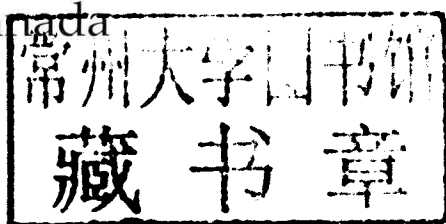


EDITED BY
EDGAR-ANDRÉ MONTIGNY

The Real Dope

Social, Legal, and Historical
Perspectives on the Regulation
of Drugs in Canada



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THE REAL DOPE: SOCIAL, LEGAL, AND HISTORICAL PERSPECTIVES ON THE REGULATION OF DRUGS IN CANADA

Recent debate around the potential decriminalization of marijuana, along with a growing perception that illicit drug use is on the rise, has brought the role of the state in controlling intoxication to the forefront of public discussion. Until now, however, there has been little scholarly consideration of the legal and social regulation of drug use in Canada. In *The Real Dope*, Edgar-André Montigny brings together leading scholars from a diverse range of fields – including history, law, political science, criminology, and psychology – to examine the relationship between moral judgment and legal regulation.

Highlights of this collection include rare glimpses into how LSD, cocaine, and Ecstasy have historically been treated by authority figures. Other topics explored range from anti-smoking campaigns and addiction treatment to the relationship between ethnicity and liquor control. Readers will find intriguing links across arguments and disciplines, providing a much-needed foundation for meaningful discussion.

EDGAR-ANDRÉ MONTIGNY is an independent scholar and lawyer living in Toronto.

*In memory of
Edgar Joseph Montigny
(1927–2007)*

Acknowledgments

This collection began as a fourth-year honours research paper for the University of Toronto, Faculty of Law, under the direction of Professor Lorraine Weinrib. In that paper, I explored something I had noticed earlier while teaching issues of race and immigration: a purely historical link, or so it seemed to me then, between a particular intoxicating substance and a particular unpopular new immigrant group and the subsequent criminalization of that substance. At the same time, as a teaching assistant for Professor Alan Young (Osgoode Hall Law School), I encountered Professor Young's ample legal scholarship on constitutional arguments against the criminalization of marijuana. I also worked with Professor Ed Morgan (University of Toronto, Law), assisting with test-case litigation. The case I worked on dealt with the recent criminalization of khat. I was struck by how hard it was to ignore the association of this relatively unknown drug with a new immigrant group and its rather hasty criminalization. It became obvious to me that the link between race and the criminalization of drugs may not be the purely 'historical artifact' I thought it was.

In exploring the issue further, I was exposed to numerous other provocative and interesting works on various aspects of the regulation of drugs in Canada. It also became increasingly clear that the public debate over the (de)criminalization of marijuana was making the use and regulation of drugs a hot current topic. I realized that there were relatively limited resources available to people who wished to explore these issues within a Canadian framework. Sources that offered both historical and modern perspectives on the issues were even more rare. While there were adequate materials dealing with Canadian responses to marijuana, tobacco, and alcohol, sources dealing with drugs such as

heroin, cocaine, LSD, or modern 'club drugs' were few and far between. Certainly, it was nearly impossible to find material on more than one or two of these drugs in any one location. I was inspired to produce this collection to bring together a broad range of recent writing on as wide a range of drugs as possible. I wanted to explore the use and regulation of drugs in Canada from a variety of perspectives, offering in one location a healthy taste of the breadth and scope of Canadian writing on the topic and, in so doing, encouraging a more rational and informed debate on what has been a frequent topic of public discussion for several decades now.

I was encouraged and supported in this endeavour by a number of people. The contributors, of course, made a massive donation of time, talent, and energy. They had enough faith in the project (and me) to remain loyal and supportive throughout a long and sometimes frustrating process of funding applications and peer reviews. I appreciate their commitment. Without them there would be no collection.

Marcel Martel and Catherine Carstairs gave me the initial moral support I required to get started and played a crucial role in helping me turn my idea into an actual project, identifying potential contributors and defining the nature and scope of the collection. Marcel made possible a key step in the process when he organized and hosted a one-day conference at York University where the contributors were able to meet, present their work, and offer useful comments and advice to one another. Bringing together authors from across the country, who might otherwise have known each other only as e-mail addresses, was invaluable in helping to create bonds and a sense of belonging that made working together that much more rewarding.

Len Husband of the University of Toronto Press took on this project and patiently and efficiently helped to guide it through the various stages, making the process as smooth as possible, even when the occasional roadblock reared its head. I greatly appreciate the work of Len and the team at the University of Toronto Press. Anonymous reviewers offered their time and expertise, providing insightful critiques and suggestions, and editor Curtis Fahey added polish to the final product. The collection is stronger for their efforts. Despite the many obstacles and frustrations involved in producing a collection of this size, it was a worthwhile and enriching experience.

I dedicate this book to my father, who died just as I started work on it. He had spent over twenty years of his life as a policeman, much of that time in narcotics control. Although it did not manifest itself until

much later, it is quite likely that the seed of my interest in the subject of drug regulation was planted in my childhood as my father proudly displayed newspaper articles about major drug busts he was involved in and I listened to his comments about what type of deviant and dangerous person would use illicit drugs. His views softened with time. When I began working on this book, I doubted very much that he would be impressed with the arguments presented here. Yet, during my last visit with him, when I mentioned that I was putting together a collection of articles on the regulation of drugs, he surprised me by saying: 'I hope some of them recommend a better way to deal with things – the way we did it before didn't work.' So perhaps he would have been impressed with this collection after all.

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THE REAL DOPE: SOCIAL, LEGAL, AND HISTORICAL
PERSPECTIVES ON THE REGULATION OF DRUGS IN CANADA

Introduction

EDGAR-ANDRÉ MONTIGNY

The legal and social regulation of the consumption of drugs in Canada is a controversial topic with a complex history. Various versions of the Narcotic Control Act and, since 1996, the Controlled Drug and Substances Act¹ have dictated which narcotic and other substances are licit or illicit in Canada. Possessing, seeking, or obtaining a substance declared illicit by the act can result in severe penalties. Punishment for simple possession of marijuana can range from a fine of \$1,000 and/or up to six months in prison to as long as seven years in prison. Trafficking in marijuana or opium can result in a potential life sentence.² It is clear that the law treats illicit drugs as serious threats to the health, welfare, and safety of Canadians, strictly prohibiting their use and potentially providing punishments more severe than those offered for a number of serious violent crimes. Assault, for instance, carries a maximum sentence of only five years. Even 'sexual assault with a weapon' or 'assault causing bodily harm' carry maximum sentences of fourteen and ten years respectively. There are in fact very few crimes that carry the potential for life imprisonment applicable to trafficking in opium or marijuana. If sentencing provisions are any indication of the potential threat that crimes are supposed to represent to the nation, simply possessing a drug such as marijuana is considered a substantial threat and trafficking in illicit drugs is assumed to represent a danger equal to murder, kidnapping, or high treason.

The penalties associated with illicit drugs would suggest that there is a clear and obvious distinction, visible to all, between the threats posed by illicit and licit drugs. However, this distinction is often difficult to see. A simple comparison between tobacco and marijuana makes this clear.

Throughout decades of debate over the use and regulation of drugs in Canada, tobacco has remained a legal substance. Aside from a few early attempts to regulate tobacco use,³ and despite recent successes in that regard, there has never been any serious initiative to criminalize tobacco or impose upon users of the substance the type of punishments allotted to persons who use substances such as marijuana. This has been the case despite mounting evidence of the serious health risks tobacco poses to not only those who use the substance but non-users as well. On the contrary, many have fought against attempts to limit or regulate tobacco use in any way, claiming they have a 'right' to smoke.

If the dangers posed to the health of society have any impact on the decision to declare a substance illegal, tobacco should have been criminalized decades ago. It has been clear for some time that tobacco use is North America's leading cause of preventable death.⁴ Smoking tobacco has been conclusively linked to heart disease, strokes, brain aneurisms, bronchitis, emphysema, and a variety of cancers. There are approximately 40,000 deaths a year from tobacco, or 100 deaths a day by some calculations.⁵ Tobacco, because of its nicotine content, has been proven to create a potent addiction, very similar to that created by heroin or cocaine, substances banned by the Criminal Code on the basis of the danger their addictive properties represent to society.⁶ Tobacco-related health-care costs amounted to \$9.5 billion in Canada in 1992 alone. Yet the Supreme Court of Canada concluded in *RJR-Macdonald* that, even though 'the detrimental health effects of tobacco consumption are both dramatic and substantial, the government was justified in not criminalizing tobacco consumption.'⁷ So, despite obvious health risks and costs, there is no obligation on Parliament to criminalize a drug such as tobacco on that basis.

Even if health risks justify the criminalization of a substance, there is ample evidence that at least some substances, such as marijuana, remain illegal in Canada despite the fact that they pose little or no obvious health risks, and certainly nowhere near the risks associated with tobacco. The most detailed examination of the medical evidence relating to marijuana on file with the Canadian court system was prepared for the Supreme Court of Canada's review of *Clay v. R.*, *Malmo-Levine v. R.*, and *Caine v. R.* The judges in *Clay* and *Caine* heard expert-opinion evidence from more than ten expert witnesses and five civilian witnesses on issues relating to the botanical, pharmacological, and medical aspects of cannabis. The trial judge in *Clay* found that the consumption of cannabis is relatively harmless compared to the so-called hard

drugs including tobacco and alcohol, that cannabis is not an addictive substance, that there is no evidence of a casual relationship between cannabis use and criminality, and that cannabis does not make people more aggressive or violent. The British Columbia Court of Appeal concluded that there was no conclusive evidence demonstrating any risk to the users of marijuana.⁸

The more research is conducted on marijuana, the more evidence emerges that cannabis, rather than being harmful, may in fact have positive medical properties. A growing body of modern medical research confirms that cannabis has significant medical value in the treatment of glaucoma and as an anti-emetic to reduce nausea and vomiting from chemotherapy related to cancer treatments. Cannabis also has beneficial effects on patients with certain chronic neurological diseases such as multiple sclerosis, cerebral palsy, and spinal-cord injury. Moreover, cannabis has been found to slow the process of brain decay, suggesting that it may have a meaningful role to play in combating degenerative diseases such as Alzheimer's, Parkinson's, and Huntington's and motor-neurone diseases.⁹

Clearly, the criminal sanctions related to cannabis use or possession are entirely out of proportion to any threat the drug poses to most Canadians. This was recognized as early as 1972 by the federal commission of inquiry into the Non-Medical Use of Drugs (otherwise known as the Le Dain Commission). The Le Dain Commission concluded that the known, probable, and possible side effects of cannabis use did not justify the enforcement policies that were then, and are essentially still, in place. Internationally, at least nine government-sponsored reports have come to the same conclusion, namely that cannabis does not cause sufficient harm to the individual or society to justify resort to criminal sanctions.¹⁰

At the very least, the comparison between the treatment of tobacco and the treatment of marijuana suggests that the distinction between licit and illicit drugs has little to do with the actual harm or threat they represent to society, since at least some illegal substances pose little threat while some legal ones pose an obvious and significant threat. Laws that criminalize a rather harmless substance on the basis of the health or medical risk involved but leave citizens free to consume a particularly dangerous substance would seem to lack rationality.

It is the apparent irrationality of many aspects of the legal and social regulation of drug use in Canada that has stimulated scholars to explore the subject. Much of the writing in the area has sought to explain or at

least point out contradictions and irrationalities inherent in the regulation of drug use in this nation both in the informal, social sense and in the legal context. Many authors have taken the stand that if, the 'threat' posed to society by certain substances cannot be explained in medical terms, then it must be that other, perhaps 'unspoken,' fears have constituted the justification for treating drugs like tobacco and marijuana so differently. Much of the controversy related to the regulation of drug use stems from conflict between various ideals of the relationship between the state and citizen and the extent to which the state can or should curtail certain activities in the interests of promoting a particular set of moral values. For this reason, the history of the regulation of drug use provides an excellent arena in which to study how social values become translated into policy, which groups in society have the greatest influence over social values and policy, and the role of the media and public opinion in the process. The essays in this collection touch on all of these issues, offering but a sample of the scope of the subject. To put the essays in context, it is best to provide a general overview of some of the key themes dealt with in the historical literature on the regulation of drug use in Canada.

Race, Ethnicity, and Drug Laws

Numerous authors have argued that early drug laws were essentially racist in nature, targeting the use of certain substances for criminal sanction not because of the threat posed by the substance itself but because of the perceived threat posed to society by the use of the substance by a particular minority group. A number of authors have pointed out that a full understanding of the origins of Canadian drug laws requires that drug laws be placed within the context of the overall moral-reform campaign that was in progress at the time the first such laws were passed.¹¹

Most of the work in this area has linked the development of drug laws to the fears of the Canadian white Anglo-Saxon middle class during the latter decades of the nineteenth century and the early decades of the twentieth century, when industrialization and immigration stimulated widespread concern over rapidly changing social conditions. A varied group of religious, medical, and social reformers, often referred to as moral reformers, campaigned on several fronts to put in place a wide range of laws, by-laws, and regulations to curb what they saw as a moral decline caused largely by the increasing numbers of non-Anglo-Saxon immigrants in their midst.

The basic problem, as the moral reformers saw it, was that non-Anglo-Saxon immigrants were of a lower overall genetic quality and, therefore, less intelligent and less able to control or regulate their desires and passions. This meant that they would be inclined towards immorality. At the very least, it was argued that Anglo-Saxons had a basic understanding of right and wrong and were able generally to contain their behaviour within accepted limits. Immigrants from different cultures could not be expected to have the same understanding of Canadian 'rules of conduct' or the same ability to regulate their behaviour accordingly. It was thus necessary for Parliament, legislatures, and municipalities to create laws that made the basic moral rules explicit and that would allow the various levels of the state to monitor, regulate, and, when warranted, punish the activities of those people, mainly immigrants, who might not abide by the rules. Immigrants would be forced to conform to Anglo-Saxon behavioural and moral standards 'for their own good.'¹²

Demands for legal regulation were generally most successful when the activity in question could be depicted as a moral threat because of its association with a non-Anglo-Saxon immigrant group. It is no coincidence that what became the basic outline and form of Canada's drug laws was put in place between 1908 and 1929, when the largely anti-immigrant 'moral law' movement was at its height. Opium became the first drug targeted by the moral-reform movement and the legal treatment of this substance helped lay the groundwork for the treatment of various other substances.

As with many of the activities prohibited during the moral-reform era, the use of various drugs had gone on in Canada for several decades before it was identified as problematic. In the nineteenth century, opiates were freely prescribed by Canadian physicians and they could also be obtained without prescriptions. There was no customs duty on opium imported into Canada before 1879 and after this date only minimal fees applied. In 1907 alone, forty-four tons of opium were legally imported into Canada.¹³

Cocaine and opium were widely used in most patent medicines and physicians employed them to treat a wide range of problems from diarrhea to pain.¹⁴ Heroin was used to relieve coughs. The majority of users were white middle-class Protestants, members of the dominant class in Canada.¹⁵ There was no pressure to control the use or importation of any of these drugs. None was seen as dangerous.¹⁶ In fact, it appears that no Western nation used the criminal law to prohibit the