

BEYOND CANNABIS: PSYCHEDELIC DECRIMINALIZATION AND SOCIAL JUSTICE

by
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Psychedelics are powerful psychoactive substances that alter consciousness and brain function. Like cannabis, psychedelics have long been considered prohibited Schedule I substances under the Controlled Substances Act of 1970. However, via the powerful psychological experiences they induce, psychedelics are now being shown to be viable therapeutic alternatives in treating depression, substance use disorders, and other mental illnesses, and even to enhance the wellbeing of healthy individuals.

In May 2019, Denver, Colorado became the first city in the country to decriminalize psilocybin (the active compound in “magic mushrooms”)—a potential major shift in the War on Drugs. Ballot initiatives for the decriminalization of psilocybin and similar substances are now reaching voters in other cities and states. What principles might justify this decriminalization—eliminating criminal penalties for, at a minimum, the use and possession—of psilocybin and other psychedelics?

This Article provides background on psychedelics and a historic overview of the laws surrounding them. It then considers several potential justifications for decriminalizing psychedelics: (1) medical value; (2) religious freedom; (3) cognitive liberty; and (4) identity politics. Lastly, the Article proposes that, given the neurological changes in the brain caused by use of psychedelics, psychedelic law reform can also be conceptualized as a matter of neurodiversity—a recent claim to equality holding that neurological variations should be recognized and respected along with other human differences. It is argued that situating psychedelic law reform under the neurodiversity paradigm, and thus as a matter of social justice, could lessen the stigma surrounding psychedelics and generate additional popular support for future decriminalization efforts.

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INTRODUCTION

*Those who feel that they are more creative or insightful or self-aware while under the influence of psychedelics . . . may be delusional or they may be right. Prohibitionists commonly assume that such claimants are delusional, but proof of that assumption is entirely absent.*¹

Given the public outcry for its legalization,² cannabis has attracted much recent attention in the legal literature.³ Far less coverage has been given, however, to the

¹ STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* 154 (1993).

² Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 *UCLA L. REV.* 74, 77 (2015) (“Unprecedented public support for legalizing marijuana has emboldened Brandeisian experimentation across the country.”).

³ For examples, see the other contributions to this Symposium issue: Alexis Holmes, *Zoning*,

“classic” psychedelics⁴—i.e., psilocybin (the active compound in “magic mushrooms”), lysergic acid diethylamide (LSD), N,N-dimethyltryptamine (DMT), ayahuasca, and mescaline (the active compound in the peyote plant).⁵ These substances powerfully alter perception, mood, and cognitive processes, typically to a greater degree than does the use of cannabis. Like cannabis, psychedelics have long been considered prohibited Schedule I substances under the Controlled Substances Act (CSA) of 1970.⁶ Substances classified under Schedule I are said to have: (1) no currently accepted medical use; (2) a lack of accepted safety for use under medical supervision; and (3) a high potential for abuse.⁷

Yet a new wave of research from major universities such as NYU, Johns Hopkins, UCLA, and Imperial College London⁸ finds that psychedelics do not lead to dependence, are generally considered physiologically safe, and have demonstrated medical benefits.⁹ In fact, psychedelics are being shown to be viable therapeutic alternatives in treating depression, substance use disorders, and other mental illnesses,¹⁰ and even to increase the well-being of individuals without health problems via the powerful mystical or psychological experiences they induce.¹¹

And despite the persisting stigma of hedonism, rebellion, and social upheaval

Race, and Marijuana: The Unintended Consequences of Proposition 64, 23 LEWIS & CLARK L. REV. 939 (2019); Susan F. Mandiberg, *A Hybrid Approach to Marijuana Federalism*, 23 LEWIS & CLARK L. REV. 823 (2019); Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789 (2019); Hayley Hollis, Note, *Cannabis Law, the Constitution, and the ABA Model Rules*, 23 LEWIS & CLARK L. REV. 1063 (2019); Blake Marvis, Comment, *Reefer Madness in Federal Court: An Overview of How Federal Courts are Dealing with Cannabis Litigation and Why It Is Necessary to “Dig into the Weeds,”* 23 LEWIS & CLARK L. REV. 967 (2019); Zach Nelson, Note, *If It Looks Like a Duck: Equal Protection, Selective Prosecution, and Geographic Differences in the Federal Prosecution of Marijuana Crimes Under the Controlled Substances Act*, 23 LEWIS & CLARK L. REV. 1007 (2019).

⁴ See Mason Marks, *Psychedelic Medicines for Mental Illness and Drug Abuse: Overcoming Social and Legal Obstacles*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 69, 69 (2018) (providing “the first comprehensive review of the social and legal obstacles to developing psychedelic medicines”).

⁵ See, e.g., David E. Nichols, *Psychedelics*, 68 PHARMACOLOGICAL REVIEWS 264, 266 (2016).

⁶ 21 U.S.C. § 801 (1970).

⁷ *Id.* §§ 811(b)–(c), 812(b)(1); see also U.S. DRUG ENF’T ADMIN., DRUG SCHEDULING, <http://www.dea.gov/druginfo/ds.shtml> (last visited June 18, 2019).

⁸ See, e.g., David E. Nichols et al., *Psychedelics as Medicines: An Emerging New Paradigm*, 101 CLINICAL PHARMACOLOGY & THERAPEUTICS 209, 215 (2017).

⁹ See, e.g., Nichols, *supra* note 5, at 277.

¹⁰ See, e.g., RICHARD LOUIS MILLER, PSYCHEDELIC MEDICINE: THE HEALING POWERS OF LSD, MDMA, PSILOCYBIN, AND AYAHUASCA 31 (2017); Kenneth W. Tupper et al., *Psychedelic Medicine: A Re-Emerging Therapeutic Paradigm*, 187 CMAJ 1054 (2015).

¹¹ See, e.g., James W.B. Elsey, *Psychedelic Drug Use in Healthy Individuals: A Review of Benefits, Costs, and Implications for Drug Policy*, DRUG SCI. POL’Y & L., July 2017, at 1.

surrounding them, public support for psychedelics is growing.¹² In May 2019, Denver, Colorado became the first city in the United States to decriminalize psilocybin—potentially a major shift in the War on Drugs.¹³ Additional referenda for the decriminalization of psilocybin are now set to reach voters in Oregon and California in 2020.¹⁴ Legislation has also been proposed in Iowa to remove the substance from the state’s controlled substances list.¹⁵ Billionaires are investing heavily in psychedelics research.¹⁶ Microdosing—the practice of ingesting a very small dose of a psychedelic while an individual goes about daily life—is a common and accepted practice among many artists and entrepreneurs.¹⁷ Popular intellectuals and entertainers advocate for the use of psychedelics as tools for personal development, at times reaching millions of people on podcasts and other new media.¹⁸ Myriad popular

¹² See, e.g., Jensen Davis, *Psychedelics in the Age After Aquarius*, HARV. POL. REV. (2018), <http://harvardpolitics.com/covers/psychedelics-in-the-age-after-aquarius/> (noting that a “psychedelic renaissance” is occurring in recent years).

¹³ Esther Honig, *In Close Vote, Denver Becomes 1st U.S. City to Decriminalize Psychedelic Mushrooms*, NPR (May 9, 2019, 3:22 AM), <https://www.npr.org/sections/health-shots/2019/05/09/721660053/in-close-vote-denver-becomes-first-u-s-city-to-decriminalize-psychedelic-mushroom>. Shortly before publication of this Article, in June 2019, Oakland, California became the second city in the country to decriminalize psilocybin, as well as other “natural” psychedelics like mescaline. Jon Blistein, *Oakland Decriminalizes Magic Mushrooms, Other Natural Psychedelics*, ROLLING STONE (June 5, 2019, 6:01 PM), <https://www.rollingstone.com/culture/culture-news/oakland-decriminalize-magic-mushrooms-natural-psychedelics-844879/>.

¹⁴ James Hamblin, *The Mushrooms Are Slowly Taking Effect*, ATLANTIC (May 16, 2019), <https://www.theatlantic.com/health/archive/2019/05/mushroom-law/589192/> (noting that movements may be underway in Canada and Australia). A previous attempt at a ballot initiative in California failed to reach voters.

¹⁵ See Honig, *supra* note 13.

¹⁶ Christina Farr, *Investors Are Starting to Bet Big on Psychedelic Medicine*, CNBC (Mar. 27, 2019, 2:44 PM), <https://www.cnbc.com/2019/03/27/psychedelic-medicine-start-ups-vet-ketamine-psilocybin-for-depression.html>.

¹⁷ See, e.g., AYELET WALDMAN, *A REALLY GOOD DAY: HOW MICRODOSING MADE A MEGA DIFFERENCE IN MY MOOD, MY MARRIAGE, AND MY LIFE 3* (2017); Sharon Begley, *Scientists Are Starting to Test Claims About “Microdosing,”* SCI. AM.: STAT (Aug. 24, 2018), <https://www.scientificamerican.com/article/scientists-are-starting-to-test-claims-about-microdosing/>; James Fadiman & Sophia Korb, *Microdosing: The Phenomenon, Research Results, and Startling Surprises*, PSYCHEDELIC SCI. (Apr. 21, 2017), <http://psychedelicsscience.org/conference/interdisciplinary/microdosing-the-phenomenon,-research-results,-and-startling-surprises>.

¹⁸ See, e.g., Erik Hedegaard, *How Joe Rogan Went from UFC Announcer to 21st-Century Timothy Leary*, ROLLING STONE (Oct. 22, 2015, 4:00 PM), <https://www.rollingstone.com/culture/culture-features/how-joe-rogan-went-from-ufc-announcer-to-21st-century-timothy-leary-182319/>; Big Think, *Sam Harris: Can Psychedelics Help You Expand Your Mind?*, YOUTUBE (Oct. 30, 2014), <https://www.youtube.com/watch?v=XOET9n8wnmo>; PowerfulJRE, *Joe Rogan Experience #946 – Dennis McKenna*, YOUTUBE (Apr. 17, 2017), <https://www.youtube.com/watch?v=oKiKfAmysrI>; PowerfulJRE, *Joe Rogan Experience, #1136 – Hamilton Morris*, YOUTUBE (June 26, 2018), <https://www.youtube.com/watch?v=HM8WDZlth3M/>.

periodicals have published recent editorials on psychedelics.¹⁹ And Michael Pollan released a New York Times bestselling book, *How to Change Your Mind: What the New Science of Psychedelics Teaches Us About Consciousness, Dying, Addiction, Depression, and Transcendence*.²⁰

Amidst this psychedelic renaissance, a recent legal commentary advocates for the development of “psychedelic medicines,” arguing that the current mental health and opioid epidemics justify renewed exploration of the therapeutic potential of psychedelics.²¹ However, in addition to therapeutic uses, psychedelics are also being found to enhance the wellbeing of individuals without health problems.²² And the aforesaid ballot initiatives include the elimination of criminal penalties for non-medical as well as medical uses of psilocybin.²³ This trend toward general decriminalization appears likely to continue as popular support for psychedelics grows and

¹⁹ E.g., Dinah Bazer, *I Took A Psychedelic Drug for My Cancer Anxiety. It Changed My Life*, TIME (Dec. 1 2016), <http://time.com/4586052/psychedelic-drug-psilocybin-cancer-anxiety/>; Jan Hoffman, *A Dose of a Hallucinogen from a ‘Magic Mushroom,’ and Then Lasting Peace*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/health/hallucinogenic-mushrooms-psilocybin-cancer-anxiety-depression.html>; Jacqueline Howard, *‘Magic Mushroom’ Drug Lifted ‘Cloud of Doom’ for Cancer Patients*, CNN (Dec. 1 2016), <https://www.cnn.com/2016/12/01/health/magic-mushrooms-cancer-patients/index.html>; Olga Khazan, *The Life-Changing Magic of Mushrooms*, ATLANTIC (Dec. 1 2016), <https://www.theatlantic.com/health/archive/2016/12/the-life-changing-magic-of-mushrooms/509246/>; Stephanie Kossman, *Medical Daily: The War on Drugs May Have Represented Psychedelics; Here’s Why That Matters*, MULTIDISCIPLINARY ASS’N PSYCHEDELIC STUD. (May 13, 2016), <https://maps.org/news/media/6201-medical-daily-the-war-on-drugs-may-have-misrepresented-psychedelics-here-s-why-that-matters>; Steven Kotler, *Are Psychedelics the Wonder Drug We’ve Been Waiting for?*, FORBES (Mar. 11, 2015, 10:56 AM), <https://www.forbes.com/sites/stevenkotler/2015/03/11/are-psychedelics-the-wonder-drug-weve-been-waiting-for/#5e6e86f2566c>; Linda Marsa, *A Good Trip*, AEON (Mar. 28, 2014), <https://aeon.co/essays/how-psychedelics-are-helping-cancer-patients-fend-off-despair>; Mac McClelland, *The Psychedelic Miracle*, ROLLING STONE (Mar. 9, 2017), <https://www.rollingstone.com/culture/culture-features/the-psychedelic-miracle-128798/>; Roc Morin, *Do Psychedelic Drug Laws Violate Human Rights?*, ATLANTIC (Mar. 4, 2016), <https://www.theatlantic.com/health/archive/2016/03/psychedelic-drugs/471603/>; Michael Pollan, *The Trip Treatment*, NEW YORKER (Feb. 9, 2015), <https://www.newyorker.com/magazine/2015/02/09/trip-treatment>; Allison Tierney, *Clinical Trials on Treating Addiction with Psychedelics Planned in BC*, VICE (Apr. 26, 2017), https://www.vice.com/en_ca/article/ez3qbn/clinical-trials-on-treating-addiction-with-psychedelics-planned-in-bc.

²⁰ MICHAEL POLLAN, *HOW TO CHANGE YOUR MIND: WHAT THE NEW SCIENCE OF PSYCHEDELICS TEACHES US ABOUT CONSCIOUSNESS, DYING, ADDICTION, DEPRESSION, AND TRANSCENDENCE* (2018). However, Pollan has since voiced his opinion against the decriminalization of psilocybin via ballot initiative. See Michael Pollan, *Not So Fast on Psychedelic Mushrooms*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/opinion/denver-mushrooms-psilocybin.html> [hereinafter Pollan, *No So Fast*].

²¹ See Marks, *supra* note 4.

²² See Elsey, *supra* note 11.

²³ See, e.g., Office of the Sec’y of State of Or., Initiative Petition 2020-012 (Nov. 8, 2018),

the stigma surrounding the substances lessens.²⁴ What principles might justify this sort of decriminalization—eliminating criminal penalties for, at a minimum, the general use and possession—of psilocybin and other psychedelics? Put differently, is the prohibition of psychedelics defensible?

This Article considers potential justifications for the decriminalization of psychedelics based in (1) healthcare needs, (2) religious freedom, (3) cognitive liberty, and (4) identity politics—i.e., analogy of a “psychedelic identity” to queer theory and the LGBTQ movement.²⁵ It then proposes a reframing of the cognitive liberty and identity politics-related justifications through invocation of a recent equality claim, neurodiversity: “the diversity of human brains and minds [and] the infinite variation in neurocognitive functioning within our species.”²⁶ Under this lens, criminalizing the use and possession of psychedelics, and, by extension, the neurological changes to the brain caused by psychedelics, is non-accommodating to “neurodivergent perspectives,” i.e. deviating from dominant or “neurotypical” societal standards.²⁷ Those who are drawn to psychedelics and the psychedelic experience can be seen to represent a natural and valuable form of human diversity and creative potential that should not be thwarted by criminal penalty.²⁸ In sum, consideration of psychedelic law reform as a matter of neurodiversity, and thus of social justice, could lead to greater public support for the ballot initiatives, voter referenda, and other legislation that is spurring decriminalization efforts in increasing numbers of cities and states.

This Article proceeds in three Parts. Part I provides background on the classic

<http://oregonvotes.org/irr/2020/012cvt.pdf> (“Reduces psilocybin criminal penalties; allows licensed psilocybin administration, manufacture, possession, delivery; creates regulatory program, fund.”).

²⁴ See Hamblin, *supra* note 14 (“[D]ecriminalization could open the door to more widespread use for various medicinal reasons. It could also be a bellwether for the nation, and the world, as people begin to reflect on why psychedelic mushrooms are among the most tightly regulated ingestible substances on the planet . . .”).

²⁵ As a caveat, this Article does not claim that the arguments presented necessarily justify the outright *legalization* of psychedelics, especially not in an unregulated capacity. Focusing on state law *decriminalization*, discussion of psychedelic legalization and its corresponding regulations is left to future works.

²⁶ Nick Walker, *Neurodiversity: Some Basic Terms & Definitions*, NEUROCOSMOPOLITANISM (Sept. 27, 2014), <http://neurocosmopolitanism.com/neurodiversity-some-basic-terms-definitions>.

²⁷ See, e.g., THOMAS ARMSTRONG, THE POWER OF NEURODIVERSITY: UNLEASHING THE ADVANTAGES OF YOUR DIFFERENTLY WIRED BRAIN 1–27 (2011); Robert D. Austin & Gary P. Pisano, *Neurodiversity as a Competitive Advantage*, HARV. BUS. REV., May–June 2017 at 96, 99 (“Because neurodiverse people are wired differently from ‘neurotypical’ people, they may bring new perspectives . . .”).

²⁸ Neşe Devenot, *Psychedelics and Identity Politics: Coming Out of the Psychedelic Closet*, PSYMPOSIA (May 3, 2016), <https://www.psymposia.com/magazine/psychedelics-and-identity-politics>.

psychedelics—psilocybin, LSD, DMT, ayahuasca, and mescaline. Part II provides a historical overview of the events leading to psychedelic prohibition, prohibition itself, and recent efforts to decriminalize psychedelics. Part III explores existing justifications for this sort of psychedelic law reform, including medical benefit, religious freedom, cognitive liberty, and psychedelic identity politics, and, before concluding, proposes a reframed justification under the neurodiversity paradigm.

I. THE CLASSIC PSYCHEDELICS

The term “psychedelic” was coined by psychiatric researcher Humphry Osmond.²⁹ Osmond combined the Greek words *psyche* (“mind” or “soul”) with *delein* (“to make manifest”) to create a new word meaning “mind manifesting.”³⁰ Osmond’s aim was to describe a class of substances that catalyze the emergence into conscious awareness of previously unconscious or repressed cognitions, perceptions, and emotions.³¹ What distinguishes psychedelics from other substances, according to one seminal definition, “is their capacity reliably to induce states of altered perception, thought, and feeling that are not experienced otherwise except in dreams or at times of religious exaltation.”³²

This Article limits its focus to the classic psychedelics—psilocybin, LSD, DMT, ayahuasca, and mescaline.³³ In the pharmacological sense, each is defined as

²⁹ Harold Osmond, *A Review of the Clinical Effects of Psychotomimetic Agents*, 66 ANNALS N.Y. ACAD. SCI. 418–34 (1957). While “psychedelic” remains the most popular, other terms are sometimes used to describe this class of substances. They are frequently called “hallucinogens” due to their ability to produce hallucinations at high doses. See, e.g., Note, *Hallucinogens*, 68 COLUM. L. REV. 521 (1968). Recent research finds, though, that psychedelics do not ordinarily produce true hallucinations at typical doses, i.e., users can appreciate that their perceptual abnormalities are unreal, so the term might be seen as pejorative. Nichols, *supra* note 5, at 266. A term denoting the spiritual significance of the substances is “entheogen” (from the Greek word *entheos* meaning “god within”). *Id.* at 269; Carl A.P. Ruck et al., *Entheogens*, 11 J. PSYCHEDELIC DRUGS 145, 146 (1979). Aldous Huxley, whose mescaline experience would become the subject of his famous 1954 book *The Doors of Perception*, suggested the word “phanerothyme,” or “bringing forth the spirit or soul.” Janice Hopkins Tanne, *Humphry Osmond*, 328 BRIT. MED. J. 713 (2004) (noting that in a letter to Humphry Osmond, Huxley wrote, “To make this mundane world sublime, Take half a gram of phanerothyme,” to which Osmond responded, “To fathom Hell or soar angelic/Just take a pinch of psychedelic”).

³⁰ Link R. Swanson, *Unifying Theories of Psychedelic Drug Effects*, FRONTIERS PHARMACOLOGY, Mar. 2018, at 1, 1.

³¹ *Id.*

³² Jerome H. Jaffe, *Drug Addiction and Drug Abuse*, in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 522, 553 (Alfred Goodman Gilman et al. eds., 8th ed. 1990).

³³ Other substances sometimes considered under the broad umbrella of psychedelics include methylenedioxymethamphetamine (MDMA or “ecstasy”), ketamine, salvia, kratom, and ibogaine. See Jag Davies, *Why is the U.S. Disregarding Plants Like Iboga and Kratom in the Fight Against Overdose and Addiction?*, DRUG POL’Y ALLIANCE (Feb. 29, 2016), <http://www.drugpolicy.org>.

a “serotonin receptor agonist,” i.e., a substance that exerts its effects primarily on the brain’s serotonin receptors.³⁴ Modern research suggests that the effects of the classic psychedelics include three broad stages.

First, shortly after the substance is taken, a short term “acute psychedelic state” is induced, lasting from minutes to hours.³⁵ This stage is characterized by a “significant alteration of conscious experience . . . [or] a psychedelic peak experience.”³⁶ The peak phase may cause a user to feel

a sense of unity (e.g. merging with the universe, the sense that all things are one), ineffability (being unable to fully describe the experience in words), a deep positive mood, a sense of sacredness or awe, transcendence of time and space, and a noetic quality (a feeling of revelation or intuitive understanding).³⁷

The peak experience may also result, however, in a “bad trip” (or “challenging experience,” as it is now being labeled in the therapeutic context).³⁸ The “[a]cute effects of psychedelic drugs can be aversive, with paranoia and the fear of going insane noted by some who take them.”³⁹ Second, following the peak phase, a “psychedelic afterglow” state may occur, during which the user of the substance “may have an

org/blog/why-us-disregarding-plants-iboga-and-kratom-fight-against-overdose-and-addiction. These substances affect the brain using different mechanisms than the classic psychedelics, and thus draw on a different body of scientific research. In particular, large-scale clinical trials are currently being conducted on MDMA for therapeutic uses, and there is a push for its legalization as well. See, e.g., Yasmin Tayag, *Inverse: People Are Taking Legal MDMA to Cure Anxiety*, MULTIDISCIPLINARY ASS’N PSYCHEDELIC STUD., <https://maps.org/resources/students/6071-inverse-people-are-taking-legal-mdma-to-cure-anxiety-3>. Cannabis is sometimes included under the umbrella of psychedelics as well given its relatively mild hallucinogenic properties.

³⁴ R.L. Carhart-Harris & D.J. Nutt, *Serotonin and Brain Function: A Tale of Two Receptors*, J. PSYCHOPHARMACOLOGY (Aug. 31, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5606297/>; Charles D. Nichols & Elaine Sanders-Bush, *Serotonin Receptor Signaling and Hallucinogenic Drug Action*, 2 HEFFTER REV. PSYCHEDELIC RES. 73 (2001), <https://heffter.org/docs/hrireview/02/chap5.pdf>.

³⁵ Elsey, *supra* note 11, at 2.

³⁶ *Id.* at 2.

³⁷ *Id.* at 2.

³⁸ See, e.g., John Horgan, *As Psychedelics Revival Rolls On, Don’t Downplay Bad Trips*, SCI. AM.: CROSS-CHECK (Feb. 9, 2015), <https://blogs.scientificamerican.com/cross-check/as-psychedelics-revival-rolls-on-don-t-downplay-bad-trips/>; *Misguided Mainstreaming of Psychedelic Drugs: Challenging Experiences*, RICK STRASSMAN MD (Oct. 25, 2017), <https://www.rickstrassman.com/misguided-mainstreaming-of-psychedelic-drugs-challenging-experiences/>.

³⁹ Elsey, *supra* note 11, at 5; see also *Mushroom (Mushrooms / 2g) First and Last Time – Solipsistic Purgatory*, BLUELIGHT (June 28, 2011, 1:55 PM), [http://www.bluelight.org/vb/threads/579910-\(Mushrooms-2g\)-First-and-last-time-Solipsistic-purgatory](http://www.bluelight.org/vb/threads/579910-(Mushrooms-2g)-First-and-last-time-Solipsistic-purgatory) (anonymous user on popular drug discussion website describing a bad trip on psilocybin as a “solipsistic purgatory”).

elevated mood and feel less burdened by their worries and stressors.”⁴⁰ Or, while rare, psychosis or mania can instead result.⁴¹ This afterglow phase tends to last about two to four weeks.⁴² Finally, there may be lasting psychological changes “precipitated either by general drug effects or of the subjective psychedelic/mystical experience itself.”⁴³

Neuroscience is studying the effects of psychedelics on the human brain. To this end, brain imaging has been performed on volunteers in the peak psychedelic state with psilocybin, LSD, and ayahuasca, enabling researchers to piece together a possible model relating to the effects of these substances on the brain.⁴⁴ Findings suggest that use of psychedelic substances causes substantial changes to the brain, and particularly to the “default mode network” (DMN), a network of brain regions engaged when the mind wanders.⁴⁵

The DMN is thought to support cognitive processes such as self-reflection, theory of mind, and contemplation of one’s past and future.⁴⁶ The DMN can perhaps be considered the objective, physical correlate to the subjective, psychic “narrative-self or ego.”⁴⁷ While the DMN appears to be necessary for the experience of waking consciousness, it also can restrict other brain states and thus limits the contents of our conscious experience.⁴⁸

In effect, psychedelic states promote an unconstrained style of thinking by reducing neural activity within the DMN.⁴⁹ As one expert notes, “it seems that in the acute drug phase, psychedelics disrupt normal or even entrenched patterns of brain

⁴⁰ *Id.* at 2.

⁴¹ See, e.g., Brett Felty, *Let’s Talk About Psychedelic-Induced Psychosis*, PSYMPOSIA (Dec. 12, 2018), <https://www.psymposia.com/magazine/psychedelic-psychosis/> (analyzing the aphorism: “The psychotic drowns in the same waters in which the mystic swims with delight.”).

⁴² Elsey, *supra* note 11, at 2.

⁴³ *Id.* at 2.

⁴⁴ See, e.g., Robin L. Carhart-Harris et al., *Neural Correlates of the LSD Experience Revealed by Multimodal Neuroimaging*, 113 PROCS. NAT’L ACAD. SCI. 4853, 4854 (2016) [hereinafter Carhart-Harris et al., *LSD Experience*]; Robin L. Carhart-Harris et al., *Neural Correlates of the Psychedelic State as Determined by fMRI Studies with Psilocybin*, 109 PROCS. NAT’L ACAD. SCI. 2138 (2012); see generally Fernanda Palhano-Fontes et al., *The Psychedelic State Induced by Ayahuasca Modulates the Activity and Connectivity of the Default Mode Network*, PLOS ONE, Feb. 18, 2015, at 5; Enzo Tagliazucchi et al., *Increased Global Functional Connectivity Correlates with LSD-Induced Ego Dissolution*, 26 CURRENT BIOLOGY 1043, 1045–47 (2016).

⁴⁵ Robin L. Carhart-Harris et al., *The Entropic Brain: A Theory of Conscious States Informed by Neuroimaging Research with Psychedelic Drugs*, FRONTIERS HUM. NEUROSCIENCE, Feb. 2014, at 1, 6.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 7.

activity that characterize waking experience, enabling a greater range of activity patterns to surface.”⁵⁰ Thus, “this may explain the unusual insights and perspectives that frequently become available under the influence of psychedelics.”⁵¹ As Rick Doblin notes:

The classic psychedelics act by dissolving our filtering systems—more or less the system in our brain talking about the ego. LSD and psilocybin weaken that part of the brain. You don’t see things from your own individual perspective anymore, but you see a larger perspective, and you get more sensory input.⁵²

Reduced DMN activity and other observable changes to brain function is therefore said to be the objective catalyst underlying the subjective mystical or psychological experiences that characterize the psychedelic states.

A brief overview of the classic psychedelics—psilocybin, LSD, DMT, ayahuasca, and mescaline—will now be provided.

A. *Psilocybin*

Psilocybin is the principal psychoactive component of a genus of mushrooms (psilocybe).⁵³ In this form, psilocybin has been ingested for centuries and perhaps millennia, within certain cultures for religious and sacramental reasons.⁵⁴ For instance, the use of psilocybin and other psychoactive plant materials was common in pre-Columbian Mesoamerican societies, e.g., Aztec and Mayan cultures, as well as in regions of Australia and Tanzania.⁵⁵ Modern science, however, only began studying psilocybin significantly in the 1950s.⁵⁶

Recent studies are finding psilocybin to be particularly useful in treating anxiety, substance use disorders, and depression, and in studying the neurobiology of mystical experiences. Not unlike the other classic psychedelics, psilocybin’s psychological effects include significant alterations in cognition and perception. If used under the right conditions, research finds that psilocybin can occasion mystical experiences in users, characterized by feelings of unity, a “deeply positive mood,” and

⁵⁰ Elsey, *supra* note 11, at 2.

⁵¹ *Id.*

⁵² Danielle Lim, *HelloMD: MAPS Founder Rick Doblin Talks Psychedelics, MDMA and the FDA*, MULTIDISCIPLINARY ASS’N PSYCHEDELIC STUD. (May 10, 2019), <https://maps.org/news/media/7732-hellomd-maps-founder-rick-doblin-talks-psychedelics-mdma-the-fda>.

⁵³ R.R. Griffiths et al., *Psilocybin Occasioned Mystical-Type Experiences: Immediate and Persisting Dose-Related Effects*, 218 *PSYCHOPHARMACOLOGY* 649, 649 (2011).

⁵⁴ See SACRED MUSHROOM OF VISIONS: TEONANÁCATL: A SOURCEBOOK ON THE PSILOCYBIN MUSHROOM 2 (Ralph Metzner ed., 2004).

⁵⁵ Nichols, *supra* note 5, at 268.

⁵⁶ Robin L. Carhart-Harris et al., *Psilocybin with Psychological Support for Treatment-Resistant Depression: An Open-Label Feasibility Study*, 3 *LANCET PSYCHIATRY* 619, 619 (2016).

“transcendence of time and space,”⁵⁷ as well as, in some cases, adverse psychological effects including panic reactions and paranoid experiences.⁵⁸ According to one study:

[W]hen administered to volunteers under supportive conditions, psilocybin occasioned experiences similar to spontaneously occurring mystical experiences and which were evaluated by volunteers as having substantial and sustained personal meaning and spiritual significance. The ability to prospectively occasion mystical experiences should permit rigorous scientific investigations about their causes and consequences, providing insights into underlying pharmacological and brain mechanisms, nonmedical use and abuse of psilocybin and similar compounds, as well as the short-term and persisting effects of such experiences.⁵⁹

Psilocybin is more appealing to psychedelic researchers and advocates than LSD for at least two reasons. First, psilocybin lacks as strong an association to the counterculture of the 1960s, and thus is less stigmatized than LSD.⁶⁰ Second, its duration is shorter than LSD, with effects usually lasting between six and eight hours.⁶¹ The use and possession of psilocybin has been decriminalized in Denver, Colorado. Similar ballot initiatives for decriminalization of psilocybin are scheduled to reach voters in other cities and states.⁶²

B. LSD

LSD (lysergic acid diethylamide) was first synthesized by Albert Hofmann in 1938 at Sandoz Pharmaceuticals in Basel, Switzerland, with the hope of developing a stimulant.⁶³ Hofmann later discovered its effects by accident in 1943 when exposed to a small dose of the substance.⁶⁴ He wrote in his lab notes regarding this

⁵⁷ R.R. Griffiths et al., *Psilocybin Can Occasion Mystical-Type Experiences Having Substantial and Sustained Personal Meaning and Spiritual Significance*, 187 *PSYCHOPHARMACOLOGY* 268, 272 (2006).

⁵⁸ See Frederick S. Barrett et al., *Neuroticism is Associated with Challenging Experiences with Psilocybin Mushrooms*, 117 *PERSONALITY & INDIVIDUAL DIFFERENCES* 155, 156 (2017); Theresa M. Carbonaro et al., *Survey Study of Challenging Experiences After Ingesting Psilocybin Mushrooms: Acute and Enduring Positive and Negative Consequences*, 30 *J. PSYCHOPHARMACOLOGY* 1268, 1275 (2016).

⁵⁹ Griffiths et al., *supra* note 57, at 282.

⁶⁰ Pollan, *supra* note 19.

⁶¹ Paul Austin, *LSD vs. Psilocybin Mushrooms*, *THIRD WAVE* (Sept. 25, 2015), <https://thethirdwave.co/lsd-vs-shrooms/>.

⁶² Hamblin, *supra* note 14; Honig, *supra* note 13.

⁶³ ALBERT HOFMANN, *LSD: MY PROBLEM CHILD* 12 (1980); see also Dan Wakefield, *The Hallucinogens: A Reporter's Objective View*, in *LSD: THE CONSCIOUSNESS-EXPANDING DRUG* 49, 52 (David Solomon ed., 1966).

⁶⁴ *Id.* at 15.

experience:

I was forced to interrupt my work in the laboratory in the middle of the afternoon and proceed home being affected by a remarkable restlessness, combined with a slight dizziness. At home I lay down and sank into a not unpleasant intoxicatedlike [sic] condition, characterized by an extremely stimulated imagination. In a dreamlike state, with eyes closed . . . I perceived an uninterrupted stream of fantastic pictures, extraordinary shapes with intense, kaleidoscopic play of colors. After some two hours this condition faded away.⁶⁵

In an effort to find out whether LSD was the cause of his strange condition, Hofmann took a larger dose. He wrote:

Every exertion of my will, every attempt to put an end to the disintegration of my ego, seemed to be a wasted effort. I was seized by the dreadful fear of going insane. I was taken to another world, another place, another time. My body seemed to be without sensation, lifeless, strange. Was I dying?⁶⁶

LSD gained popularity as a recreational drug and cultural phenomenon in the 1960s, before it was made illegal.⁶⁷ Its effects are similar to, but tend to be stronger and longer lasting than, psilocybin. Users report profound psychological experiences, i.e., trips, lasting 6 to 15 hours.⁶⁸ While still heavily stigmatized in the popular culture, LSD has also become recognized for its therapeutic and mindfulness effects. It has been found to help “people with a variety of conditions, focusing primarily on the treatment of anxiety associated with life-threatening illness.”⁶⁹ LSD is also known for “its ability to catalyze spiritual or mystical experiences and to facilitate feelings of interconnection,” and thus is useful to many “for spiritual uses, creativity, and personal growth.”⁷⁰

C. DMT

DMT (N,N-dimethyltryptamine) is unique in being the only psychedelic substance to occur naturally in the human body.⁷¹ This led to speculation that production of DMT might be a contributing factor to psychosis (which has since shown to

⁶⁵ *Id.*

⁶⁶ *Id.* at 16–18.

⁶⁷ Daniel Wacker et al., *Crystal Structure of an LSD-Bound Human Serotonin Receptor*, 168 CELL 377, 377 (2017).

⁶⁸ John Horgan, *DMT Is in Your Head, But It May Be Too Weird for the Psychedelic Renaissance*, SCI. AM. (Apr. 16, 2010), <https://blogs.scientificamerican.com/cross-check/dmt-is-in-your-head-but-it-may-be-too-weird-for-the-psychedelic-renaissance/>.

⁶⁹ *LSD-Assisted Psychotherapy*, MULTIDISCIPLINARY ASS’N PSYCHEDELIC STUD., <https://maps.org/research/psilo-ld> (last visited Apr. 4, 2019).

⁷⁰ *Id.*

⁷¹ Horgan, *supra* note 38.

be inaccurate).⁷² In 1990, Rick Strassman, a psychiatrist at the University of New Mexico, obtained permission from the federal government to conduct additional studies on DMT.

Suspecting that the substance might contribute to mystical experiences, Strassman conducted over 400 DMT sessions involving 12 volunteers who were injected intravenously (DMT is typically smoked) with varying doses. Strassman's findings were striking. Moderate doses of DMT "elicited the nearly instantaneous onset of visual hallucinatory phenomena, bodily dissociation, and extreme shifts in mood, which totally replaced subjects' previously ongoing mental experiences."⁷³ According to some accounts of the DMT experience, users feel like they are entering "free-standing, independent levels of existence"⁷⁴ and perceiving encounters with strange and intelligent "beings," "entities," or "aliens."⁷⁵ According to a description by one of Strassman's subjects:

There was an initial sense of panic. Then the most beautiful colors coalesced into beings. There were lots of beings. They were talking to me but they weren't making a sound. It was more as if they were blessing me, the spirits of life were blessing me. They were saying that life was good. At first it felt like I was going through a cave or a tunnel or into space, at a first rate, definitely. I felt like a ball hurtling down to wherever it was.⁷⁶

However, several of Strassman's subjects experienced adverse effects resulting from their subjective psychological experiences, often refusing to believe that what they had perceived were dreams or hallucinations. This eventually caused him to end the research study.⁷⁷

The DMT experience is more intense and concentrated than other classic psychedelics, typically lasting for no more than several minutes.⁷⁸ Recent research finds that the psychedelic experience induced by DMT mirrors near-death experiences—"complex subjective experiences . . . including the subjective feeling of transcending one's body and entering an alternative realm, perceiving and communicating with

⁷² *Id.*

⁷³ Rick J. Strassman et al., *Dose-Response Study of N,N-Dimethyltryptamine in Humans: II. Subjective Effects and Preliminary Results of a New Rating Scale*, 51 ARCHIVES GEN. PSYCHIATRY 98, 100 (1994).

⁷⁴ RICK STRASSMAN, DMT: THE SPIRIT MOLECULE 176 (2001).

⁷⁵ *Id.* at 185; Jules Evans, *Caves All the Way Down: Do Psychedelics Give Access to a Universal, Mystical Experience of Reality, or Is That Just a Culture-Bound Illusion?*, AEON (July 17, 2018), <https://aeon.co/essays/is-psychedelics-research-closer-to-theology-than-to-science>; Scott A. McGreal, *DMT, Aliens, and Reality—Part 1*, PSYCHOL. TODAY (Oct. 1, 2012), <https://www.psychologytoday.com/us/blog/unique-everybody-else/201210/dmt-aliens-and-reality-part-1>.

⁷⁶ STRASSMAN, *supra* note 74, at 190.

⁷⁷ *Id.* at 293.

⁷⁸ *Id.* at 46.

sentient ‘entities’ and themes related to death and dying.”⁷⁹

D. *Ayahuasca*

Ayahuasca (meaning “vine of souls” or “vine of the dead”) is a natural psychedelic traditionally used by indigenous groups from the Northwestern Amazon for therapeutic and ritualistic purposes.⁸⁰ It is typically prepared by combining the vine *Banisteriopsis caapi* with the leaves of the plant *Psychotria viridis*, which contain DMT.⁸¹ While DMT is orally inactive by itself, the alkaloids present in *B. caapi* allow the substance to act on the brain’s serotonin receptors when ingested orally, as with psilocybin or LSD.⁸²

Ayahuasca provides a less intense, but longer lasting, experience than DMT—usually several hours rather than minutes in duration.⁸³ Users sometimes describe the experience as dream-like and report profound insights into personal problems.⁸⁴ Ayahuasca’s effects may include alterations in perception, euphoria, increased introspection and remembrance of autobiographical memories, and positive mood.⁸⁵ Potential adverse reactions include nausea, vomiting, and bad trips.⁸⁶

In the last 25 years (and increasingly so in the last decade), widespread ayahuasca use has expanded from the Amazon to the U.S., Asia, Europe, and Africa.⁸⁷ Like other psychedelics, there is hope of therapeutic potential and cognitive enhancement. However, there is also concern about the dangers of psychedelic tourism and cultural misappropriation.⁸⁸ Notably, the U.S. Supreme Court has allowed a religious organization an exemption to the prohibition of ayahuasca under the Religious Freedom Restoration Act (RFRA) of 1993.⁸⁹

⁷⁹ Christopher Timmermann et al., *DMT Models the Near-Death Experience*, FRONTIERS PSYCHOL., Aug. 2018, at 1, 1.

⁸⁰ Nichols, *supra* note 5, at 268.

⁸¹ Ede Frecska et al., *The Therapeutic Potentials of Ayahuasca: Possible Effects Against Various Diseases of Civilization*, FRONTIERS PHARMACOLOGY, Mar. 2016, at 1, 1–2.

⁸² *Id.*

⁸³ Compare *id.* at 6–7 (listing studies which track effects of ayahuasca up to 125 minutes after ingestion), with Strassman et al., *supra* note 73, at 98 (“Psychological effects of IV DMT . . . were almost completely resolved by 30 minutes.”).

⁸⁴ Frecska et al., *supra* note 81, at 8.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1; Rafael Guimarães dos Santos, *Immunological Effects of Ayahuasca in Humans*, 46 J. PSYCHOACTIVE DRUGS 383, 383 (2014).

⁸⁸ Frecska et al., *supra* note 81, at 2.

⁸⁹ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420 (2006).

E. *Mescaline*

Mescaline is the psychoactive ingredient in the cactus plant peyote, which is commonly found in the American Southwest and Northern Mexico.⁹⁰ Evidence suggests that Native Americans have been using peyote as long ago as 5,700 years.⁹¹ Mescaline was heavily researched from about the 1870s to the 1960s.⁹² It has been suggested as a treatment for alcoholism and depression.⁹³ The new wave of psychedelics research, though, has focused on the other classic psychedelics to the relative exclusion of mescaline.⁹⁴

Mescaline is regularly consumed as a sacrament during services of the Native American Church.⁹⁵ While peyote contains mescaline, a prohibited Schedule I substance, members of the Native American Church have been held to have a legal exemption to use it for religious purposes.⁹⁶

II. PSYCHEDELICS AND THE LAW

This Part will provide a brief historic overview of the laws and events surrounding the legal prohibition of psychedelics. It focuses first on the events leading up to psychedelic prohibition, then on the prohibition of psychedelics itself, and lastly on recent decriminalization efforts under certain state and local laws.

A. *Before Psychedelic Prohibition*

Psychedelics have been used for thousands of years for their mind-altering properties. For instance, a hallucinogenic substance called soma was used regularly in ancient India and was written about with great praise in the literature during that time period.⁹⁷ In ancient Greece, documentation indicates that a secret ceremony

⁹⁰ Nichols, *supra* note 5, at 268.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 323.

⁹⁴ *E.g.*, Thomas Anderson et al., *Microdosing Psychedelics: Personality, Mental Health, and Creativity Differences in Microdosers*, 236 *PSYCHOPHARMACOLOGY* 731, 734 (2019) (majority of study participants using LSD or psilocybin); Anastasia Ruban & Aleksandra A. Kolodziej, *Changes in Default-Mode Network Activity and Functional Connectivity as an Indicator of Psychedelic-Assisted Psychotherapy Effectiveness*, 13 *NEUROPSYCHOLOGIA* 91 (2018) (reviewing studies of LSD, DMT, psilocybin, ketamine, and ayahuasca).

⁹⁵ Nichols, *supra* note 5, at 274.

⁹⁶ *Id.*; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420 (2006).

⁹⁷ Nichols, *supra* note 5, at 268.

in a village near Athens involved the ingestion of a psychedelic brew.⁹⁸ And as previously noted, Native Americans have been using peyote as a sacrament for millennia.⁹⁹ Indeed, naturally occurring psychedelics “might have been catalysts for the development of humankind’s earliest philosophies and theologies.”¹⁰⁰

In contrast, modern research on psychedelics in the United States began around 1874 and was openly accepted until about 1962.¹⁰¹ With minimal restrictions, research and interest in psychedelics continued to increase, peaking in the 1950s and into the 1960s.¹⁰² Studies during those decades produced many clinical findings, suggesting beneficial effects in the treatment of anxiety, mood, and substance use disorders.¹⁰³ According to one report:

Between 1950 and the mid-1960s there were more than a thousand clinical papers discussing 40,000 patients, several dozen books, and six international conferences on psychedelic drug therapy. It aroused the interest of many psychiatrists who were in no sense cultural rebels or especially radical in their attitudes. It was recommended for a wide variety of problems including alcoholism, obsessional neurosis, and childhood autism.¹⁰⁴

In 1961, the U.S. signed and ratified the United Nations Single Convention on Narcotic Drugs (the “Single Convention”), which regulated cannabis, opium, and cocaine, but not the classic psychedelics.¹⁰⁵ While the Single Convention did not forbid medical research of the substances it governed, it did “limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use, and possession of [those] drugs.”¹⁰⁶ And though it did

⁹⁸ *Id.* at 268.

⁹⁹ *Emp’t Div. v. Smith*, 494 U.S. 872, 903 (1990).

¹⁰⁰ David E. Nichols, *Hallucinogens*, 101 PHARMACOLOGY & THERAPEUTICS 131, 133 (2004) (citation omitted) (quoting RICHARD EVANS SCHULTES & ALBERT HOFMANN, *PLANTS OF THE GODS* (1979)); *see also* TERRENCE MCKENNA, *FOOD OF THE GODS* 25 (1992) (proposing that ingestion of psilocybin mushrooms might have sped up the evolutionary process between *Homo erectus* and early *Homo sapiens*, known as the “stoned ape” theory).

¹⁰¹ Richard Elliot Doblin, *Regulation of the Medical Use of Psychedelics and Marijuana* 9 (June 2000) (unpublished Ph.D thesis, Harvard University).

¹⁰² Nichols, *supra* note 5, at 267.

¹⁰³ *E.g.*, Jan Bastiaans, *Mental Liberation Facilitated by the Use of Hallucinogenic Drugs*, in PSYCHEDELIC REFLECTIONS 143–52 (Lester Grinspoon & James B. Bakalar eds., 1983); J.N. Sherwood et al., *The Psychedelic Experience—A New Concept in Psychotherapy*, 4 J. NEUROPSYCHIATRY 69, 77 (1962); *see also* R.E. Mogar & C. Savage, *Personality Changes Associated with Psychedelic (LSD) Therapy: A Preliminary Report*, 1 PSYCHOTHERAPY: THEORY RES. & PRACTICE 154, 154 (1964).

¹⁰⁴ LESTER GRINSPOON & JAMES B. BAKALAR, *PSYCHEDELIC DRUGS RECONSIDERED* 192 (1997).

¹⁰⁵ Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151.

¹⁰⁶ *Id.* art. 4(c).

not regulate psychedelics, the Single Convention marked a shift in philosophy from an advertising and labeling framework to a morality-based approach of prohibiting the use of several chemicals.¹⁰⁷

Meanwhile, also in the early 1960s, the Harvard Research Project began at Harvard University.¹⁰⁸ Timothy Leary—then a lecturer in psychology and later a counterculture icon—and Richard Alpert—then assistant professor in psychology and later the spiritual figure known as Ram Dass—began a series of experiments with psilocybin and other psychedelics.¹⁰⁹ The goal was initially to characterize the subjective effects of the substances in various naturalistic environments.¹¹⁰ Given the lack of regulations on psychedelics, Leary and Alpert, who were not medical doctors, could administer the substances to human subjects without medical supervision.¹¹¹ These studies “generated an increasing amount of attention, controversy and backlash, and marked the concluding phase of the era of open acceptance of psychedelic research in the United States.”¹¹²

Beginning with 175 participants, the experiments at Harvard continued to grow to include prisoners and divinity students who would take psilocybin in religious contexts.¹¹³ Leary and Alpert began to self-administer psychedelics as well.¹¹⁴ Criticism from the Harvard community started to mount as many were not convinced that the psilocybin experiences were beneficial to participants or to those administering the substances, for that matter.¹¹⁵

In 1962, the Kefauver-Harris Amendments to the 1938 Food, Drug, and Cosmetics Act were passed (the “1962 Amendments”), which resulted in a major expansion of Food and Drug Administration (FDA) authority.¹¹⁶ The 1962 Amendments required “adequate and well-controlled investigations” that provided sufficient evidence showing that a drug was safe and effective before being marketed to the public.¹¹⁷ Thus, pharmaceutical companies now had to obtain premarketing

¹⁰⁷ Marks, *supra* note 4, at 88. In fact, the Single Convention’s preamble declared that use of narcotics “[c]onstitutes a serious evil for the individual and is fraught with social and economic danger to mankind.” Single Convention on Narcotic Drugs, *supra* note 105, pmb1.

¹⁰⁸ Doblin, *supra* note 101, at 27.

¹⁰⁹ *Id.*; see also RAMDASS.ORG, <https://www.ramdass.org> (last visited Apr. 12, 2019).

¹¹⁰ Timothy Leary et al., *Reactions to Psilocybin in a Supportive Environment*, 137 J. NERVOUS & MENTAL DISEASE 561–63 (1963).

¹¹¹ Doblin, *supra* note 101, at 27–28.

¹¹² *Id.* at 27.

¹¹³ *Id.* at 27–28.

¹¹⁴ See JAY STEVENS, *STORMING HEAVEN: LSD AND THE AMERICAN DREAM* (1987).

¹¹⁵ Doblin, *supra* note 101, at 29.

¹¹⁶ Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780, 780 (1962).

¹¹⁷ *Id.* at 781.

approval from the FDA.¹¹⁸ Under the 1962 Amendments, psychedelics were considered to be unapproved, experimental drugs that required FDA permission before they could be administered to research subjects.¹¹⁹ Psychedelics could no longer be provided to physicians by pharmaceutical companies.¹²⁰ Instead, psychedelics could only be supplied to researchers who worked within federal or state agencies or obtained permission from those agencies.¹²¹

The 1962 Amendments had an adverse effect on the Harvard Research Project, given the increasing difficulty of obtaining psilocybin.¹²² And despite attempted reforms to the research—e.g., the creation of an advisory board to review additional projects, medical screenings of subjects, and the elimination of participation by undergraduates—Leary and Alpert continued to draw substantial opposition from the Harvard administration and faculty regarding their refusal to comply with the strict requirements of scientific research, rumors that the team was providing psychedelics to undergraduates, and especially their engagement with non-academic counterculture figures in the growing psychedelics movement of the 1960s.¹²³ Ultimately, Leary and Alpert departed Harvard in 1962 to start what they called the International Federation for Internal Freedom.¹²⁴ Leary's subsequent zealous advocacy, multiple arrests and imprisonments, and increasingly bizarre conduct contributed greatly to the moral panic surrounding psychedelics in the mid-to-late 1960s.¹²⁵

Then the Drug Abuse Control Amendments of 1965 mandated that no person may sell, manufacture, compound, or process any depressant, stimulant, or drug with a "hallucinogenic effect," except those with special permits for certain restricted uses.¹²⁶ While possession of psychedelics remained legal for a time, the FDA began to shut down research projects relating to LSD and mescaline.¹²⁷ Pharmaceutical

¹¹⁸ U.S. DEP'T OF HEALTH & HUM. SERVS., GUIDANCE FOR INDUSTRY: PROVIDING CLINICAL EVIDENCE OF EFFECTIVENESS FOR HUMAN DRUG AND BIOLOGICAL PRODUCTS 2 (1998).

¹¹⁹ Doblin, *supra* note 101, at 34.

¹²⁰ *Id.*

¹²¹ GRINSPOON & BAKALAR, *supra* note 104, at 309.

¹²² Doblin, *supra* note 101, at 36.

¹²³ *Id.* at 30, 47.

¹²⁴ *Id.* at 32, 36.

¹²⁵ See, e.g., POLLAN, *supra* note 20, at 203–07. Pollan believes, though, that the psychedelic "upheaval would almost certainly have happened without Timothy Leary" given others' widespread recreational promotion of psychedelics, for instance Ken Kesey's Bay Area "Acid Tests." *Id.* at 206–07.

¹²⁶ Drug Abuse Control Amendments of 1965, 89 Pub. L. No. 74, 79 Stat. 226–28, 230 (1965).

¹²⁷ Moheb Costandi, *A Brief History of Psychedelic Psychiatry*, 27 *PSYCHOLOGIST* 714, 715 (2014).

companies stopped distributing LSD.¹²⁸ In 1968, possession of LSD was criminalized.¹²⁹

B. *Psychedelic Prohibition*

Despite continued positive findings with respect to psychedelics research, public opinion turned sharply against the substances during the late 1960s. This was due in large part to the negative publicity from the Harvard Research Project and Leary's later conduct, increasing recreational uses of the substances, and the aforementioned new drug laws. A backlash of hysteria resulted against psychedelics, with exaggerated media reports of drug-induced insanity, brain damage, attempts to fly after taking LSD, and other sensationalized or fabricated stories.¹³⁰ Michael Pollan writes:

The dark side of psychedelics began to receive tremendous amounts of publicity—bad trips, psychotic breaks, flashbacks, suicides—and beginning in 1965 the exuberance surrounding these new drugs gave way to moral panic. As quickly as the culture and the scientific establishment had embraced psychedelics, they now turned sharply against them. By the end of the decade, psychedelic drugs—which had been legal in most places—were outlawed and forced underground.¹³¹

Moreover, psychedelics were blamed by those in power for anti-Vietnam War attitudes and the rejection of mainstream culture and social norms by the younger generation. As journalist Don Lattin puts it:

One of the mantras of the 1960s was “Question Authority,” and the psychedelic counterculture of that era prompted many of us to question everything, including the very nature of reality. Altered states of consciousness inspired us to reject the dogma and denominationalism of organized religion and value our own spiritual and mystical experience. Psychoactive plants like peyote, psilocybin mushrooms and ayahuasca gave us a new appreciation of our interconnectedness to the rest of the natural world, inspiring the environmental movement. And, during the war in Vietnam, chemically induced compassion did not help the military-industrial complex persuade us that it was a good idea to send hundreds of thousands of young men to the other side of the

¹²⁸ Doblin, *supra* note 101, at 41.

¹²⁹ LSD and Other Depressant and Stimulant Drugs, 90 Pub. L. No 639, 82 Stat. 1361, 1361 (1968).

¹³⁰ Nichols, *supra* note 5, at 267; *see also*, J. Fred E. Shick & David E. Smith, *Analysis of the LSD Flashback*, 3 J. PSYCHEDELIC DRUGS 13, 13 (1970) (describing evidence supporting “the national media’s publicity campaign against LSD by utilizing quick and easy slogans such as ‘LSD Can Turn On You’ and ‘After Only One Trip, It Can Recur at Any Time’”).

¹³¹ POLLAN, *supra* note 20, at 3.

world to slaughter people in Southeast Asia.¹³²

The War on Drugs has since been found to have been a politically motivated power play to discredit the anti-war and hippie movements and to oppress racial minorities.¹³³ As Pollan eloquently describes the rationale for prohibiting psychedelics, the “Nixon Administration sought to blunt the counterculture by attacking its neurochemical infrastructure.”¹³⁴ In fact, an interview with Nixon’s top advisor, John Erlichman, was recently uncovered in which he admits that the Nixon Administration’s motive for starting the entire drug war was both racist and culturist. Erlichman confesses:

You want to know what [the War on Drugs] was really all about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying. We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.¹³⁵

In 1970, Congress passed the Controlled Substances Act (CSA), which was signed into law by Nixon.¹³⁶ The CSA was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹³⁷ Having replaced the prior patchwork of legislation relating to psychoactive and addictive substances, the CSA has since served as the cornerstone for federal drug control.¹³⁸

The CSA regulates the manufacture, distribution, sale, import and export, dispensing, possession, and research of substances under its control.¹³⁹ The implementing regulations require that each person or entity who handles a controlled substance

¹³² DON LATTIN, *CHANGING OUR MINDS: PSYCHEDELIC SACRAMENTS AND THE NEW PSYCHOTHERAPY* 11 (2017).

¹³³ See SHANE BLACKMAN, *CHILLING OUT: THE CULTURAL POLITICS OF SUBSTANCE CONSUMPTION, YOUTH AND DRUG POLICY* 28–51 (2004).

¹³⁴ POLLAN, *supra* note 20, at 58.

¹³⁵ *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited June 22, 2019).

¹³⁶ Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801–904 (2012)).

¹³⁷ See Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALBANY GOV’T L. REV. 332, 334–35 (2013).

¹³⁸ *Id.* at 333.

¹³⁹ 21 U.S.C. § 801(2). The implementing regulations require that each person or entity who handles a controlled substance be registered or licensed with the Drug Enforcement Administration (DEA). 21 C.F.R. § 1301 (2018).

be registered or licensed with the Drug Enforcement Agency (DEA).¹⁴⁰ Each registrant or licensee must adhere to regulations designed to ensure that controlled substances are (1) used only for legitimate medical or scientific purposes, and (2) given to patients who have a legitimate need for the substances.¹⁴¹ To this end, controlled substances are classified into a sort of spectrum under the CSA.¹⁴² According to the DEA:

Drugs, substances, and certain chemicals used to make drugs are classified into five (5) distinct categories or schedules depending upon the drug's acceptable medical use and the drug's abuse or dependency potential. The abuse rate is a determinate factor in the scheduling of the drug; for example, Schedule I drugs have a high potential for abuse and the potential to create severe psychological and/or physical dependence. As the drug schedule changes—Schedule II, Schedule III, etc., so does the abuse potential—Schedule V drugs represent the least potential for abuse.¹⁴³

Resulting largely from the stigma that developed as to psychedelics in the 1960s, the CSA included the classic psychedelics (along with cannabis) in Schedule

¹⁴⁰ 21 C.F.R. § 1301. The CSA grants rule-making authority to the Attorney General to schedule and reschedule substances, which has been sub-delegated to the head of the DEA since 1973. 21 U.S.C. § 821; Kreit, *supra* note 137, at 335.

¹⁴¹ 21 C.F.R. §§ 1301.32, 1306.

¹⁴² Under the CSA, a substance is classified as Schedule I if it (1) “has a high potential for abuse,” (2) “no currently accepted medical use in treatment in the United States,” and (3) “[t]here is a lack of accepted safety for use of the drug . . . under medical supervision.” 21 U.S.C. § 812(b)(1). Schedule I substances “may be obtained and used lawfully only by doctors who submit a detailed research protocol for approval by the Food and Drug Administration (FDA) and who agree to abide by strict recordkeeping and storage rules.” *All. for Cannabis Therapeutics v. Drug Enf't Admin.*, 15 F.3d 1131, 1133 (D.C. Cir 1994) (citing 21 C.F.R. §§ 1301.33, 1301.42). Examples include the classic psychedelics as well as heroin, cannabis, and MDMA. Schedule II substances are those with “a high potential for abuse” with use potentially leading to “severe psychological or physical dependence.” 21 U.S.C. § 812(b)(2). Examples include cocaine, methamphetamine, oxycodone, fentanyl, Adderall and Ritalin. In the middle of the spectrum, Schedule III substances are defined as drugs with a “moderate or low potential physical dependence or high psychological dependence.” *Id.* § 812(b)(3). The abuse potential for Schedule III substances is purportedly less than Schedule I and Schedule II, but more than Schedule IV. *Id.* Examples include ketamine (a substance with certain psychedelic properties), anabolic steroids, and testosterone. Nearing the far side of the spectrum, Schedule IV substances are those considered to have “a low potential for abuse” and low risk of dependence. *Id.* § 812(b)(4). Examples include Xanax, Soma, Valium, and Ambien. Finally, Schedule V substances are those with “a low potential for abuse relative to the drugs or other substances in schedule IV” and consist of preparations containing limited quantities of certain narcotics. *Id.* § 812(b)(5). Examples are Lomitol, Motofen, Lyrica, and Parapectolin.

¹⁴³ U.S. DRUG ENF'T ADMIN., DRUG SCHEDULING, <http://www.dea.gov/druginfo/ds.shtml> (last visited June 18, 2019).

I, the most restrictive class of substances.¹⁴⁴ Severe punishments for the use, possession, and distribution of psychedelics resulted, with draconian sentences akin to those who committed violent crimes.¹⁴⁵ The other consequence of scheduling psychedelics is that applications and procedures necessary to conduct research on the substances became extremely burdensome and expensive.¹⁴⁶

Further still, the 1971 Convention on Psychotropic Drugs placed the classic psychedelics (and cannabis) under strict international control, as international governments bound by the treaty followed the U.S.'s lead.¹⁴⁷ This led to an international moratorium on psychoactive substances, including psychedelics, which exists to this day. While the drug war is certainly not the first time psychedelics have been outlawed by a government, the U.S. not only declared psychedelics illegal, but also "successfully exported its ideology against 'illicit drugs' through international treaties."¹⁴⁸ In effect, this created a form of cultural hegemony.

C. *Psychedelic Decriminalization*

In opposition to federal drug policy, state law efforts began to decriminalize cannabis as early as 1973, with Oregon being the first state to do so.¹⁴⁹ These early progressive efforts served as a precursor to the legalization of cannabis occurring widely in recent years. We are now beginning to see the decriminalization of psychedelics, namely psilocybin, at the state and municipal levels as well.

In May 2019, Denver, Colorado became the first city in the U.S. to decriminalize psilocybin following an initiative that collected enough signatures to put a measure on the ballot for municipal elections. In serving as a bellwether for the rest of the country, this successful initiative might be considered to represent a major turning point in the War on Drugs.¹⁵⁰ Though the measure does not legalize psilocybin, it makes use and possession of the substance by those 21 and older the city's "lowest law enforcement priority."¹⁵¹ Under the measure, psilocybin mushrooms

¹⁴⁴ Benton B. Bodamer, *Psychoactive Substances, Dietary Supplements, and the War on "Drugs": Law, Myth, and Tradition as the Social Control of Consciousness*, 66 OHIO ST. L.J. 1311, 1317–18 (2005).

¹⁴⁵ David E. Nichols, *Hallucinogens*, 101 PHARMACOLOGY & THERAPEUTICS 131, 133 (2004).

¹⁴⁶ *Id.* at 151.

¹⁴⁷ David Nutt, *Illegal Drugs Laws: Clearing a 50-Year-Old Obstacle to Research*, PLOS BIOLOGY, Jan. 2015, at 2.

¹⁴⁸ Devenot, *supra* note 28.

¹⁴⁹ Keith Speights, *Where is Marijuana Legal?*, MOTLEY FOOL (Dec. 7, 2018, 11:12 AM), <https://www.fool.com/investing/2018/12/07/where-is-marijuana-legal.aspx>.

¹⁵⁰ *Cf.* Pollan, *No So Fast*, *supra* note 20 (remarking that "[p]silocybin has a lot of potential as medicine, but we don't know enough about it yet to legalize it," and claiming that "ballot initiatives may not be the smartest way to get there").

¹⁵¹ Honig, *supra* note 13 (noting that "a slim majority of 50.56% voted in favor of

grown for personal use will also be a low enforcement priority.¹⁵²

The states of Oregon and California (after a previously failed attempt), are also taking steps toward decriminalizing psilocybin.¹⁵³ In November 2018, for instance, Oregon’s secretary of state approved language for a ballot initiative that would decriminalize psilocybin, i.e., “reduce existing criminal penalties for the unlawful manufacture, possession, and delivery of psilocybin,” and even allow for its manufacture under a license in certain cases.¹⁵⁴ Legislation for decriminalizing psilocybin and similar substances has also been introduced in Iowa.¹⁵⁵

Decriminalization of psilocybin or other psychedelics would reduce or eliminate criminal penalties for use and possession, and possibly manufacturing and distribution, depending on the breadth of the legislation.¹⁵⁶ While it would not eliminate the black market for psychedelics, decriminalization might serve to lessen the stigma associated with the substances.¹⁵⁷ State decriminalization—unlike legalization—is not necessarily in conflict with federal law either, i.e., decriminalization means that states, which cannot be forced to implement drug regulations, are taking no legislative action.¹⁵⁸ Thus, by decriminalizing psychedelics, states would be leaving the regulation—i.e., investigation, prosecution, and sentencing—of the substances to the federal government, should it choose to pursue enforcement under the CSA.¹⁵⁹

Ordinance 301”).

¹⁵² *Id.*

¹⁵³ Kyle Jaeger, *California Activists Take First Steps to Decriminalize Psilocybin Mushrooms Statewide*, MARIJUANA MOMENT <https://www.marijuanamoment.net/california-activists-take-first-steps-to-decriminalize-psilocybin-mushrooms-statewide>; Meerah Powell, *How Denver’s Vote to Decriminalize Psilocybin Mushrooms Could Help Oregon*, OPB (May 9, 2019, 3:00 PM), <https://www.opb.org/news/article/denver-psilocybin-legalization-oregon-ballot-measure>. Oregon is already the first state to have reduced criminal sanctions—downgrading penalties for possession of small amounts of psychedelics from a felony to a misdemeanor—for possession of certain Schedule I substances, including psilocybin and LSD. Marks, *supra* note 4, at 131–32.

¹⁵⁴ Office of the Sec’y of State of Or., Initiative Petition 2020-012 (Nov. 8, 2018), <http://oregonvotes.org/irr/2020/012cvt.pdf> (“Reduces psilocybin criminal penalties; allows licensed psilocybin administration, manufacture, possession, delivery; creates regulatory program, fund.”); Kristian Foden-Vencil, *Oregon Takes 1st Major Step Toward Legalizing Psychedelic Mushrooms*, OPB (Nov. 29, 2018, 4:37 PM), <https://www.opb.org/news/article/legalize-mushrooms-psilocybin-ballot-measure-oregon>.

¹⁵⁵ Honig, *supra* note 13.

¹⁵⁶ Marks, *supra* note 4, at 131.

¹⁵⁷ *Id.* at 130.

¹⁵⁸ *Id.* at 131.

¹⁵⁹ *Id.*

In the context of marijuana, Eric Blumenson and Eva Nilsen note that decriminalization, while imperfect, is a step forward from a policy standpoint.¹⁶⁰ It eliminates the “virtual[] total loss of liberty imposed” under prohibition.¹⁶¹ Decriminalization cuts down on arrests, imprisonments, and wasteful law enforcement practices.¹⁶² And, arguably, as a matter of state rather than federal law, decriminalization does not violate the U.S.’s international drug treaty obligations previously discussed.¹⁶³ Decriminalization thus represents a realistic and pragmatic step toward ending the prohibition on psychedelics.

III. JUSTIFYING PSYCHEDELIC DECRIMINALIZATION

This Part elaborates on the theoretical justifications that exist for decriminalizing psychedelics. Several advocates have made strong arguments for law reform based on mental health and substance abuse crises, religious freedom, cognitive liberty, and identity politics through parallels to queer theory and the LGBTQ movement. This Part will first review these justifications and then, in taking into account tenets of both the cognitive liberty and identity politics approaches, offer a reframed perspective rooted in neurodiversity—the principal that cognitive differences, such as those caused by use of psychedelics, should be recognized and respected along with other human variations and social categories.¹⁶⁴

A. *Psychedelics as Medicines*

In an excellent and timely contribution to the legal literature on psychedelics, Mason Marks provides the “first comprehensive review of the social and legal obstacles to developing psychedelic medicines.”¹⁶⁵ Marks, who holds degrees in both law and medicine, focuses understandably on the medical aspect of psychedelic law reform. To this end, he joins in advocating for the creation of therapeutic exceptions to the prohibition of psychedelics. As Marks notes, given the promise of psychedelics as treatments for depression, anxiety, substance use disorders, and other mental illnesses, it is important to move beyond the 1960s-era stigma of psychedelics, especially given the current opioid and suicide epidemics plaguing the U.S.¹⁶⁶ Marks explains:

Physicians and policy makers should . . . attempt to understand where these

¹⁶⁰ Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y 43, 74 (2009).

¹⁶¹ *Id.* at 76.

¹⁶² *Id.* at 74.

¹⁶³ *Id.*

¹⁶⁴ See Part III.D.

¹⁶⁵ Marks, *supra* note 4, at 69.

¹⁶⁶ *Id.* at 73–74.

biases come from and examine whether they are rooted in fact or fiction.

Despite the growing promise of psychedelics, investigations into their therapeutic effects are often too slow, expensive, and infrequent. Legitimate medical research is hindered by the Schedule I status of [psychedelics]. Updating current regulations could reduce barriers to research and open up new alternatives to millions of patients who are nonresponsive to traditional therapies.¹⁶⁷

According to Marks, legal measures (such as state law decriminalization) that would encourage the medical use of psychedelics are justified based on the relative ineffectiveness of traditional psychiatric drugs in treating mental illness. Suicide claims roughly 40,000 Americans per year making it the tenth leading cause of death in the U.S.,¹⁶⁸ and the current opioid epidemic was recently declared to be a public health emergency. Indeed, one in five adults in the U.S. experience some form of mental illness every year.¹⁶⁹ While psychiatric drugs, especially selective serotonin reuptake inhibitors (SSRIs) like Prozac, are common treatments for mental illness, they are not altogether effective.¹⁷⁰ As noted by one expert:

It can be seen that the effects of psychedelic drugs could go beyond the relatively small and inconsistent effects of pharmaceuticals such as SSRIs in healthy subjects, in that they not only produce improvements in mood, but may also give access to states of consciousness and insights of great significance even after a single dose. In doing so, psychedelic drugs may cater to a human need for meaning, connectedness and purpose; needs which it may be argued are widely overlooked in Western, individualistic cultures.¹⁷¹

Indeed, psychedelics operate differently from modern medicine in that they provide users with powerful mystical or psychological experiences which can act as catalysts for changes in thought patterns and behavior.¹⁷² As described by one sci-

¹⁶⁷ *Id.* at 74.

¹⁶⁸ Alex B. Long, *Abolishing the Suicide Rule*, 113 NW. U. L. REV. 767, 767 (2019).

¹⁶⁹ *Mental Illness*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml#part_154785 (last updated Feb. 2019).

¹⁷⁰ Marks, *supra* note 4, at 75.

¹⁷¹ Elsey, *supra* note 11, at 4.

¹⁷² See Peter Gasser et al., *LSD-Assisted Psychotherapy for Anxiety Associated with a Life-Threatening Disease: A Qualitative Study of Acute and Sustained Subjective Effects*, 29 J. PSYCHOPHARMACOLOGY 57, 57 (2015); Peter Gasser et al., *Safety and Efficacy of Lysergic Acid Diethylamide-Assisted Psychotherapy for Anxiety Associated with Life-Threatening Diseases*, 202 J. NERVOUS & MENTAL DISEASE 513, 513–14 (2014); Griffiths et al., *supra* note 53; Griffiths et al., *supra* note 57; Teri Krebs & Pål-Ørjan Johansen, *Lysergic Acid Diethylamide (LSD) for Alcoholism: Meta-Analysis of Randomized Controlled Trials*, 26 J. PSYCHOPHARMACOLOGY 994, 994 (2012); Francisco A. Moreno et al., *Safety, Tolerability, and Efficacy of Psilocybin in 9 Patients with Obsessive-Compulsive Disorder*, 67 J. CLINICAL PSYCHIATRY 1735, 1735 (2006); David E. Nichols

entific study: “[s]ingle moderate-dose psilocybin, in conjunction with psychotherapy produced rapid, robust, and sustained clinical benefits in terms of reduction of anxiety and depression in patients with life-threatening cancer. . . . leading to immediate antidepressant and anxiolytic effects with enduring [] clinical benefits.”¹⁷³

Given the potential benefits and growing body of research surrounding psychedelics, Marks proposes several options for legal reform. These include (1) working within existing regulatory guidelines to get FDA approval for psychedelics; (2) removing at least certain psychedelics from Schedule I of the CSA so that research becomes less expensive and burdensome; (3) reducing federal restrictions on psychedelics; (4) creating state-governed systems for regulating psychedelics; (5) implementing state-sponsored psychedelic research programs; and (6) decriminalizing psychedelics, at least for medical purposes, at the state level.¹⁷⁴

One issue with treating psychedelics exclusively as medicines, however, is that it presupposes a focus on limited therapeutic exceptions to prohibition of psychedelics. In addition to therapeutic uses, however, the psychological experiences generated by psychedelics, and related neurological changes to the brain, are also being found to enhance the well-being of individuals without health problems.¹⁷⁵ Focusing only on medical exemptions to prohibition could obscure the fact that healthy individuals can also benefit from the use of psychedelics, and that a legal right to do so could exist.¹⁷⁶

et al., *Psychedelics as Medicines: An Emerging New Paradigm*, 101 *CLINICAL PHARMACOLOGY & THERAPEUTICS* 209, 215 (2017).

¹⁷³ Stephen Ross et al., *Rapid and Sustained Symptom Reduction Following Psilocybin Treatment for Anxiety and Depression in Patients with Life-Threatening Cancer: A Randomized Controlled Trial*, 30 *J. PHARMACOLOGY* 1165, 1175 (2016).

¹⁷⁴ Marks, *supra* note 4, at 69.

¹⁷⁵ Rick Doblin, *Pahnke’s “Good Friday Experiment”: A Long-term Follow-up and Methodological Critique*, 23 *J. TRANSPERSONAL PSYCHOL.* 1, 2 (1991); Patrick C. Dolder et al., *LSD Acutely Impairs Fear Recognition and Enhances Emotional Empathy and Sociality*, 41 *NEUROPSYCHOPHARMACOLOGY* 2638, 2640 (2016); Elsey, *supra* note 11, at 3–5; Griffiths et al., *supra* note 57, at 270; Willis W. Harman et al., *Psychedelic Agents in Creative Problem-Solving: A Pilot Study*, 19 *PSYCHOL. REP.* 211, 215 (1966); K.P.C. Kuypers et al., *Ayahuasca Enhances Creative Divergent Thinking While Decreasing Conventional Convergent Thinking*, 233 *PSYCHOPHARMACOLOGY* 3395, 3396 (2016); Matthias E. Liechti et al., *Alterations of Consciousness and Mystical-Type Experiences After Acute LSD in Humans*, 234 *PSYCHOPHARMACOLOGY* 1499, 1508 (2017); Katherine A. MacLean et al., *Mystical Experiences Occasioned by the Hallucinogen Psilocybin Lead to Increases in the Personality Domain of Openness*, 25 *J. PSYCHOPHARMACOLOGY* 1453, 1456 (2011); C. Savage et al., *The Effects of Psychedelic (LSD) Therapy on Values, Personality, and Behavior*, *INT’L J. NEUROPSYCHIATRY* 241, 242 (1966); Yasmin Schmid et al., *Acute Effects of Lysergic Acid Diethylamide in Healthy Subjects*, 78 *BIOLOGICAL PSYCHIATRY* 544, 551 (2015); Walter Norman Pahnke, *Drugs & Mysticism: An Analysis of the Relationship Between Psychedelic Drugs and Mystical Consciousness* (June 1963) (unpublished Ph.D. dissertation, Harvard University).

¹⁷⁶ Elsey, *supra* note 11, at 3–5.

A related issue is ensuring equal access to the benefits of medicalized psychedelics. There is a danger that psychedelics could “become medicine for the elite,” absent adequate health insurance coverage.¹⁷⁷ Some predict that the microdosing trend—taking very small amounts of a psychedelic daily to boost mood, attention, and creativity—may lead to the control of psychedelics by big pharmaceutical companies, given that the economic market could now be large enough to justify their entry. Indeed, “[o]n the cusp of medicalization, there is a very real chance that psychedelics will become another cash crop for the pharmaceutical industry.”¹⁷⁸

Moreover, the state law bills to decriminalize psilocybin have generally not made a firm distinction between medical and non-medical uses. Thus, while the medical dimension of psychedelic reform is certainly significant, the remainder of the Article will focus on potential justifications for reform beyond therapeutic uses of psychedelics.

B. *Psychedelics and Religious Freedom*

Some believe that use of psychedelics and the mystical experiences they give rise to should be protected under the Free Exercise Clause of the First Amendment: “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*”¹⁷⁹ In 1968, Alan Watts wrote *Psychedelics and Religious Experience* in the *California Law Review*, in which he presented a vigorous religious freedom argument against the impending prohibition of psychedelics.¹⁸⁰ In it, Watts describes the mystical psychedelic experience as consisting of several phases leading to a unitary or non-dualistic understanding of reality different from our consensus reality.¹⁸¹

First is a “slowing down of time, a *concentration in the present*. One’s normally compulsive concern for the future decreases, and one becomes aware of the enormous importance and interest of what is happening at the moment.”¹⁸² Second is an

awareness of polarity the vivid realization that states, things, and events which we ordinarily call opposite are interdependent, like back and front or the poles of a magnet. By polar awareness one sees that things which are explicitly different are implicitly one: self and other, subject and object, left and right, male and female¹⁸³

¹⁷⁷ Davis, *supra* note 12.

¹⁷⁸ *Id.*

¹⁷⁹ U.S. CONST. amend. I (emphasis added).

¹⁸⁰ Alan Watts, *Psychedelics and Religious Experience*, 56 CALIF. L. REV. 74 (1968).

¹⁸¹ *Id.*

¹⁸² *Id.* at 76.

¹⁸³ *Id.* at 77.

Third is “*awareness of relativity*. I see that I am a link in an infinite hierarchy of processes and beings, ranging from molecules through bacteria and insects to human beings, and, maybe, to angels and gods—a hierarchy in which every level is in effect the same situation.”¹⁸⁴ From this, Watts claims that “it is but a short step to the realization that all forms of life and being are simply variations on a single theme: we are all in fact one being doing the same thing in as many different ways as possible.”¹⁸⁵ Fourth and finally is “*awareness of energy*, often in the form of intense white light, which seems to be both the current in your nerves and that mysterious e which equals mc^2 .”¹⁸⁶

Given the profundity of the psychedelic experience, Watts concludes that “free and responsible use [of psychedelics should] be exempt from restraint in any republic which maintains a constitutional separation of Church and State.”¹⁸⁷ If the “mystical experience conforms with the tradition of genuine religious involvement, and to the extent that psychedelics induce that experience,” according to Watts, “users are entitled to some constitutional protection.”¹⁸⁸ Otherwise it is a “barbarous restriction of spiritual and intellectual freedom.”¹⁸⁹ According to Watts:

Inability to accept the mystic experience is more than an intellectual handicap. Lack of awareness of the basic unity of organism and environment is a serious and dangerous hallucination. For in a civilization equipped with immense technological power, the sense of alienation between man and nature leads to the use of technology in a hostile spirit—to the “conquest” of nature instead of intelligent cooperation with nature. The result is that we are eroding and destroying our environment, spreading Los Angelization instead of civilization.¹⁹⁰

If psychedelic mysticism constitutes the exercise of religion, the spiritual use of psychedelics should perhaps be considered an extension of the principle of religious freedom that already is recognized as to certain religious groups to use ayahuasca and mescaline under the Free Exercise Clause and Religious Freedom Restoration Act (RFRA).¹⁹¹ In *Gonzalez v. O Centro Espirita Beneficente Uniao de Vegetal*, the Supreme Court allowed religious exemptions to the CSA for purposes of a Brazilian Church’s use of ayahuasca based on RFRA.¹⁹² In *Church of the Holy Light of the*

¹⁸⁴ *Id.* at 78.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 79.

¹⁸⁷ *Id.* at 84.

¹⁸⁸ *Id.* at 84–85.

¹⁸⁹ *Id.* at 85.

¹⁹⁰ *Id.* at 82.

¹⁹¹ Lauren Agresti, *Not Everyone’s Cup of Tea: Ayahuasca, Spiritual Seekers & Free Exercise*, 14 GEO. J.L. & PUB. POL’Y 269, 272 (2016).

¹⁹² *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).

Queen v. Mukasey, a district court in Oregon extended this ruling to allow members of the Brazilian Santo Daime religion to import and drink ayahuasca for religious ceremonies, subject to reasonable restrictions.¹⁹³ And, in spite of an adverse decision in *Employment Division v. Smith*, exemptions for uses of peyote for sacramental purposes by the Native American Church might exist under RFRA.¹⁹⁴

Problems with the religious freedom argument in the context of chemical mysticism, though, include difficulties in defining both “religion” and “freedom.” Religion is an amorphous concept of which the U.S. Supreme Court has avoided discussing seriously.¹⁹⁵ Walter Houston Clark proposes that religion be conceptualized broadly as “the inner individual’s experience of a Beyond, especially as evidenced by [their] attempts to harmonize [their] life with the Beyond.”¹⁹⁶ According to Erich Fromm, religion is “any group-shared system of thought and action that offers the individual a frame of orientation and an object of devotion.”¹⁹⁷

Under these broad definitions, if a psychedelic allows for a mystical experience, even in someone who identifies as atheist or agnostic, perhaps that is a religious use of it.¹⁹⁸ Yet other definitions of free exercise, for First Amendment purposes, are considerably narrower and limited to organized religion or theistic practice.¹⁹⁹ Moreover, claims to religious freedom often require a longstanding commitment to religious sincerity and a way of life that the casual user of psychedelics, even if spiritually guided, would be hard-pressed to meet.²⁰⁰

¹⁹³ *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 1210 (D. Or. 2009).

¹⁹⁴ *Native Am. Church of N.Y. v. United States*, 468 F. Supp. 1247, 1251 (S.D.N.Y. 1979). *But see* *Emp’t Div. v. Smith*, 494 U.S. 872, 882 (1990) (finding that the free speech clause of the First Amendment offered no protection for use of peyote by petitioner because use of the substance was “unconnected with any communicative activity,” and holding that the First Amendment’s protection of the “free exercise” of religion does not allow a person to use a religious motivation as a reason not to obey a law of general applicability). Constitutional protection for Native American religious peyote use is ambiguous based on *Smith* and the Religious Freedom Restoration Act, which was passed following *Smith*. Christopher Parker, *A Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use*, 16 BYU J. PUB. L. 89, 89 (2001).

¹⁹⁵ Charlotte Walsh, *Psychedelics and Cognitive Liberty: Reimagining Drug Policy Through the Prism of Human Rights*, 29 INT’L J. DRUG POL’Y 80, 87 (2016).

¹⁹⁶ *See* Walter Houston Clark, *Religious Aspects of Psychedelic Drugs*, 56 CALIF. L. REV. 86, 87 (1968) (emphasis omitted).

¹⁹⁷ ERICH FROMM, *TO HAVE OR TO BE?* 135 (1976).

¹⁹⁸ *See* Walsh, *supra* note 195, at 82.

¹⁹⁹ Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Guarantee*, 80 HARV. L. REV. 1381, 1427 (1967) (“[T]o adopt a sympathetic view toward the nontheistic claim would be to equate the free exercise of religion with the pursuit of happiness.”).

²⁰⁰ Joel Jay Finer, *Psychedelics and Religious Freedom*, 19 HASTINGS L.J. 667, 698–99 (1968) (“[R]eligious sincerity as commonly understood is not something that can be acquired overnight

Like “religion,” the definition of “freedom” has been disputed in the context of psychedelics and religious freedom. The belief that psychedelics can provide insights into the ultimate nature of reality, as Watts and others believe, may not hold up to a critical account.²⁰¹ Indeed, there may not be a “‘core mystical experience’ of unitive consciousness found at the heart of all religions,” nor “one universal psychedelic experience that people from all cultures reliably and predictably have.”²⁰² The view that psychedelics lead to non-dual mystical experiences outside of time and space might instead be a product of our Western culture. As Jules Evans notes, psychedelics could be reflecting users’ own beliefs back to them in vivid technicolor, thus making them seem “transcendentally true.”²⁰³ Evans writes:

We hope that we are discovering something objectively true about the brain, or about ultimate reality. And psychedelic neuroscience might discover certain common neural patterns underlying different types of psychedelic experience. But as for the subjective experience, how do we know if our trips reveal “ultimate reality” or just the reflection of our own subconscious?²⁰⁴

To this end, if it is true that psychedelics “twist the mind in certain directions,” then “[h]ow could we tell whether the drug (1) enhanced [the users’] freedom by increasing [their] knowledge, illuminating [their] values and expanding [their] options for meaningful choice . . . or (2) diminished [their] capacity to resist the lure of intoxicating and seductive illusions?”²⁰⁵ Regardless, these issues seem to matter less to the cognitive liberty and social justice arguments presented below, which allow the law to remain agnostic as to whether psychedelic mysticism constitutes a matter of religious freedom.

C. *Psychedelics and Cognitive Liberty*

Beyond therapeutic and religious uses, some have theorized a right to use psychedelics more broadly under principles of freedom of thought or cognitive liberty, i.e., a basic right to self-determination. Freedom of thought is the freedom of an individual to hold or consider a thought, fact, or viewpoint independent of others’ ideas. It is the foundation of other liberties, such as freedom of speech, expression,

or that can be principally motivated by a desire to smoke marijuana. Religion is commitment. It is dedication. It is a profound search for ultimate answers through awareness of the Divine. Wary of being defrauded, a jury is likely to pay close attention to everything in a claimant’s life that has any bearing on his sincerity.”).

²⁰¹ McGreal, *supra* note 75 (arguing that “[p]sychedelic drug phenomena do not justify radical new views of reality” given that such phenomena “probably have a great deal to do with psychological factors that influence people’s judgment about what is real”).

²⁰² Evans, *supra* note 75.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Finer, *supra* note 200, at 728.

and religion, and was espoused by Immanuel Kant and John Stewart Mill, each considered a “founding father” of modern constitutional theory.²⁰⁶

While there is no explicit mention of freedom of thought in the U.S. Constitution or Bill of Rights, Justice Benjamin Cardozo remarked that freedom of thought, along with freedom of expression, is “the matrix, the indispensable condition of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.”²⁰⁷ Justice Frank Murphy wrote that “[f]reedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind.”²⁰⁸ More recently, the Supreme Court noted that “freedom of mind” is the “broader concept” of which freedom of speech is but one aspect.²⁰⁹

Cognitive liberty is, in a sense, synonymous with freedom of thought, though it can more specifically refer to individuals maintaining self-determination over their own brain chemistry. This “right to self-determine what is on (and in) one’s mind, can be inferred from general and widely-accepted ideas of the relation between the individual and the state, granting persons wide ranging liberties in self-regarding matters.”²¹⁰ As Richard Glen Boire observes in *On Cognitive Liberty*:

The right to control one’s own consciousness is the quintessence of freedom. If freedom is to mean anything, it must mean that each person has an inviolable right to think for him or herself. It must mean, at a minimum, that each person is free to direct one’s own consciousness; one’s own underlying mental processes, and one’s beliefs, opinions, and worldview. This is self-evident and axiomatic.²¹¹

Randy Barnett has argued that individuals should have the right to control their own bodies, and that federal drug laws undermine control over personhood “by seeking to subject the bodies of some persons to the forcible control of other persons. Such laws seek forcibly to prevent persons from using their bodies in ways that they desire and that do not interfere with the equal liberty of others.”²¹² A similar argument has been presented regarding cannabis by Blumenson and Nilsen in *Liberty Lost: The Moral Case for Marijuana Law Reform*. They write:

²⁰⁶ Jan-Christoph Bubltz, *My Mind is Mine!? Cognitive Liberty as a Legal Concept, in COGNITIVE ENHANCEMENT: AN INTERDISCIPLINARY PERSPECTIVE* 243 (Elisabeth Hildt & Andreas Francke eds., 2013).

²⁰⁷ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

²⁰⁸ *Jones v. Opelika*, 316 U.S. 584, 618 (1942) (Murphy, J., dissenting).

²⁰⁹ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

²¹⁰ Bubltz, *supra* note 206, at 236.

²¹¹ Richard Glen Boire, *On Cognitive Liberty*, DRUG EQUALITY ALLIANCE, http://drugequality.org/files/Boire%20_On_Cognitive_Liberty.pdf.

²¹² Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11 (2009).

One need not resolve this dispute concerning marijuana's value to recognize that at least for its users, banning marijuana *does* implicate their freedom of thought and sometimes even the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." That is one reason why a ban on marijuana cuts so close to core aspects of personhood—to the freedom of thought and religion that are necessary to respect an autonomous being's ability to choose what to think and what kind of person to be. That such thoughts, and such an identity, are not esteemed by a majority of Americans and their government is really beside the point: the very idea of this liberty is to protect each individual's sovereignty in this realm (as the Supreme Court long ago recognized).²¹³

Relatedly, Charlotte Walsh, in discussing psychedelic law reform in the United Kingdom through a human rights prism, believes that "individuals should have the right to autonomous self-determination over their own brain chemistry, a right that is currently infringed by the prohibition of psychedelics."²¹⁴ Walsh argues that there may be no bright line between using psychedelics in a medical, religious, or spiritual sense if one adopts a holistic understanding of human health, flourishing, and prosperity.²¹⁵ In critique of narrow medical and religious exemptions, Walsh writes:

Whether or not it is believed that people should have to justify their psychedelic use on any grounds is bound up with one's view of the proper relationship between the individual and the State, with whether or not it is believed that the latter has any business concerning itself with which substances the former choose to ingest. Therapeutic and religious exemptions—whilst considerably better than nothing—perpetuate the notion that people should only be allowed to take psychedelics in constrained circumstances that their government has deemed acceptable.²¹⁶

In support of cognitive liberty, Walsh points to Article 9 of the European Convention on Human Rights: "Everyone has the right to freedom of thought, conscience and religion."²¹⁷ Similarly, Article 18 of the United Nations' Universal Declaration of Human Rights states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to

²¹³ Eric Blumenson & Eva Nilsen, *Liberty Lost: The Moral Case for Marijuana Law Reform*, 85 IND. L.J. 279, 294 (2010). Blumenson and Nilsen also make the case that marijuana should be protected based on the Declaration of Independence's inalienable right to the pursuit of happiness. Such a right also "should protect those who seek affective rather than cognitive benefits from marijuana—uses for whom it serves as a relaxant, a social lubricant, an antidepressant, or a palliative." *Id.* at 295.

²¹⁴ Walsh, *supra* note 195, at 83.

²¹⁵ *Id.*

²¹⁶ *Id.* at 83.

²¹⁷ *Id.* at 81.

manifest his religion or belief in teaching, practice, worship and observance.”²¹⁸

And Boire analogizes psychedelic prohibition to an Orwellian dystopia where U.S. citizens no longer even realize that their freedom of thought has been restricted by the government’s prohibition of psychedelics:

In George Orwell’s dystopian novel *Nineteen Eighty-Four*, the Oceania government diligently worked to establish “Newspeak,” a carefully crafted language designed by the government for the purpose of making unapproved “modes of thought impossible.” Prior to Newspeak, the people of Oceania communicated with “Oldspeak,” an autonomous natural language capable of expressing nuanced emotions and multiple points of view. By controlling language through the imposition of Newspeak—by “eliminating undesirable words”—the government of Oceania was able to control, and, in some cases, completely extinguish certain thoughts. As a character in *Nineteen Eighty-Four* explained to Winston Smith “Don’t you see that the whole aim of Newspeak is to narrow the range of thought? . . . Every year fewer and fewer words, and the range of consciousness always a little smaller.” Those people raised with Newspeak, having never known the wider-range of Oldspeak, might fail to notice, indeed, might be unable to even perceive, that the Government was limiting consciousness.

In 1970 . . . the United States government produced its own index of forbidden thought catalysts: the federal schedule of controlled substances. Included on the initial list of Schedule I substances were seventeen substances denoted as “hallucinogens” The experience elicited by these substances in their chemical or natural plant forms is the par excellence of “Oldspeak”—a cognitive modality dating from pre-history.²¹⁹

In sum, cognitive liberty provides a powerful justification for decriminalizing psychedelics (and perhaps other controlled substances too). However, its liberty-centered focus has not caught on in the collective consciousness to the degree needed to effect largescale change to the War on Drugs; in fact, cognitive liberty has been found not to poll well among the public.²²⁰ In the remaining subpart, this Article therefore seeks to reframe the cognitive liberty argument through the lens of diversity. Focusing on cognition-based diversity, rather than on liberty, may have broader (or at least alternate) appeal, especially among those who identify as liberal or progressive.²²¹ Emphasizing the social justice aspects of psychedelic law reform could

²¹⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948).

²¹⁹ Boire, *supra* note 211.

²²⁰ Horizons 2016: Jag Davies, *What Does the End of Psychedelic Criminalization Look Like?*, Vimeo (Jan. 27, 2017), <https://vimeo.com/201376673> (“It’s worth emphasizing that polling for cognitive liberty does not do very well.”).

²²¹ See, e.g., Geoffrey Evans et al., *Measuring Left–Right and Libertarian–Authoritarian Values in the British Electorate*, 47 BRITISH J. SOCIOLOGY 93, 98–101 (1996) (noting that liberal or left-

thus serve to further remedy the stigma surrounding psychedelics, and, in turn, generate additional public support for ending an unjust psychedelic prohibition.

D. Psychedelics and Social Justice

Theories of social justice are particularly apt with respect to psychedelic law reform given the marginalization, discrimination, and oppression of users of psychedelics during the decades-long War on Drugs.²²² The prohibition on psychedelics and other controlled substances resulted, in large part, from the Nixon Administration's abuse of power designed to thwart social justice-oriented causes, namely the Vietnam War and the environmental movement, and to control minority populations.²²³ As a result of anti-drug laws, those who wish to possess and use psychedelics risk incarceration, stigmatization by others, loss of jobs or custody of children, and other adversities to the extent that they are caught using the substances (or perhaps even merely disclosing their interest in them). Ido Hartogsohn argues that this viewpoint is inconsistent with current manifestations of identity politics:

Since the rise of the minority rights movement it has become increasingly unacceptable to stigmatize . . . disadvantaged groups, yet . . . it is still accepted as perfectly legitimate, even desirable, to stigmatize drug users and paint them as dumb and lazy. In a world where disadvantaged groups are ever more vigilant about microaggressions, it is still considered safe to debase drug users using derogative terms, portray them as recklessly irresponsible fiends, and blame them [for] the ills of society.²²⁴

Perhaps then, as provocative as it might seem, users of psychedelics can be considered a minority group based on their persecuted preference for altered states of consciousness. If considered a formal minority group, users of psychedelics might theoretically receive some form of constitutional protection.²²⁵ Or, as a practical matter,

leaning individuals place emphasis on diversity, equality, and social justice while libertarians prefer anti-authoritarian values).

²²² See Devenot, *supra* note 28 (“The decades-long ‘War on Drugs’ has created a situation in which the use of psychedelics is a social justice issue.”); Jag Davies, *Psychedelic Justice: How Do We Repair the Harms of Psychedelic Prohibition?*, MULTIDISCIPLINARY ASS’N PSYCHEDELIC STUD. (2017), <https://maps.org/news/bulletin/articles/420-bulletin-spring-2017/6627-psychedelic-justice-how-do-we-repair-the-harms-of-psychedelic-prohibition> (“Psychedelic prohibition is a legacy of racism, colonialism, and the repression of indigenous cultures. This legacy continues today, with thousands of people every year getting handcuffed, arrested, branded for life as criminals, and serving time behind bars simply for using or possessing a psychedelic substance. These people are more likely to be young, non-white, and socioeconomically marginalized than most other people who use psychedelics.”).

²²³ See *supra* notes 133–138 and accompanying discussion.

²²⁴ Ido Hartogsohn, *Are the Politics of Consciousness a Form of Identity Politics?*, ENTHEOGENIC RES. INTEGRATION & EDUC. (Feb. 11, 2016), <https://erievision.org/eip-ido>.

²²⁵ For a thorough analysis of this point in the context of neurodiversity (but not with regard

acceptance of psychedelic law reform as a matter of social justice could be instrumental in garnering additional public support for the voter referendums to decriminalize psilocybin or other psychedelics.

1. *A Psychedelic Identity*

Neşe Devenot has drawn controversial analogy to queer theory²²⁶ and the LGBTQ movement in her study of psychedelic philosophy. In her essay, *Coming Out of the Psychedelic Closet: Psychedelics and Identity Politics*, Devenot compares coming out as a user of psychedelics to coming out as LGBTQ given mutual oppression and social stigma.²²⁷ In this way, Devenot maps what she labels a “psychedelic identity” onto other identity-based claims through the theory of intersectionality—i.e., that various types of systemic prejudice and oppression are interdependent and interconnected.²²⁸ While sometimes focused on deconstructing the binary between heterosexual and homosexual, queer theory can be considered, more broadly, as a contrast to normativity and deviance instead. As David Halperin defines it:

Queer is by definition *whatever* is at odds with the normal, the legitimate, the dominant. *There is nothing in particular to which it necessarily refers.* It is an identity without an essence. “Queer,” then, demarcates not a positivity but a positionality vis-à-vis the normative²²⁹

Viewed in this light, queer theory can be seen as an umbrella theory encompassing an individual’s right to do what they please with their mind and body, of which sexual identity and psychedelic identity are each a conceptual aspect. Devenot writes:

Rather than an uncritical appropriation of queer discourse, this alliance represents a commitment to “intersectionality” Linking the struggle for social justice across identity categories, intersectionality resists discrimination

to psychedelics or other substance use, specifically), see Andrea Lollini, *Brain Equality: Legal Implications of Neurodiversity in a Comparative Perspective*, 51 NYU J. INT’L L. & POL. 69, 91 (2018).

²²⁶ Queer theory is a subset of critical theory focusing on the construction and deconstruction of sexual and gendered identities and categorizations. Its roots lie within the queer political movement of the late 1980s and early 1990s, with prominent theorists including Judith Butler and Eve Segwick, though can be traced further to theoretical works from the 1960s and 1970s, especially Michel Foucault’s *The History of Sexuality*. April S. Callis, *Playing with Butler and Foucault: Bisexuality and Queer Theory*, 9 J. BISEXUALITY 213 (2009).

²²⁷ Devenot, *supra* note 28; see also Neşe Devenot, *Psychedelic Drugs*, in MACMILLAN INTERDISCIPLINARY HANDBOOKS: GENDER 361, 363 (Iris van der Tuin ed., 2016).

²²⁸ Devenot, *supra* note 28. The term intersectionality was coined in 1989 by law professor and critical theorist Kimberle Crenshaw in her groundbreaking article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

²²⁹ DAVID M. HALPERIN, SAINT FOUCAULT: TOWARD A GAY HAGIOGRAPHY 62 (1995).

based on race, gender, sexual orientation, ability, and age, among other categories. That the inclusion of psychedelic identity within these categories remains controversial demonstrates the work that remains for securing the rights of individuals to determine their own states of body and mind.²³⁰

Further, in an attempt to show that propensity to use psychedelics is innate or determined (i.e., not a choice), Devenot posits that there are certain “psychedelic people [who] have existed throughout time and across cultures.”²³¹ To this end, “[f]or many thousands of years, in every known culture, there has been some percentage of the population . . . which has used this or that plant to achieve a transformation in its state of consciousness.”²³² Moreover, “[j]ust as someone can be gay without ever having sex,” Devenot believes “that some people are psychedelic explorers of the mind without ever taking drugs.”²³³ To the percentage of the population “born with a predisposition to experiment or respond favorably to them . . . the use of psychedelics can feel like a homecoming.”²³⁴

Therefore, especially if some individuals have a predisposition to experimenting with altered states of consciousness, psychedelic identity might be said to exist alongside the social categories of race, gender, ability, age, and sexual orientation.²³⁵ But regardless, the “alienation of both psychedelic and queer people results from a common cultural prejudice against those who experience and interact with the world differently from the dominant and traditional population.”²³⁶ As Devenot explains:

Coming out as psychedelic empowers psychedelic practices of knowledge and community, and it connects this movement to other continuing struggles for social justice. In adopting the language of civil rights and gay rights, we place ourselves in the context of these larger struggles and the importance of fighting against oppression of all kinds.²³⁷

In response, some have expressed agreement with Devenot’s linkage of psychedelics and LGBTQ rights.²³⁸ For instance, in *Are the Politics of Consciousness a Form of Identity Politics?*, Hartogsohn compares psychedelics with human sexuality from a similar perspective:

²³⁰ Devenot, *supra* note 28.

²³¹ *Id.*

²³² *Id.* (quoting ALEXANDER SHULGIN & ANN SHULGIN, *PIHKAL: A CHEMICAL LOVE STORY* (1991)).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Hartogsohn, *supra* note 224; Julie Holland, *Out Yourself*, *PSYMPHOSIA* (May 25, 2016), <https://www.psymposia.com/magazine/out-yourself>.

In actuality, the tendency to experiment with altered states of consciousness is arguably as natural and ubiquitous as the need to experiment with sexuality. All human cultures, indigenous or modern, make some use of mind-alterants, a tendency which often emerges already in childhood. Some people have a special propensity for experimenting with altered states of minds—yet they are not dumber, more dangerous, or in any way inferior to those who do not share this tendency, as is often suggested by anti-drug organizations.²³⁹

Others, though, have argued that the analogy to queer theory is misguided or offensive. For instance, one commentator claims that “the risk of coming out as queer is grossly unequal to the risk of disclosing as a psychedelic user,” and “adopting the language and tactics of queer struggle for the psychedelic cause constitute an inapposite appropriation, rather than a mutually agreeable contribution to the civil rights discourse.”²⁴⁰ It is also difficult for many to accept that one’s propensity for taking psychedelics is innate, determined, or immutable in the same sense as one’s LGBTQ status. Thus, while the conception of a psychedelic identity is a helpful theoretical mechanism, comparison of that identity to a queer identity may be problematic.

2. *Psychedelics and Neurodiversity*

Perhaps then, the social justice argument for psychedelic law reform can be reframed²⁴¹ from one invoking queer theory and the LGBTQ movement to one invoking the neurodiversity paradigm—the equality movement advocating that *cognitive* differences between individuals should be embraced as normal and natural

²³⁹ Hartogsohn, *supra* note 224.

²⁴⁰ Emma Kaywin, *The Asymmetric Risk of Coming Out in Queer and Psychedelic Communities*, PSYMPHOSIA (June 9, 2016), <https://www.psymposia.com/magazine/asymmetricrisk/>.

²⁴¹ It is important to note, though, that queer theory and neurodiversity are not hermetically sealed categories of thought. In combining the queer theory and neurodiversity analogies, psychedelic persons may identify as “neuroqueer,” a term gaining traction inside and outside of academic circles. One practice considered to be neuroqueer involves “[e]ngaging in practices intended to ‘undo’ one’s cultural conditioning toward conformity and compliance with dominant norms, with the aim of reclaiming one’s capacity to give more full expression to one’s neurodivergence and/or one’s uniquely weird personal potentials and inclusions,” as well as “[w]orking to transform social and cultural environments in order to create spaces and communities—and ultimately a society—in which engagement in [such practices] is permitted, accepted, supported, and encouraged.” Nick Walker, *Neuroqueer: An Introduction*, NEUROCOSMOPOLITANISM (May 2, 2015), <http://neurocosmopolitanism.com/neuroqueer-an-introduction>. Interest in, and use of, psychedelics would seem to fit well under such descriptions of neuroqueer practices.

human variations.²⁴² Neurodiversity, a portmanteau of “neurological” and “diversity,” is a recent claim to equality originating in the 1990s.²⁴³ According to a leading proponent of neurodiversity, the term refers broadly to “the diversity of human brains and minds [and] the infinite variation in neurocognitive functioning within the species.”²⁴⁴ Andrea Lollini’s recent legal overview of the concept describes the movement as a push toward “brain equality.”²⁴⁵

Given that there is no single healthy and normal version of the human mind and brain, and that similar unequal power dynamics exist for cognitive variance as for other social categories, the neurodiversity movement believes that neurological differences, whether innate or acquired through experience, should be recognized and respected along with other human variations. Lollini writes:

Modern legal systems recognize different grounds for discrimination such as race, gender, religion, ethnicity, sexual orientation, age, and disability, based on the social and historical processes that shaped the constitutional traditions of each country. Since the second half of the twentieth century, inter-

²⁴² See ARMSTRONG, *supra* note 27, at 1–27; Austin & Pisano, *supra* note 27, at 96, 99 (“Because neurodiverse people are wired differently from ‘neurotypical’ people, they may bring new perspectives . . . to create or recognize value.”); see also Harvey Blume, *Neurodiversity*, ATLANTIC (Sept. 1998), <https://www.theatlantic.com/magazine/archive/1998/09/neurodiversity/305909/> (“Neurotypical syndrome is a neurobiological disorder characterized by preoccupation with social concerns, delusions of superiority, and obsession with conformity.”); cf. Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483, 490 (2010) (“Defining a person as more or less neuro-typical is a function of both lay and medical culture, and cultural variations are so extreme as to escape modeling.”).

²⁴³ DANA LEE BAKER, *THE POLITICS OF NEURODIVERSITY: WHY PUBLIC POLICY MATTERS* ix (2011); Edward Griffin & David Pollak, *Student Experiences of Neurodiversity in Higher Education: Insights from the BRAINHE Project*, 15 DYSLEXIA 23, 25 (2009); Francisco Ortega, *The Cerebral Subject and the Challenge of Neurodiversity*, 4 BIOSOCIETIES 425, 427 (2009).

²⁴⁴ Walker, *supra* note 26. Walker articulates the fundamental principles of the neurodiversity paradigm as follows:

1. Neurodiversity—the diversity of brains and minds—is a natural, healthy, and valuable form of human diversity.
2. There is no “normal” or “right” style of human brain or human mind, any more than there is one “normal” or “right” ethnicity, gender, or culture.
3. The social dynamics that manifest in regard to neurodiversity are similar to the social dynamics that manifest in regard to other forms of human diversity (e.g., diversity of race, culture, gender, or sexual orientation). These dynamics include the dynamics of social power relations—the dynamics of social inequality, privilege, and oppression—as well as the dynamics by which diversity, when embraced, acts as a source of creative potential within a group or society.

Nick Walker, *Throw Away the Master’s Tools: Liberating Ourselves from the Pathology Paradigm*, NEUROCOSMOPOLITANISM (Aug. 16, 2013), <http://neurocosmopolitanism.com/throw-away-the-masters-tools-liberating-ourselves-from-the-pathology-paradigm>.

²⁴⁵ See generally Lollini, *supra* note 225.

national and regional human rights mechanisms have fostered a strong cosmopolitan culture against the exclusion of groups and individuals on the basis of physical and cultural attributes. Unfortunately, because discrimination is a structural feature of our societies, the path to equality is a never-ending challenge. In the context of this unfinished and ongoing process, several communities have raised a new equality claim: *neurodiversity*.

Over the last two decades, [the neurodiversity movement] has attempted to redefine the perception of brain-based disorders by reconsidering the nature of atypical perceptual and cognitive performance.²⁴⁶

The neurodiversity paradigm's most prominent and vocal sub-movement is the autism rights movement, though autism is by no means the only form of neurodivergence. Neurodiversity can refer to a larger set of often pathologized neurodivergent conditions like attention deficit or hyperactivity disorder, bipolar disorder, anxiety, multiple personality disorder, schizophrenia and other forms of psychosis, developmental dyspraxia, epilepsy, and Tourette's Syndrome.²⁴⁷ More broadly still, it can properly refer to *any* variation in brain functioning which deviates from social norms without resorting to disorders, diagnoses, or diseases.²⁴⁸

Under tenets of neurodiversity, brain function that deviates from societal norms should not be rejected, stigmatized, or considered pathological. In this way, the neurodiversity movement marks a shift from focusing on neurological predispositions of disability to focusing on human diversity and identity. In other words, "in terms of *human operating systems* rather than diagnostic labels Not all features of atypical human operating systems are bugs."²⁴⁹

As explained in Part I, when psychedelics are taken, neuroimaging techniques find "significant reductions in activity across many brain areas, including frontal and temporal cortical regions, as well as hubs of the [default mode network]."²⁵⁰ Moreover, researchers have found, at least with psilocybin, increased integration, or "cross talk," linking brain regions that typically do not exchange information, thus "boost[ing] the sheer amount of diversity in our mental life."²⁵¹ Use of psychedelics has also been linked to increased neural plasticity—increasing the synapses, branches, and dendritic spines of neurons.²⁵² This rewiring of brain function—removal of certain filtering mechanisms, rerouting of neural traffic, and changes to

²⁴⁶ *Id.* at 70–71.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ STEVE SILBERMAN, *NEUROTRIBES: THE LEGACY OF AUTISM AND THE FUTURE OF NEURODIVERSITY* 471 (2015).

²⁵⁰ Raphael Milliere et al., *Psychedelics, Meditation, and Self-Consciousness*, *FRONTIERS PHARMACOLOGY*, Sept. 2018, at 1, 4 (emphasis omitted).

²⁵¹ POLLAN, *supra* note 20, at 318; *see also* Milliere et al., *supra* note 250, at 2.

²⁵² Calvin Ly et al., *Psychedelics Promote Structural and Functional Neural Plasticity*, 23 *CELL*

the structure of neurons —can lead to short-term or long-term changes in thinking style, including unusual insights and perspectives deviating from neurotypicality.²⁵³ At least one study has found that use of psychedelics can cause long-term changes to the personality through increasing the trait of “openness”—an appreciation of new experiences.²⁵⁴ This indicates that at least certain changes to the brain created during the psychedelic experience may persist indefinitely.

Resulting presumably from these underlying brain changes, users of psychedelics often view the world very differently than non-users. Studies find that a loss of the sense of self and the self-world boundary, known as Drug-induced Ego Dissolution (DIED), is common.²⁵⁵ DIED, in effect, creates the sense of unity and interconnectedness with others and the natural world is a hallmark of the psychedelic experience.²⁵⁶ Changes in brain patterns resulting from use of psychedelics has also been associated with the decreased valuation of acquisitions typically cherished in our society such as monetary gain and social status,²⁵⁷ enhanced creativity and alternate forms of problem solving, increased empathy, trust, closeness, desire to be with others,²⁵⁸ or, more darkly, paranoia, and, in rare cases, psychosis or Hallucinogen Persisting Disorder—where users report perceptual disturbances for months or even years following a psychedelic experience.²⁵⁹

In this objective sense, then, the psychedelic experience and its lasting effects can be seen to constitute a type of “neurodivergence”—an atypical, stigmatized form of cognitive and perceptual diversity which deviates from societal norms. Moreover, as Devenot and Hartogsohn each argue, the predisposition to experiment with psychedelics might well be innate and determined.²⁶⁰ Yet one need not accept that premise to proceed with the neurodiversity framing. Neurodivergence does not have to be genetic or innate, but can also be produced through experience, such as from use of psychedelics. As one leading proponent of the neurodiversity movement states:

Neurodivergent is quite a broad term. Neurodivergence (the state of being

REP. 3170 (2018).

²⁵³ Elsey, *supra* note 11, at 2.

²⁵⁴ MacLean et al., *supra* note 175, at 1453 (assessing the effect of psilocybin on changes to the “big five” domains of personality—Extroversion, Neuroticism, Agreeableness, Conscientiousness, and Openness—and finding that “in participants who had mystical experiences during their psilocybin session, Openness remained significantly higher than baseline more than 1 year after the session.”).

²⁵⁵ Milliere et al., *supra* note 250, at 2.

²⁵⁶ Griffiths et al., *supra* note 57, at 270.

²⁵⁷ Savage et al., *supra* note 175, at 244.

²⁵⁸ Dolder et al., *supra* note 175, at 2640.

²⁵⁹ Leo Hermle et al., *Hallucinogen-Persisting Perception Disorder*, 2 THERAPEUTIC ADVANCES PSYCHOPHARMACOLOGY 199, 202 (2012).

²⁶⁰ See *supra* notes 227–240 and accompanying discussion.

neurodivergent) can be largely or entirely genetic and innate, or it can be largely or entirely *produced by brain-altering experience*, or some combination of the two (autism and dyslexia are examples of innate forms of neurodivergence, while alterations in brain functioning caused by such things as trauma, long-term meditation practice, or *heavy usage of psychedelic drugs* are examples of forms of neurodivergence *produced through experience*).²⁶¹

Another proponent notes that “neurodiversity acts as a positive force in human evolution, enabling alternative and creative ways of thinking, knowing, and apprehending the world.”²⁶² Yet, especially given the stigma resulting from the War on Drugs, society frowns upon the use of psychedelics and the effects of the substances. As Watts puts it:

The idea of mystical experiences resulting from drug use is not readily accepted in Western societies. Western culture has, historically, a particular fascination with the value and virtue of man as an individual, self-determining, responsible ego, controlling himself and his world by the power of conscious effort and will. Nothing, then, could be more repugnant to this cultural tradition than the notion of spiritual or psychological growth through the use of drugs. A “drugged” person is by definition dimmed in consciousness, fogged in judgment, and deprived of will.²⁶³

However, through the lens of the neurodiversity paradigm, perhaps the psychedelic identity could be reconceptualized from drugged, delusional, inferior, and criminal—as has been the case for decades—to a natural and valuable form of human diversity and creative potential.

A focus on objective and observable brain diversity does not mean, though, that the subjective and intuitive insights gained from the psychedelic experience should be discounted. In the epilogue to *How to Change Your Mind*, titled “In Praise of Neural Diversity,” Pollan acknowledges the neurological underpinnings of the psychedelic experience, though argues that this does not diminish its significance: “Just because the psychedelic journey takes place entirely in one’s mind doesn’t mean it isn’t real. It is an experience and, for some of us, one of the most profound a person can have.”²⁶⁴ For many, including Pollan, the psychedelic experience “can serve as a reference point, a guidepost, a wellspring, and . . . a kind of spiritual sign or shrine.”²⁶⁵ Further, Pollan acknowledges that the tendency of psychedelics to enhance the subjective dimensions of reality raises significant questions about our materialist understanding of consciousness and the external world—i.e., “[t]he

²⁶¹ Walker, *supra* note 26 (emphasis added).

²⁶² MARGARET PRICE, *MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY* 16 (2011) (citing SUSANNE ANTONETTA, *A MIND APART: TRAVELS IN A NEURODIVERSE WORLD* (2005)).

²⁶³ Watts, *supra* note 180, at 74.

²⁶⁴ POLLAN, *supra* note 20, at 409.

²⁶⁵ *Id.*

ground underfoot may be much less solid than we think.”²⁶⁶ Access to such non-neurotypical thoughts, feelings, and intuitions, while discomfoting for some, may be valuable; they should not be ignored or prohibited.

Lastly, it is worth clarifying that, due to the psychological dangers involved, use of psychedelics outside of the therapeutic context should not necessarily be *endorsed* or *encouraged* by law or society. And there should be treatment and education available for people who are suffering mental health issues due to bad trips—which regularly occur under psychedelic prohibition and will continue to occur whether or not psychedelics are decriminalized. However, for many users of the substances, the psychedelic experience, and the changes to brain function that necessarily accompany it, constitute a profound aspect of their identity. To this end, criminalizing the use and possession of psychedelics by responsible adult individuals should be seen as non-accommodating to neurodivergent thinking and perspectives. The psychedelic identity and community are, as a matter of social justice, thus deserving of equity and inclusion rather than discrimination and exclusion. Decriminalizing psychedelics at the state level through ballot initiatives is therefore a step in the right direction.

CONCLUSION

We are experiencing a resurgence of interest in psychedelics, e.g., psilocybin, LSD, DMT, ayahuasca, and mescaline. A new wave of research finds that the mystical or psychological experiences that psychedelics induce—and the corresponding neurological changes to the brain—can be therapeutic in treating depression, substance use disorders, anxiety, and other mental illnesses, and can also benefit healthy individuals. Near to the time of this writing, Denver, Colorado became the first city in the U.S. to decriminalize psilocybin. Other cities and states may soon follow Denver’s lead. These attempts at decriminalization could perhaps be a precursor to legalization of psilocybin and other psychedelics. Hopefully, future discussion will focus on how to regulate such a regime. In any case, further state law reforms will depend on additional public support for psychedelics.

To this end, this Article discussed several justifications for the decriminalization of psychedelics—medical value, religious freedom, cognitive liberty, and identity politics. It then attempted a reframing of the cognitive liberty and identity politics-related justifications under tenets of the neurodiversity paradigm. It is unclear whether such a brain equality argument would hold clout in a court of law, but to the extent that it gains a following in the popular consciousness, we are more likely to see additional successful ballot initiatives for psychedelic law reform. This turn of events could shape the end of the unjust prohibition on altered states of consciousness.

²⁶⁶ *Id.* at 413.