute of

Medicine, in 1999, which begrudgingly admitted the therapeutic value of cannabis, U.S. public officials continue to obfuscate and deny the truth to the detriment of public health for the citizens.

110. Cannabis is undoubtedly one of the most thoroughly studied psychoactive substances known to man and certainly has the longest history of use with the possible exception of alcohol. In thousands of years of use by millions of people, it has proven to be relatively harmless as compared to even the most benign-seeming drugs and has never been shown to cause even a single death.

Applying a rational standard of harmfulness, the possession by adults of marijuana, regardless of one's intent, is an individual liberty not affecting the rights of others nor doing harm to other persons, and that therefore the presumption of constitutionality of the marijuana prohibition must fall and the burden shifts to the government to justify the infringement of that right by a compelling interest.

29. Utilizing the analytical steps stated above, it should be evident that the right to possess marijuana regardless of intent is neither protected by any provision of the Constitution nor prohibited by it. Of course, the interstate transportation and sale of the drug could properly be regulated in economic and commercial ways under Article I, Section 8 of the United States Constitution, as can any other substance or activity which affects interstate commerce. However, the Commerce Clause cannot logically be construed to prohibit the mere possession with intent to distribute

marijuana outright. Consequently, possession with intent to distribute may be an activity which lies within the ambit of the Ninth Amendment as a right retained by the people.

111. Proceeding further in this analysis, it also becomes clear that possession with intent to distribute such a relatively harmless substance as marijuana neither infringes upon anyone else's constitutionally protected rights, nor endangers the evident good of the community. An activity such as possession which affects no one beyond the person or persons doing the possessing can hardly be said to infringe on another person's rights. By the defendant's alleged actions in possessing with intent to distribute a quantity of marijuana, he has not interfered with the right of others to do or refrain from doing the same. No other person's rights to life, liberty or the pursuit of happiness have been affected. No one's rights to free speech, press, religion, association, due process, equal protection, or any of the remaining panoply of rights specifically guaranteed by the Constitution have been affected by the defendant's alleged activities.

112. The remaining question is whether by his alleged activity he has endangered the "evident good of the community." In analyzing this question, the first issue to be considered is whether statutes which prohibit possession or distribution of marijuana are regulations which affect the behavior of competent adults. The answer is so obvious that it hardly needs to be belabored. No one would seriously contend that a statute which prohibits possession with intent to distribute marijuana is directed solely to the behavior of minors. It is rather obvious that the prohibitions of the statute are directed, and were intended to be directed by Congress, toward the behavior of adult citizens. We do

not contend here that Congress could not properly direct a statute to the behavior of minors only. We are concerned only with the effect of statutes on the behavior of competent adults.

113. Secondly, statutes prohibiting marijuana clearly limit the ability of an individual to shape his or her conscience or plan his or her lifestyle. If a person wishes to possess, use and distribute a drug which has an effect only upon himself or herself or only upon those who freely and voluntarily choose to join in that conduct without complaint, a criminal statute prohibiting that behavior clearly limits their ability to so plan their lifestyle. If a person wishes to develop a lifestyle centered around the use of drugs, and enters into that lifestyle freely and without being physically forced or coerced by someone else, it may be grounds, as Mill said, for "remonstrating with him, or reasoning with him, or persuading him, or entreating him" to do otherwise in order to make him happier, or wiser, but it is not grounds for compelling him under the pain of criminal sanctions and loss of liberty to adopt a different lifestyle. The very idea is abhorrent to the most fundamental concepts of liberty and freedom upon which this nation was founded.

114. The final, and perhaps most important issue in determining whether possession with intent to distribute marijuana, et. al. endangers the evident good of the community is whether such behavior affects or harms persons other than the actor or actors involved. The only ways in which the possession with whatever intent one has of a harmless substance such as marijuana affects other persons is in economic and commercial ways, which are more properly subject to economic regulations, such as taxation, import duties, and the like, but not criminal sanctions.

115. Furthermore, whether the right to possess marijuana with whatever intent -- distribution, personal use, or otherwise -- is a fundamental right or not is not the issue. The Ninth Amendment does not protect *only* "fundamental" rights. It protects *all* rights not enumerated in the Constitution, fundamental or not. The converging interests and rights affected by the statutes prohibiting marijuana justify the application of the very least which the Ninth Amendment provides -- the use of analogical reasoning to permit the intent and mandate of the Bill of Rights to apply to novel situations.

116. If the substance is as harmless as the medical evidence has shown marijuana to be, the defendant's intent in possessing it is irrelevant. If it can do little or no harm regardless of what he does with it, of what moment is it that the defendant may allegedly have possessed it with an intent to distribute it or conspired with others to do so?

117. Defendant does not dispute that the commercial use or distribution of marijuana can validly be regulated by civil economic means. Under the Commerce Clause, it could be taxed, or required to be sold in specific outlets or forms, and under state inspection, as is done with alcohol or tobacco. What defendant disputes is the improper and unconstitutional use of the police power to infringe upon his rights to possess it regardless of intent, absent a showing by the Government of a compelling interest justifying the imposition of criminal sanctions to compel him to not possess it.

118. It has been established through scientific research that marijuana is a relatively harmless substance, certainly less

harmful than alcohol or tobacco, two substances, drugs if you will, that are regulated solely by economic means. The alleged activities of the defendant caused harm to no one. By his alleged possession with intent to distribute marijuana, he was not forcing this drug upon persons unwilling to accept it or visiting physical or psychological damage upon other persons unwillingly. Indeed, his alleged behavior, if it affected anyone, affected only himself.

119. Consequently, a prima facie showing having been made that the possession with intent to distribute marijuana is an activity which does not interfere with the rights of others or to do harm to other persons, the presumption of constitutionality of 21 U.S.C. §841(a)(1), et al., as they apply to marijuana, must fall and the burden now shifts to the Government to prove that the infringement of this asserted Ninth Amendment right is justified by a compelling interest.

Wherefore the undersigned respectfully requests that the relief sought in the foregoing motions be granted.

Dated: June 29, 2010 /s/ Mark J. Mahoney

Mark J. Mahoney
HARRINGTON & MAHONEY
70 Niagara St., 3rd Floor
Buffalo, New York 14202-3407
Tel: (716) 853-3700
Facs: (716) 853-3710
mmahoney@harringtonmahoney.com

United States District Court
Western District of New York

United States of America,

Plaintiff

v.

Certificate of Service
Indictment _ 09-Cr-357-A

Lumni Zhuta,

Defendant

Ivonne DeLuca, an employee with the office of Harrington & Mahoney, located at 70 Niagara St., Buffalo, New York 14202-3407 affirm to be true and state under penalty of perjury that on June 29, 2010 Lumni Zhuta's Motion to Dismiss were electronically filed with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

1. AUSA Mary C. Baumgarten, Esq.

/s/ Ivonne DeLuca

Ivonne DeLuca

Sworn before me this
29th day of June, 2010

/s/ Denise M. Dzierzewski

Denise M. Dzierzewski
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 8/17/2010