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Addicted to Drug Control: The History of American Drug Prohibition and its Consequences for Modern Psychedelic Medicine

Seth McDowell

Western Kentucky University, seth.mcdowell844@topper.wku.edu

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ADDICTED TO DRUG CONTROL: THE HISTORY OF AMERICAN DRUG
PROHIBITION AND ITS CONSEQUENCES FOR MODERN PSYCHEDELIC
MEDICINE

A Capstone Experience/ Thesis Project

Presented in Partial Fulfillment of the Requirements for

the Degree Bachelor of Arts with

Honors College Graduate Distinction at Western Kentucky University

By

Seth T. McDowell

* * * * *

Western Kentucky University
2019

CE/T Committee:

Dr. Patricia Minter, Advisor

Dr. Eric Reed

Dr. Christopher Keller

Approved by

Advisor
Department of History

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ABSTRACT

Psychedelics have been used medicinally and as vehicles for spiritual discovery for millennia. They achieved international notoriety in the decades following Albert Hofmann's accidental discovery of LSD's psychological effects, which spurred an explosion of psychedelic research. While much of the research showed psychedelics to have tremendous therapeutic potential, some studies declared them to be dangerous. By the end of the 1960s, LSD and other classic psychedelics had become cultural pariahs, linked to the counterculture, chromosome damage, and birth defects. For this reason, Congress outlawed psychedelics in the Comprehensive Drug Abuse Control and Prevention Act of 1970, which consolidated more than a half-century of racist and xenophobic drug legislation into one law. This essentially strangled psychedelic research with bureaucratic control and rendered reclassification all but impossible, despite promising modern research. For these reasons, this capstone will consider psychedelic drugs in the context of United States illicit drug policy as a whole and effectively argue that racism, classism, and xenophobia brought about psychedelic prohibition to the detriment of those seeking nontraditional medicine to help assuage the symptoms of a variety of mental illnesses.

Key Words: Psychedelics, Drug Policy, Racism, Xenophobia, Medicine, Human Rights

*Dedicated to those who have shown fearless devotion to the treatment of mental illness
and protection of human rights by studying a class of drugs that has remained a societal
pariah for decades.*

ACKNOWLEDGMENTS

When embarking on a project of this nature, studying behaviors that are categorically condemned by the federal government and many in the populace as a whole, one would expect to face a great deal of skepticism regarding the project's legitimacy. My experience has been quite different. I am moved to say that, from the outset, everyone involved with this capstone has received it with an open mind and has unreservedly encouraged me to pursue it. Aside from the occasional sarcastic remark involving the potential "field work" included in my research, my advisors, friends, and family have shown nothing but unequivocal support.

First, I would like to thank my primary advisor, Dr. Patricia Minter. As a student in Dr. Minter's legal history, United States history, and human rights courses, I have grown more intellectually than I ever thought possible. Under her guidance, I have become an unassuming, engaged, and enthusiastic student of history. Dr. Minter has also served as my student advisor throughout my four years at WKU, during which she has encouraged me to pursue a diverse and academically rigorous curriculum that has done well to prepare me for future endeavors in law school. In her role as advisor for this project, Dr. Minter has given me a sense of direction, advice, and only the most constructive feedback. In all three capacities, her relentless energy and unquestionable devotion to both students and subject has been infectious; only an individual with the

greatest drive and best intentions could fulfill the demands of advisor and professor while simultaneously campaigning for and serving in the position of Kentucky State Representative. No word or gesture can adequately characterize my gratitude.

I would next like to thank Dr. Eric Reed, who graciously accepted my request for advising on this project. His modern European history course gave me a clear sense of the dynamic nature of history, as well as the many avenues through which it may be studied. Dr. Leila Watkins has been similarly invaluable to this project. Were it not for her encouragement and support, I would never have embarked on this ambitious and challenging journey. With that in mind, I would like to thank the Honors College as a whole for pushing me to engage in the highest level of undergraduate research. This experience has certainly been the capstone of my undergraduate development.

I owe an unimaginable debt to my parents, who created and have maintained the intellectually lively environment I have always enjoyed the privilege of living in. Their Herculean childrearing efforts gave me the tools to pursue any endeavor I wish to undertake. I can only hope that my accomplishments live up to the potential they labored to create. To my friends, relatives, and the countless others whom I have failed to mention, understand that you occupy irreplaceable positions within this project and in my world as a whole. To those both mentioned and unmentioned: thank you for making this project possible.

VITA

July 30, 1997.....Born- Louisville, Kentucky
2015.....Bethlehem High School, Bardstown
Kentucky
2019.....Western Kentucky University

PRESENTATIONS

- Western Kentucky University REACH Week – “The History of Psychedelic Drugs Before United States Law.” March 2019

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INTRODUCTION

Psychedelic drug use did not originate with the counterculture of the 1960s. Albert Hofmann's accidental ingestion of LSD-25 in 1943 was not the first moment in history wherein an individual experienced "a dreamlike state" characterized by "an uninterrupted stream of fantastic pictures, extraordinary shapes with intense, kaleidoscopic play of colors"¹ as a result of drug administration. The Ancient Aztecs referred to psilocybin mushrooms as *teonanacatl*, or "flesh of the gods."² The fly agaric mushroom was utilized by the Aryans prior to their conquest of India around 1600 BCE; over one hundred hymns in the *Rig-Veda*, the earliest lengthy piece of Hindu literature are devoted to deifying this fungus.³ Many have speculated that the mandrake root, which was used by oracles, magicians, and necromancers, played a role in creating the illusion that Jesus Christ had risen from the dead.⁴ Compiling a history of psychedelic drug use would involve reviewing thousands of years of human experience from around the entire globe.

Unfortunately, United States drug policy does not consider this long and complex history. Psychedelic drugs fell victim to the trajectory of US drug control that began in

¹ Albert Hofmann, *LSD: My Problem Child* (New York: McGraw-Hill Book Company, 1980), 9. <https://www.maps.org/images/pdf/books/lsdmyproblemchild.pdf>

² Lester Grinspoon and James B. Bakalar, *Psychedelic Drugs Reconsidered* (New York: The Lindesmith Center, 1997), 17.

³ *Ibid.*, 39-40.

⁴ *Ibid.*, 39.

the second half of the 19th century. Prohibition of these substances overlooked the fact that they are often considered a group distinct from other, addictive drugs such as heroin and cocaine.⁵ This broad class of drugs has been experimentally administered to successfully treat anxiety, PTSD, depression, addiction, and OCD.⁶ However, their use is wholly proscribed under the federal Controlled Substances Act of 1970, which categorizes illicit drugs into five groups, or schedules, based on the relative risk factors for each drug. For example, psychedelics were placed in Schedule I, the most prohibited category of drugs in the United States. Schedule I drugs supposedly exhibit “a high potential for abuse, no current medical use, and a lack of safety for use under medical supervision.”⁷ Under their current legal status, psychedelics are incredibly difficult to research. Though they could be used to treat a variety of mental health disorders that therapists have found difficult, the future of psychedelics in medicine looks gloomy for the present.

This thesis will therefore seek to unravel the complicated history of illicit drug legislation in the United States in order to comprehensively examine the legal status of psychedelic drugs. This section will introduce each chapter and present an argument to consider throughout the project. Chapter 1 will illustrate the history of drug prohibition in the United States from the passage of the Harrison Narcotics Act in 1914 through the 1950s, focusing in particular on the societal and political forces that have consistently brought about changes in drug legislation. Chapter 2 will discuss how the trends outlined

⁵ Mason Marks, “Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles,” *New York University Journal of Legislation and Public Policy* 21, 2018, 90.

⁶ *Ibid.*, 71.

⁷ Bakalar and Grinspoon, 310.

in Chapter 1 persisted through the discovery of lysergic acid diethylamide and subsequent explosion of psychedelic research, bringing about the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 (Title II of which is known as the aforementioned Controlled Substances Act). Chapter 3 will shift to a comparison of psychedelic research conducted prior to 1970 and contemporary psychedelic studies, finding that the totality of evidence surrounding psychedelics contradicts their legal classification. Chapter 4 will examine how relevant Supreme Court precedents have affected both individual liberty and avenues for medical legalization.

The legal classification of psychedelics ignores a surfeit of research demonstrating their undeniable therapeutic and medical potential. Pahnke indicated psilocybin could elicit “a substantial amount of positive, and virtually no negative, persisting changes in attitude and behavior” in the preeminent psychedelic experiment of the 1960s, the “Good Friday Experiment.”⁸ Doblin’s follow-up study more than two decades later found these positive effects to have persisted for many of Pahnke’s subjects.⁹ Albert Hofmann describes how LSD-assisted psychotherapy in the 1950s and ‘60s demonstrated great promise by eliminating barriers between patient and therapist, bringing out suppressed memories, and alleviating the isolation of patients with “egocentric problem cycle[s].”¹⁰ Langner, a psychiatrist with experience in more than two thousand LSD-assisted psychotherapy sessions, declared in 1967 that he could not

⁸ Rick Doblin, “Pahnke’s Good Friday Experiment: A Long-Term Follow-up and Methodological Critique,” *The Journal of Transpersonal Psychology* 23, no. 1, 1991: 23.

⁹ *Ibid.*

¹⁰ Hofmann, 27.

“believe that [LSD] under proper supervision can be other than a useful chemotherapeutic agent in psychiatry.”¹¹

Modern research supports this high praise. Griffiths’ study on psilocybin and mystical experiences showed that after fourteen months, a high number of subjects treated with the drug reported substantial levels of improvement in well-being, life satisfaction, and positive behavior.¹² Additionally, nearly all of these subjects rated the study as one of the most spiritually significant experiences of their lives.¹³ Gasser’s follow-up study on Swiss patients who underwent psycholytic therapy¹⁴ with either MDMA or LSD between 1988 and 1993 showed that 90% of the patients reported at least some degree of improvement with the psychological issues they were experiencing.¹⁵ Bogenschutz’s trial with psilocybin-assisted psychotherapy for patients suffering from Alcohol Use Disorder found that “each [patient] achieved a reduction in alcohol intake reflective of his/her goals.”¹⁶ Similarly, Johnson has found that psilocybin may be an effective treatment for smoking cessation in a study wherein 60% of the patients had quit

¹¹ Fred W. Langner, “Six Years’ Experience with LSD Therapy,” in *The Use of LSD in Psychotherapy and Alcoholism*, ed. Harold A. Abramson (New York: Bobbs-Merrill, 1967): 128.

¹² Roland R. Griffiths, et al., “Psilocybin Occasioned Mystical-Type Experiences: Immediate and Persisting Dose-Related Effects,” *Psychopharmacology* 218, no. 4 (2011): 662. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3308357/>

¹³ Ibid.

¹⁴ A form of psychotherapy where psychedelics are administered.

¹⁵ Peter Gasser, “Psycholytic Therapy with MDMA and LSD in Switzerland,” *Newsletter of the Multidisciplinary Association for Psychedelic Studies* 5, no. 3 (1994-95): 6. <https://maps.org/news-letters/v05n3/05303psy.html>

¹⁶ Michael P. Bogenschutz, et al., “Clinical Interpretations of Patient Experience in a Trial of Psilocybin-Assisted Psychotherapy for Alcohol Use Disorder,” *Pharmacology* 9 (2018): 5. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5826237/>

smoking more than a year after treatment.¹⁷ At the very least, the literature shows that a number of psychedelics have the potential to improve the psyche of numerous individuals suffering from a wide variety of ailments when administered by an experienced physician in a controlled environment.

Psychedelics are also involved in some religious rituals, and consideration of these practices by the courts has had a major impact on First Amendment jurisprudence. This development has severely limited Free Exercise protections for minority religions, most significantly in the case of *Employment Division, Department of Human Resources v. Smith*. The Court departed from a forty year-old balancing test that instructed judges to weigh the burden a law placed on an individual's religious exercise against the interest of the state in prohibiting certain acts.¹⁸ It instead eliminated all Free Exercise protections in cases where the defendant's religious practices violate criminal law.¹⁹ This authoritarian precedent is "an ominous sign that minority religions... are now vulnerable to the whim and caprice of majoritarian sentiments."²⁰ As such, it serves as the psychedelic analogue to the myriad other ills resulting from stiff drug control policies, such as the mass incarceration of predominantly non-white, poor Americans.²¹

In fact, drugs in the United States remained almost entirely unregulated by the federal government until legislators responded to trumped-up charges of criminality

¹⁷ Matthew W. Johnson, et al., "Long-term Follow-up of Psilocybin-facilitated Smoking Cessation," *American Journal of Drug and Alcohol Abuse* 43, no. 1 (2017): 57.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5641975/>

¹⁸ Rashelle Perry, "*Employment Division, Department of Human Resources v. Smith: A Hallucinogenic Treatment of the Free Exercise Clause*," *Journal of Contemporary Law* 17, no. 2 (1991): 362, 365.

¹⁹ *Ibid.*, 365.

²⁰ *Ibid.*, 359.

²¹ Michael Javen Fortner, *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment* (Cambridge: Harvard University Press, 2015), 259.

linked to drug use among the nation's African American and Chinese-American residents. When the media-generated hysteria surrounding minorities and drug use reached its fever pitch in the first two decades of the 20th century, the federal government took action by regulating cocaine and heroin, which were linked, respectively, to African American and Chinese-American violence. All subsequent drug control legislation targeted some kind of seemingly dissident group, as summarized by Richard Harvey Brown: "drug prohibition as a vehicle for minority repression appears...in the United States" in the early 20th century.²² This sort of repression is evident in the subsequent outlawing of marijuana to target Mexican-American immigrants in the 1930s, and psychedelic prohibition to target the leaders of the counterculture in the 1960s.

A departure from rights protection that unquestioningly privileges authoritarian state laws is, at minimum, an alarming consequence of outlawing psychedelics. These drugs could also provide relief to millions who suffer from mental illness. Charlotte Walsh makes a more radical argument that interprets psychedelic prohibition as a violation of cognitive liberty, which she explains is simply "the right to autonomous self-determination over [individuals'] own brain chemistry."²³ Such an analysis is invaluable and offers a holistic evaluation of human rights through the lens of psychedelic use.

This thesis argues that psychedelics have been mishandled by the law, to the detriment of millions. They are a casualty of a broader race and class war whereby

²² Richard Harvey Brown, "The Opium Trade and Opium Policies in India, China, Britain, and the United States: Historical Comparisons and Theoretical Interpretations," *Asian Journal of Social Science* 30, no. 3 (2002): 651.

²³ Charlotte Walsh, "Psychedelics and Cognitive Liberty: Reimagining Drug Policy through the Prism of Human Rights," *International Journal of Drug Policy* 29 (2016): 83. <https://ira.le.ac.uk/bitstream/2381/36731/8/Psychedelics%2520and%2520Cognitive%2520Liberty.pdf>

American power structures have traditionally paired drug use with criminality, resulting in systemic minority oppression. In light of the evidence pointing to the medical and therapeutic potential of psychedelic drugs and the dramatic rights-offenses suffered by both racial and religious minorities, it is apparent that psychedelic prohibition, and drug prohibition in general, should be reexamined in order to develop more reasonable drug control legislation.

CHAPTER 1

DRUG CONTROL LEGISLATION: THE EARLY YEARS, 1914-1960

In the nineteenth century, drugs now fearfully associated with addiction and delinquency were commonly used by average citizens.²⁴ Morphine and other opiates were hailed as incomparably effective painkillers and sedatives and were widely administered by physicians.²⁵ Cocaine was a common ingredient in sodas, medicines, and a variety of other readily available consumables, while its use was promoted by such esteemed individuals as Sigmund Freud.²⁶ In the psychedelic sphere, mescaline was isolated from peyote buttons in 1896, and though it wasn't as popular as cocaine or opium, the drug was praised as inducing "an orgy of vision."²⁷ Despite widespread use and acceptance of potentially dangerous drugs, the Harrison Narcotic Act passed in 1914 and became the first domestic federal drug control law.

²⁴ Lisa N. Sacco, "Drug Enforcement in the United States: History, Policy, and Trends," *Congressional Research Service*, 2014, 2. <https://fas.org/sgp/crs/misc/R43749.pdf>

²⁵ David F. Musto, *The American Disease: Origins of Narcotic Control* (Oxford: Oxford University Press, 1999), 1-2.

²⁶ *Ibid.*, 7.

²⁷ Havelock Ellis, "Mescal: A New Artificial Paradise," *Contemporary Review*, 1898, quoted in Stephen Siff, *Acid Hype: American News Media and the Psychedelic Experience* (Urbana, Chicago, and Springfield: University of Illinois Press, 2015), 18.

Drugs were ostensibly linked to race many decades prior to the passage of the Harrison Act. David F. Musto notes that opium addiction, particularly the real or imagined relationship between Chinese and opium addiction, had been viewed unfavorably by the public long before opium use was regulated.²⁸ Perhaps the first intersection of racism and drug use can be seen in the public's reaction to opium, as opponents of Chinese immigration often pointed to exaggerated numbers of opium addicts among the Chinese population in support of more exclusive immigration policies; they excited public fear of opium by linking its use to interracial sex.²⁹ In Victorian America, sexual relations outside of marriage were abhorred, and the idea of white women having extra-marital sex with working-class Chinese men was nothing short of terrifying.³⁰ Hamilton Wright, the most dedicated supporter of federal restrictions on opium use, "asserted the dangers of opiates in the United States with racial slurs that associated drug use with minorities" in order to garner congressional

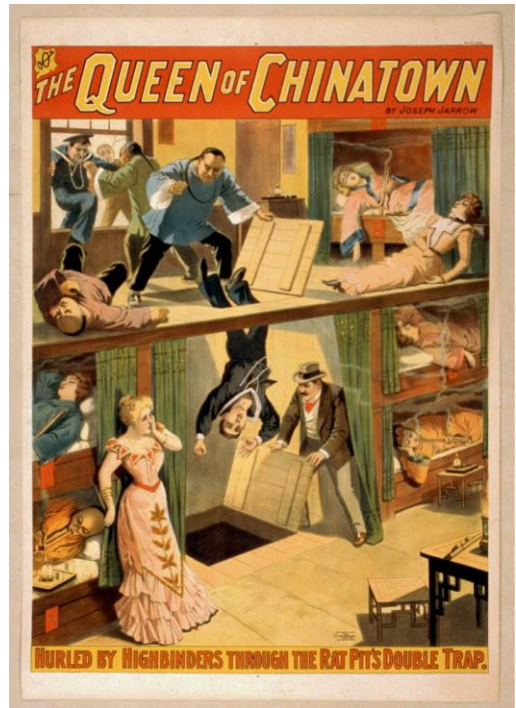


Figure 1. Poster depicting a young white man presumably attempting to "rescue" the numerous young white women helplessly addicted to opium.

Joseph Jarrow, "The Queen of Chinatown," Library of Congress.
<https://www.loc.gov/pictures/item/2014636527/>

²⁸ Musto, 4.

²⁹ Erich Goode, *Drugs in American Society* (New York: McGraw-Hill, 2005), 94-95.

³⁰ Diana L. Ahmad, "Opium Smoking, Anti-Chinese Attitudes, and the American Medical Community, 1850-1890," *American Nineteenth Century History* 1, no. 2 (2000), 59.

support for drug legislation.³¹ He and other supporters “propagandized... against the menaces of opium, addicts, orientals, and aboriginals”³² with statements such as the following: “One of the unfortunate phases of the habit of opium smoking in this country is the large number of women who have become involved and were living as common-law wives of or cohabitating with Chinese.”³³ These views crystallized with California’s passage of a statute penalizing the patrons of opium dens in 1881 and in the federal Chinese Exclusion Act, which effectively eliminated Chinese immigration for ten years, in 1882.³⁴

Cocaine was similarly linked to African American criminality. A 1913 *New York Times* article reported that “two negro boys who were crazed by cocaine” instigated a massive race riot in Mississippi after killing eight people and wounding several others.³⁵ The two supposed “fiends” in Mississippi were lynched³⁶ in just one instance where the fear of black cocaine users led to lynching. The following year, another *Times* article constructed an image of the black cocaine user that must have been incredibly alarming for white readers. According to the author, a lower-class black man would become taken by “the wildest form of insane exaltation” upon sniffing cocaine, after which he would experience depression which, along with accompanying hallucinations, “often incites

³¹ Brown, 643.

³² Ibid., 642.

³³ Hamilton Wright, *Report of the International Opium Commission, Shanghai, China, February 1, 1909 to February 26, 1909* (Shanghai: North-China Daily News & Herald, 1909), 45.

³⁴ Goode, 95.

³⁵ “10 Dead, 20 Hurt in a Race Riot: Drug-Crazed Negroes Start a Reign of Terror and Defy Whole Mississippi Town,” *New York Times*, Sep. 29, 1913.

³⁶ “Drug-Crazed Negroes,” *NYT*.

homicidal attacks upon innocent and unsuspecting victims.”³⁷ As if an insane, cocaine-fueled “negro drug ‘fiend’” who sought to terrorize innocents wasn’t frightening enough, the author added that cocaine renders its users impervious to bullets in addition to improving their marksmanship.³⁸

Such claims are supported by fantastical stories, in which one black man reportedly absorbed a bullet through the heart and another to the chest before finally forcing the officer to beat him into submission. Another involves a “cocaine nigger” in North Carolina who purportedly murdered five men using only five bullets.³⁹ Musto remarks that “anticipation of black rebellion inspired white alarm,” and that fear of the “cocainized black” grew simultaneously with the number of lynchings and the extent of legal segregation.⁴⁰ The official position of the United States government regarding drug use is best characterized by Hamilton Wright’s commentary on African American cocaine use: “It has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by negroes of the South and other sections of the country.”⁴¹

Fear of racial rebellion and geopolitics in Asia would seem to be strange issues driving Congress to restrict drug use. However, the United States’ colonization of the Philippines in 1898 essentially dropped the problem of opium use on Capitol Hill.⁴² For reasons that Musto claims were largely morality-driven, Congress rejected a bill that would have restored the Spanish system of governmental monopoly over opium, whereby

³⁷ Edward Huntington Williams, “Negro Cocaine ‘Fiends’ are a New Southern Menace: Murder and Insanity Increasing Among Lower Class Blacks Because They Have Taken to ‘Sniffing’ Since Deprived of Whisky by Prohibition,” *New York Times*, Feb. 8, 1914.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Musto, 7.

⁴¹ Wright, *Report*, 582.

⁴² *Ibid.*, 25.

the government would profit through its sale.⁴³ Instead, Congress prohibited opium use for Filipinos in 1905 while allowing other citizens to continue to use the drug for three more years in the Philippines.⁴⁴ This reservation was specifically included for Chinese residents of the Philippines,⁴⁵ out of respect for the perceptions of Chinese opium use detailed above. Britain followed suit in 1906 by agreeing to phase out their centuries-old practice of exporting opium from India to China by 1916.⁴⁶ Driven by a combination of anti-imperialism⁴⁷ and a desire for industrial growth, the Chinese government launched a fierce campaign against opium use in the first decade of the twentieth century.⁴⁸

US officials saw this international mobilization against opium use as an opportunity to get a potentially lucrative foot in the door of Chinese trade.⁴⁹ By convening the International Opium Commission (casually referred to as the Shanghai Conference), the United States hoped to appease Chinese merchants, who had responded to the maltreatment of Chinese immigrants by boycotting US goods in 1905.⁵⁰ In order to save the US from the embarrassment of having passed no domestic narcotics legislation, Congress banned the importation of nonmedical opium just prior to the convening of the

⁴³ Ibid., 26-27.

⁴⁴ Ibid., 28.

⁴⁵ Ibid., 28.

⁴⁶ Ibid., 29.

⁴⁷ Much of this can be seen as an expression of frustration with the British opium trade, which many Chinese accurately saw as a method by which the British maintained power over China. By flooding the nation with opium in exchange for silver, tea and silk, the British profited from the large number of Chinese addicts while perpetuating the problem of addiction and draining valuable resources from the country. See Brown, "The Opium Trade," 631.

⁴⁸ Musto, 30.

⁴⁹ Ibid.

⁵⁰ Ibid.

1909 Shanghai Opium Conference.⁵¹ At the Conference, supporters of stronger narcotics control in the United States added a powerful new weapon to their arsenal, as each attending nation agreed to take “drastic measures... to control morphine and other opium derivatives;” the US could not in good faith petition for stiff restrictions on narcotics to be implemented in other nations without taking similar measures itself.⁵²

Following the Shanghai Conference, Congress rejected the Foster bill, which would have introduced criminal penalties for those who failed to comply with proposed new tax and record-keeping restrictions on narcotics.⁵³ In 1911, the US participated in the International Opium Conference at the Hague, where concerns over the hypocrisy of pushing for drug laws in the international community without having any of its own again pressured the United States to pass prohibitive legislation.⁵⁴ In 1914, with Democrats controlling both Houses and the Presidency,⁵⁵ Congress overcame issues involving the Constitution’s state-federal balance of power and passed the Harrison Narcotics Act.⁵⁶ This Act, which Erich Goode characterizes as “the single most important piece of drug legislation ever enacted in the United States,”⁵⁷ was essentially the Foster bill recast as a tax measure for constitutional purposes.⁵⁸ The Harrison Act only regulated cocaine and opiates,⁵⁹ both of which were directly tied to perceptions of minority races. For the time

⁵¹ Brown, 643.

⁵² Musto, 37.

⁵³ Ibid., 41-42.

⁵⁴ Goode, 97.

⁵⁵ Musto, 59.

⁵⁶ Brown, 643.

⁵⁷ Goode, 97.

⁵⁸ Brown, 643.

⁵⁹ O. Hayden Griffin, III, “A Democracy Deficit Within American Drug Policy,” *Southern California Review of Law and Social Justice* 26 (2017): 116. <https://heinonline->

being, psychedelics and other now-illicit drugs such as marijuana remained off the federal government's radar.

In 1919, the Supreme Court prohibited addiction maintenance, and alcohol consumption was outlawed in 1920 with the 18th Amendment.⁶⁰ As intoxicants increasingly became federally regulated, cannabis entered public discourse as a dangerous drug being delivered across the southern border by deviant Chicano immigrants. The *New York Times* in 1925 reported that the plant incited violent behavior: "Crazed from smoking marihuana, Escrado Valle... ran amuck today in a local hospital with a butcher knife and killed six persons before he could be subdued."⁶¹ Two

years later, the newspaper claimed that a family had been "driven insane by eating the Marihuana plant" and that doctors had indicated the four children would not survive while the mother would remain insane forever.⁶² In 1930, Harry Anslinger was appointed as the Commissioner of Narcotics in the newly-created Federal Bureau of Narcotics.⁶³



Figure 2. Poster linking marijuana to sexual promiscuity among white women. 1936

"Marihuana: Weed with Roots in Hell," from <https://druglibrary.net/schaffer/hemp/history/rootsinhell.htm>

org.libsrv.wku.edu/HOL/Page?handle=hein_journals/scws26&div=9&id=&page=&t=1556599403&collection=journals&t=1556599404

⁶⁰ David F. Musto, "The 1937 Marijuana Tax Act," *Archives of General Psychiatry* 26 (1972): 423.

⁶¹ "Kills Six in a Hospital," *New York Times*, Feb. 21, 1925.

⁶² "Mexican Family Go Insane," *New York Times*, Jul. 6, 1927.

⁶³ Musto, *American Disease*, 210.

Anslinger assumed this position at a time of increasing alarm over marijuana that “was directed at the Mexicans who...’got loaded on the stuff and caused a lot of trouble, stabbing, assaults, and so on.”⁶⁴

Curiously, Harry Anslinger deferred decisions on marijuana control to the states until 1935.⁶⁵ He didn’t begin to push for a federal marijuana bill until political pressure from southwestern states became too great to ignore.⁶⁶ In other words, because the states who faced the greatest competition from Mexican immigrant laborers desired marijuana control, federal prohibition of marijuana became a major goal for the FBN. Once Anslinger decided to pursue federal legislation, he used everything available to him to ensure the bill’s passage, including falsified news reports and pseudoscience. In this way, the racism and xenophobia of one geographic area’s officials became national law. David F. Musto summarizes the United States’ reaction to marijuana as patently racist in his seminal work on the subject: “The attack on marihuana occurred in the 1930s when Chicanos became a distinct and visible unemployed minority.”⁶⁷

A key weapon in Anslinger’s arsenal was a letter the FBN received from the *Alamosa Daily Courier*, which Anslinger frequently cited as evidence of the danger of marijuana use. The letter explained that marijuana caused criminality among Colorado’s “degenerate Spanish-speaking residents... most of whom are low mentally, because of social and racial conditions.”⁶⁸ In 1937, Anslinger authored an article in *American* magazine that included a litany of horror stories involving marijuana “addicts,” which

⁶⁴ Ibid., 222.

⁶⁵ Ibid., 223.

⁶⁶ Ibid.

⁶⁷ Ibid., 245.

⁶⁸ Ibid., 223.

“were also embroidered with racial stereotypes, sexual innuendos, and prurient details absent from the original reports.”⁶⁹ For a nation in the throes of the Great Depression, Mexican immigrants were seen as unwanted labor competition⁷⁰ and presented an easy target for Anslinger’s anti-drug rhetoric. Anslinger presented his horror stories to Congress in 1937, as did several medical experts, one of whom testified the drug did indeed cause insanity for many users.⁷¹ Congress was convinced, and the Marijuana Tax Act passed later that year.⁷² Thus, the federal government criminalized yet another minority through drug prohibition.

Though it is possible that early drug prohibition came about from a desire to protect the health and safety of the American populace, the fact that the first two major pieces of prohibitive drug legislation specifically targeted three different minorities indicates that the original aim of US policymakers in prohibiting certain substances was more likely intended to preserve the racial hierarchy of the time. In concluding his work on the opium trade, Richard Harvey Brown offers a damning summary of the mechanisms used for minority repression in the American legal system:

...drug regulation as a vehicle for minority repression appears only in the United States... the mobilization of state power by one group against another could not easily be explicitly targeted at, say, the Chinese. Instead, minority repression could be achieved indirectly through laws against a particular practice favored by a certain group, rather than directly by an explicit targeting of that group. Thus, anti-immigration laws were passed against Chinese *foreigners*, whereas laws against opium smoking (but not drinking) were against Chinese *citizens* and legal residents of the United States.⁷³

⁶⁹ Siff, 28.

⁷⁰ Musto, 218.

⁷¹ *Ibid.*, 226-227.

⁷² Sacco, 4.

⁷³ Brown, 651.

In the decades following the passage of the Marijuana Tax Act, the criminal nature of the supposed tax measures governing drug control became more apparent. Drug use waned during World War II, only to return dramatically in the years following. Responding to the spike in heroin addiction immediately following World War II, Congress passed the federal Narcotic Drugs Import and Export Act, which introduced mandatory minimum sentences for drug possession.⁷⁴ In 1954, Harry Anslinger testified before the Senate that “Asian Communists” were intentionally spreading drug addiction among American troops in Korea and Japan.⁷⁵ Drug addiction once again came into the national spotlight as the Daniel Bill drug control hearings were televised in 1956.⁷⁶ Likewise, a number of addiction-related films were produced during this decade, such as *One-Way Ticket to Hell*,⁷⁷ and *A Hatful of Rain*.⁷⁸ In 1956, Congress increased the mandatory sentences for some offenses to five years and introduced the death penalty as a punishment for those selling heroin to minors.⁷⁹ Once again, drug abuse and minority communities were closely linked.

During World War II and in the years following, African Americans made significant economic progress, though in heavily segregated communities.⁸⁰ At the same time, the news media created a “Negro crime wave” that embarrassed African Americans who were increasingly gaining better economic footing and desired to exonerate the race

⁷⁴ Richard C. Boldt, “Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom,” *South Carolina Law Review* 62, no. 1 (2010), 285-286.

⁷⁵ William R. Conklin, “Asia Reds Accused of Making G.I.’s Narcotic Addicts,” *New York Times*, Jul. 18, 1954.

⁷⁶ Boldt, 286.

⁷⁷ “A Case History of Drug Addiction,” *New York Times*, Dec. 8, 1955.

⁷⁸ “‘Hatful of Rain’ Gets 2 Co-Stars,” *New York Times*, Nov. 16, 1956.

⁷⁹ Musto, 231.

⁸⁰ Fortner, 42-43.

from claims of inferiority.⁸¹ Black areas still dealt with disproportionate rates of poverty, and many poor African Americans without legitimate sources of income became involved in the surging heroin market of the 1950s.⁸² In keeping with the media's traditional sensationalizing of drug use, "black periodicals frequently published dramatic articles about big drug busts, sensational profiles of 'good' people gone 'wrong,' or sorrowful accounts of 'one youthful victim' who 'paid with his life for his folly.'"⁸³ Working- and middle- class blacks came to see drug users as "urban blight... something disturbing but ignorable."⁸⁴

But because African Americans "could not enjoy the fruits of postwar American citizenship out on the suburban frontier," working- and middle-class blacks dealt with poverty directly and eventually came to see poor people as criminally destructive to their communities.⁸⁵ Drug addiction was linked to criminality and seen as a moral rather than psychological issue; drug users were making deliberate choices to become criminals⁸⁶— in the eyes of the black majority, they ceased to exist as complex humans deeply affected by segregation and poverty and instead were looked at as cancerous. It is for this reason that Harlem's leaders supported stiff penalties for drug dealers and users in the latter half of the 1960s:⁸⁷ they wished to remove poor addicts and dealers that had made their communities unlivable.

⁸¹ Ibid., 31.

⁸² Ibid., 37

⁸³ Ibid., 38.

⁸⁴ Ibid., 44.

⁸⁵ Ibid., 65.

⁸⁶ Ibid., 162.

⁸⁷ Ibid., 1.

CHAPTER 2

LSD: THERAPEUTIC MIRACLE OR SOCIETAL MENACE?

During the 1950s and 60s, while political leaders were formulating policies to deal with growing numbers of drug addicts, exciting new drugs were being tested in a slew of experiments conducted with varying levels of medical responsibility. The discovery of LSD's psychological effects came about with Albert Hofmann's accidental ingestion of the substance in 1943.⁸⁸ By the mid-1950s, LSD was being tested by physicians across the United States.⁸⁹ In 1954, Aldous Huxley associated LSD and other psychedelics with mysticism in *The Doors of Perception*,⁹⁰ and psychedelics thereafter came to be seen both as potentially useful therapeutic chemicals and as means for personal exploration. Steven J. Novak claims that LSD became a "cultural crusade" at this point, and that therapists soon after "abandoned caution and adopted it in their clinical practice."⁹¹

One such therapist was Timothy Leary, an accomplished psychologist whose work on personality change transformed into a religious movement of sorts after he tried psilocybin for the first time in 1960.⁹² Most of Leary's experiments thereafter were

⁸⁸ Steven J. Novak, "LSD Before Leary: Sidney Cohen's Critique of 1950s Psychedelic Research, *Isis* 88, no. 1 (1997): 90.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, 93.

⁹¹ *Ibid.*, 109.

⁹² Siff, 121.

focused on psychedelic use, but were devoid of nearly all safety considerations and true research controls: “He foresaw collaboration between experimenter and subject, each with full control of experiments that would take place not in laboratories, but the world.”⁹³ Some of Leary’s test subjects experienced negative reactions to psychedelics, including one woman who attempted to commit suicide the day after a mescaline trip with Leary.⁹⁴ In 1963, Harvard terminated Leary for conducting experiments on students,⁹⁵ and LSD was thrust into public consciousness with reports of a drug bust in Leary’s home in 1966.⁹⁶ That year, Brian Rosborough equated the media’s handling of LSD with the hysteria over marijuana three decades before: “public commentary on psychedelic drugs has been exaggerated in a manner paralleling the evolution of social and legal attitudes toward marijuana. Magazines rushed to the fore with irresponsible and misleading studies.”⁹⁷

This furor essentially drowned the voices of responsible researchers who recognized LSD’s potential in mental health treatment. Albert Hofmann described his discovery of LSD as purely joyous: “LSD brought me the same happiness and gratification that any pharmaceutical chemist would feel on learning that a substance he or she produced might possibly develop into a valuable medicament.”⁹⁸ For Hofmann

⁹³ *Ibid.*, 122.

⁹⁴ *Ibid.*

⁹⁵ Brian Alexander Rosborough, “LSD: A Challenge to American Drug Law Philosophy,” *University of Florida Law Review* 19 (1966): 313.

⁹⁶ Siff, 146.

⁹⁷ Rosborough, 313.

⁹⁸ Hofmann, 30.

however, the drug's explosion as a popular inebriant made LSD a "problem child" instead of a valuable medical tool.⁹⁹

In 1965, responding to "a relatively uninformed public" demanding LSD control, Congress passed the Drug Abuse Control Amendments, which outlawed the sale of psychedelics.¹⁰⁰ This was followed by Sandoz Pharmaceuticals' refusal to continue to supply LSD to the United States, effectively halting all legitimate LSD experimentation in the US.¹⁰¹ In contrast, recreational LSD use continued to grow in popularity and notoriety, and in 1967 a report supposedly linking LSD to chromosome damage was released and cited by widely circulating news sources as proof of the drug's ill effects.¹⁰² Just as users of cocaine, heroin, and marijuana had been considered violent, stories of murderous LSD users were frequently printed. One article told of a man who couldn't remember stabbing his mother to death because he had been "flying on LSD for three days" and included an anecdote about a toddler who was thrown into a convulsive fit after accidentally swallowing an LSD-laced sugar cube.¹⁰³ It also reported that the New York County Medical Society called LSD "the most dangerous and abused drug in the country and one that often caused uncontrollable impulses toward violence."¹⁰⁴ Another report claimed a college freshman had jumped out of a window and fallen to her death while on LSD, and tellingly implicated hippies by pointing out that her apartment was

⁹⁹ Ibid.

¹⁰⁰ Edward J. Weintraub, "Constitutional Law (Freedom of Religion) + (LSD) = (Psychedelic Dilemma)," *Temple Law Quarterly* 41, no. 1, 1967: 68.

¹⁰¹ Ibid.

¹⁰² Siff, 155-156.

¹⁰³ "A Slaying Suspect Tells of LSD Spree," *New York Times*, Apr. 12, 1966.

¹⁰⁴ Ibid.

located “in the heart of the hippie district, but [that] she wasn’t a hippie.”¹⁰⁵ LSD, “a substance with... fantastic effects on mental perception and on the experience of the outer and inner world,”¹⁰⁶ came to be seen as one of the most dangerous drugs around.¹⁰⁷

What set the 1960s apart from the narcotics scares of decades past was the sheer number of drug users. Arrests for marijuana possession increased tenfold between 1965 and 1970, and estimates of the number of American heroin users indicate the same level of growth from 1960 to 1970.¹⁰⁸ The staggeringly rapid growth of drug use in the US provides a possible explanation for the extremity of the legal response to it. However, the method of prohibition remained unchanged—the loudest proponents of narcotic legislation still sought to control certain seemingly subversive minorities. “Hippies” protesting the Vietnam War and various flavors of injustice constituted a specific and frightening minority group, while poor African Americans were targeted as the main source of criminality and degradation in black communities. In 1970, Congress responded to the public hysteria over drug use with the Comprehensive Drug Abuse and Control Act, which mainly just consolidated all previous federal drug legislation.¹⁰⁹ One portion of the Act did alter drug policy in a radical and lasting manner, however. The section referred to as the Controlled Substances Act created five schedules for drugs that ranked them based on their supposed danger and medical potential.

This act was somewhat benign on its face. In fact, it’s even been described as a “transition between reliance on law enforcement with severe penalties and a therapeutic

¹⁰⁵ “Berkeley Coed, 19, on ‘LSD’ Plunges 3 Floors to Death,” *New York Times*, Feb. 27, 1967.

¹⁰⁶ Hofmann, 30.

¹⁰⁷ Siff, 154.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid., 261.

approach.”¹¹⁰ Individual states, on the other hand, strengthened law enforcement substantially in order to combat drug use. In 1973 Nelson Rockefeller, then-governor of New York, signed a bill that mandated life sentences for illicit drug distribution, life sentences for those who committed violent crimes while under the influence of a narcotic, and eliminated protections for young drug dealers.¹¹¹ This law was the first to establish minimum sentences for drug offenses, and forty-eight states followed suit over the next ten years.¹¹² Michael J. Fortner shows that the “black silent majority” was the driving force behind the passage of Rockefeller’s drug laws.¹¹³ He argues that, due to institutional segregation, working and middle class African Americans lived in communities where drug-related crime was rampant, and that these black citizens formed a “silent majority” in the same sense as Nixon’s constituency. While this black silent majority favored stricter drug control legislation and certainly influenced its passage, the Rockefeller drug laws were voted on by nearly all-white legislatures at the behest of those who sought to control poor blacks.

In this sense, classism resulting from institutional racism produced legislated racism masquerading as “law and order.” After 1973, the number of American prisoners more than doubled over thirteen years.¹¹⁴ The election of Ronald Reagan in 1980 signaled a major shift to the right in American politics, especially regarding drug law enforcement. In 1986, President Reagan intensified drug control by signing the Anti-Drug Abuse Act, which mandated longer sentences for possession of crack-cocaine than for powder

¹¹⁰ Musto, 261.

¹¹¹ Fortner, 191.

¹¹² *Ibid.*, 11.

¹¹³ *Ibid.*, 252-253.

¹¹⁴ *Ibid.*, 11.

cocaine, disproportionately and unabashedly targeting drug users of color,¹¹⁵ and the number of black prisoners increased by 429% over the following five years.¹¹⁶ In 1992 and 1993, 74% of all drug-related prison sentences were imposed on African Americans.¹¹⁷

The federal drug control legislation the under which the United States still operates was passed during Richard Nixon's reactionary presidency that was characterized by promises of establishing law and order. In the states, white conservative politicians capitulated to black desires for stiff criminal drug penalties, appeasing African American voters while simultaneously hopping on the political wave that had elected Nixon. So what does this mean for psychedelics?

As Musto shows, the practice of scheduling drugs can be dangerous: "the attitude a drug provoked at the time of its restriction could be frozen into the law."¹¹⁸ Today marijuana, LSD, and psilocybin remain Schedule One drugs (defined as having no medical use and a high potential for abuse) despite myriad research indicating their medical potential. It is still incredibly difficult for qualified physicians and psychologists to experiment with psychedelics due to racist and classist laws passed nearly a half-century ago. Psychedelic prohibition came at a time of societal upheaval, when psychedelic users appeared to pose a threat as significant as true drug addicts. Psychedelics were caught up in a larger, decades-old scheme to control or eliminate certain populations by criminalizing drug use. This entirely illegitimate system of drug

¹¹⁵ *Ibid.*, 10.

¹¹⁶ Tracey L. Meares, "Social Organization and Drug Law Enforcement," *American Criminal Law Review* 35, no. 19 (1998): 205.

¹¹⁷ *Ibid.*, 206.

¹¹⁸ Musto, 261.

control still stands, and the awesome potential of psychedelic medicine has yet to be thoroughly investigated.

Psychedelic drugs are not seized in such massive quantities as marijuana, cocaine and heroin, and their users and dealers are arrested and imprisoned far less frequently. Psychedelics are not addictive and are used in relatively smaller quantities than other drugs, so law enforcement generally does not prioritize stemming psychedelic drug trafficking. Additionally, the people connected with psychedelic drug use at the time they became criminalized were largely white, upper-middle class young adults who were seen as innocent, though socially deviant. They were not seen as frightening, rape-crazed African Americans, violent Chicano immigrants, or degenerate Chinese American opium addicts, and as such, law enforcement has treated them differently.

CHAPTER 3

PSYCHEDELIC RESEARCH: A CLOSER EXAMINATION

Though the Controlled Substances Act classifies psychedelics similarly to far less potentially useful drugs, such as cocaine and methamphetamine,¹¹⁹ they have repeatedly demonstrated incredible potential for use in medical and therapeutic environments. As mentioned, psychedelics have been used for millennia by a variety of cultures. It is suspected that peyote use originated in North America more than seven thousand years ago.¹²⁰ Jesuit missionaries recorded medicinal use of the drug in the seventeenth century,¹²¹ and many Native Americans continue to use it to treat a variety of ailments including cancer and diabetes.¹²² Peter Stafford notes that, remarkably, “these economically deprived people generally enjoy better-than-average health, and reliable observers have confirmed that when they do become sick and turn to peyote, the cactus seems to help them.”¹²³ Ayahuasca is similarly believed to be deeply rooted in the culture of Native Central and South Americans, and is used today to identify personal problems such as alcohol dependence so that the user may work to find remedies.¹²⁴ Its

¹¹⁹ In fact, cocaine and heroin are listed as Schedule II drugs under the CSA, owing to their limited medical uses. See *Comprehensive Drug Abuse Prevention and Control Act of 1970*, Pub. L. No. 91-513, § 812

¹²⁰ Richard Evans Schultes, et. al, *Plants of the Gods: Their Sacred, Healing, and Hallucinogenic Powers* (Vermont: Healing Arts Press, 1992): 144-145.

¹²¹ *Ibid.*, 145.

¹²² Peter Stafford, *Psychedelics Encyclopedia* (Berkeley: Ronin Publishing, Inc., 1992): 135.

¹²³ *Ibid.*

¹²⁴ Bakalar & Grinspoon, 46-47.

contemporary usage in South America is described by Richard Shultes, et al. as “above all, a medicine—the great medicine.”¹²⁵

The first recorded white people to medicinally administer psychedelics were D.W. Prentiss and Francis P. Morgan, who advocated for peyote’s use in treating anxiety, color-blindness, insomnia, and muscle spasms.¹²⁶ Medical use of psychedelics was almost nonexistent during the first half of the twentieth century however, while mescaline (the major psychoactive substance in peyote) was investigated by some as a model for psychosis.¹²⁷ The similarities in the psychological effects of mescaline and LSD led many scientists to investigate LSD in a similar manner after Hofmann’s discovery of its mental effects in 1943. In contrast to mescaline however, LSD presented scientists with new and exciting possibilities for psychopharmacological research, as the drug is several thousand times more potent than mescaline and “manifests a high specificity, that is, an activity aimed specifically at the human psyche.”¹²⁸

This led researchers such as Stanislav Grof to begin to evaluate LSD’s potential as a healing drug in the mid-1950s.¹²⁹ In 1957, Betty Eisner and Sidney Cohen administered LSD to twenty-two patients with minor mental health disorders and reexamined them after six months; the study showed 73% improvement over several life-status criteria (e.g. employment) among its participants.¹³⁰ That same year, R. A. Sandison reported that 65% of ninety-three “severely neurotic” patients showed

¹²⁵ Schultes, et al., 127.

¹²⁶ Stafford, 136.

¹²⁷ Bakalar & Grinspoon, 59.

¹²⁸ Hofmann, 25.

¹²⁹ Stafford, 41.

¹³⁰ Novak, 96.

substantial improvement six months after being treated with LSD.¹³¹ In a 1963 case study, a teenage girl was cured of her severe, chronic psoriasis in twelve LSD psychotherapy sessions, after which she claimed to be “calmer and happier than ever before, and going out with boys for the first time.”¹³² In the mid-1960s, fifty terminal patients were treated with LSD, which provided pain relief for over thirty times longer than morphine, in addition to radically improving the patients’ disposition toward their impending deaths.¹³³ In the early years of LSD research, many studies seemed to prove that LSD psychotherapy could cure alcoholism.¹³⁴

These tests represent only a fraction of the studies conducted on LSD during the 1950s and ‘60s. Unfortunately, as James Bakalar and Lester Grinspoon show, determining the collective value of the psychedelic literature from that time is quite difficult due to the high number of variables present in each study and the impossibility of conducting double-blind experiments.¹³⁵ In addition, several experiments highlight the potential for harm in LSD-assisted psychotherapy. As opposed to the sensationalized reports of birth defects, drug-induced violent crime, and suicide discussed in the previous section, these studies expose the actual risks of psychedelic use and pose a significant challenge for future experimentation.

¹³¹ Bakalar & Grinspoon, 206

¹³² *Ibid.*, 199.

¹³³ Stafford, 74.

¹³⁴ Bakalar & Grinspoon, 214.

¹³⁵ In order to investigate a new drug’s effectiveness, both the administrators and the participants in an experiment are typically unaware whether a placebo or the drug has been given in order to guarantee that the results are not a product of either group’s expectations or biases. The effects of psychedelic drugs are so powerful, however, that the researchers would certainly know whether a patient had received the experimental drug. See Bakalar & Grinspoon at 206.

Sydney Cohen, a former supporter of LSD research, grew increasingly concerned with the research practices of many and the growing recreational use of the drug, and published a study in 1960 warning of the potential adverse effects of LSD. He pointed to the potential for suicide, prolonged psychosis, and hysteria with LSD treatment.¹³⁶ Other researchers soon followed suit, and in 1964 Jerome Levine and Arnold M. Ludwig published an article analyzing both sides of the LSD controversy. They cautioned against accepting accounts of LSD as a miracle drug in psychotherapy as well as the “misleading and exaggerated” reports of the dangers of LSD treatment and concluded that “there can be little doubt that the improper use of LSD may cause great harm.”¹³⁷ A study published in 1967 took a similar stance, warning that chronic anxiety, psychosis, flashbacks, panic, and confusion¹³⁸ could possibly accompany LSD use.¹³⁹

Each of these studies cite a dearth of honestly reported information regarding psychedelic use on both sides of the debate: “comprehensive data are not available since the literature of the psychedelic movement... has tended to minimize or suppress reports of adverse reactions.”¹⁴⁰ Cohen’s 1960 study was conducted in order to examine why adverse reactions to LSD treatment seemed so infrequent, and noted that he found no publications implicating LSD in suicides, possibly because researchers were loath to

¹³⁶ Sydney Cohen, “Lysergic Acid Diethylamide: Side Effects and Complications,” *The Journal of Nervous and Mental Disease* 130, no. 1 (1960): 32-35.

¹³⁷ Jerome Levine and Arnold M. Ludwig, “The LSD Controversy,” *Comprehensive Psychiatry* 5, no. 5 (1964): 314-316, 318.

¹³⁸ Defined as “the transitory recurrence of emotions and perceptions originally experienced while under the influence of a psychedelic drug.” See Bakalar and Grinspoon, 159.

¹³⁹ Edwin Robbins, et al., “Implications of Untoward Reactions to Hallucinogens,” *Bulletin of the New York Academy of Medicine* 43, no. 11 (1967): 987-991.

¹⁴⁰ *Ibid.*, 989.

report suicides or other serious complications due to “guilt feelings.”¹⁴¹ Levine and Ludwig criticized researchers such as Timothy Leary for contributing to the “unabated enthusiasm” surrounding the use of LSD while ignoring the drug’s potential adverse effects.¹⁴²

A review of modern literature on psychedelic use similarly turns up very little information regarding the drawbacks of psychedelic administration. Most investigators praise the effects of the drugs, albeit more guardedly than researchers in the 1960s. One alarming follow-up survey of patients who were administered LSD in Denmark between 1960 and 1973 found that the majority of the patients who responded reported long-term adverse effects. According to Jens Knud Larsen, 36% of the patients experienced some form of mental deterioration at the same time as their LSD treatment and the vast majority suffered long-term side effects.¹⁴³ Larsen argues that psychiatrists currently experimenting with psychedelics are playing with fire, as too little is known regarding their long-term side effects.¹⁴⁴ The results of his study certainly indicate that scientists should exercise extreme caution when administering psychedelics to human subjects.

Even in consideration of such findings, the results of a multitude of modern projects are promising. In a study similar to Larsen’s long-term follow-up investigation, Rick Doblin found that patients who participated in Walter Pahnke’s “Good Friday Experiment” affirmed that the positive behavioral changes they experienced six months after the experiment persisted roughly twenty-five years after the original experiment; the

¹⁴¹ Cohen, “LSD... Complications,” 38-39.

¹⁴² Levine and Ludwig, 315-316.

¹⁴³ Jens Knud Larsen, “Neurotoxicity and LSD Treatment: a Follow-up Study of 151 Patients in Denmark,” *History of Psychiatry* 27, no. 2 (2016): 186.

¹⁴⁴ *Ibid.*, 188.

subjects also reported “virtually no negative... changes in attitude and behavior.”¹⁴⁵ More recently, several researchers have continued to examine the effects of drug-induced mysticism on individual behavior.

Michael P. Bogenschutz and coauthors reported that each participant in a study involving psilocybin-assisted psychotherapy for patients with Alcohol Use Disorder exhibited a marked reduction in alcohol use over the following year.¹⁴⁶ Matthew W. Johnson and his associates found psilocybin to be a “feasible adjunct to smoking cessation treatment” after observing that 60% of their participants had fully abstained from smoking more than a year after treatment. They also note that current smoking medications demonstrate a 31% abstinence rate over the year following treatment, though they qualify their findings by recognizing the small sample size of the study.¹⁴⁷

Psychedelics have also been examined for treating more serious mental illnesses. Michael C. Mithoefer and his research team published a study in 2010 finding that MDMA-assisted psychotherapy “can be used with acceptable and short-lived side effects” and “produced clinically and statistically significant improvements in PTSD symptoms.”¹⁴⁸ Roland R. Griffiths and his fellow researchers found psilocybin to “decrease symptoms of depressed mood and anxiety, and to increase quality of life in

¹⁴⁵ Doblin, 23.

¹⁴⁶ Bogenschutz, et al., 5.

¹⁴⁷ Johnson, et al., 5-6.

¹⁴⁸ Michael C. Mithoefer, et al., “The Safety and Efficacy of 3,4-methylenedioxymethamphetamine-assisted psychotherapy in Subjects with Chronic, Treatment-Resistant Posttraumatic Stress Disorder: The First Randomized Controlled Pilot Study,” *Journal of Psychopharmacology* 25, no. 4 (2010): 449.
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3122379/>

patients with a life-threatening cancer diagnosis.”¹⁴⁹ Francisco A. Moreno and coauthors published a study in 2006 finding psilocybin-assisted psychotherapy to relieve the symptoms of Obsessive-Compulsive Disorder for longer than twenty-four hours in most patients.¹⁵⁰

A great number of studies investigate the effects of psychedelic use on healthy volunteers (i.e. people without significant mental illnesses). In another study by Griffiths, roughly 90% of the healthy subjects examined reported “positive changes in attitudes, mood, life satisfaction, behavior, and altruism/social effects” persisting fourteen months after treatment.¹⁵¹ Similar effects on prosocial behavior and empathy were reported by a group of researchers led by Cedric M. Hysek in a 2014 project on MDMA.¹⁵² Erich Studerus pooled eight psilocybin studies from 1999 to 2008 and affirmed Griffiths’ findings regarding value and attitude changes, adding that their study demonstrates the “safety and tolerability” of psilocybin experiments on healthy subjects “not only acutely, but also in the long run.”¹⁵³

¹⁴⁹ Roland R. Griffiths, et al., “Psilocybin Produces Substantial and Sustained Decreases in Depression and Anxiety in Patients with Life-Threatening Cancer: a Randomized Double-Blind Trial,” *Journal of Psychopharmacology* 30, no. 12 (2016): 1194. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5367557/pdf/10.1177_0269881116675513.pdf

¹⁵⁰ Francisco A. Moreno, et al., “Safety, Tolerability, and Efficacy of Psilocybin in 9 Patients with Obsessive-Compulsive Disorder,” *Journal of Clinical Psychiatry* 67, no. 11 (2006): 1739. http://www.maps.org/research-archive/w3pb/2006/2006_Moreno_22868_1.pdf

¹⁵¹ Griffiths, et al., “Psilocybin... Mystical-Type Experiences,” 13.

¹⁵² Cedric M. Hysek, et al., “MDMA Enhances Emotional Empathy and Prosocial Behavior,” *Social, Cognitive, and Affective Neuroscience* 9, no. 11 (2014): 1651. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4221206/pdf/nst161.pdf>

¹⁵³ Erich Studerus, et al., “Acute, Subacute and Long-Term Subjective Effects of psilocybin in Healthy Humans: A Pooled Analysis of Experimental Studies,” *Journal of Psychopharmacology* 25, no. 11 (2011) 14, 16. <https://breadlord.org/downloads/psych/psilocymeme.pdf>

The difficulty in finding modern studies reporting the negative side effects of psychedelics can possibly be attributed to modern researchers ethically and cautiously studying the drugs. The hysteric stories of LSD users plunging to their deaths and of the drug causing birth defects have disappeared and been replaced by a remarkable amount of literature on how to safely and effectively administer psychedelics and even how to safely use them recreationally. In 2011, James Fadiman published *The Psychedelic Explorer's Guide: Safe, Therapeutic, and Sacred Journeys* as a safety manual for psychedelic use. It includes an eighteen-part checklist for working through a “bad trip” and a guide on how to prepare set, setting, and dosage for psychedelic trips.¹⁵⁴ A quick survey of erowid.org, a website with a great deal of literature and open forums on psychedelic drug use yields much information on the hazards of psychedelic use as well as an active online community providing support and instruction for those curious about psychedelic use.

While there is no established causal relationship between the increase of instructional psychedelic literature and decrease of reported adverse effects, modern studies indicate that recreational psychedelic users have experienced few, if any significant side effects. Teri Krebs and Pal-Orjan Johansen surveyed 21,979 lifetime psychedelics users and in 2013 published a study finding “no relation between lifetime use of psychedelics and any undesirable past year mental health outcomes, including serious psychological distress, mental health treatment..., or symptoms of panic disorder, major depressive episode, mania, social phobia, generalized anxiety disorder,

¹⁵⁴ James Fadiman, *The Psychedelic Explorer's Guide: Safe, Therapeutic, and Sacred Journeys* (Rochester: Park Street Press, 2011), 19-38, 86-89, resp.

agoraphobia, post-traumatic stress disorder, or non-affective psychosis.”¹⁵⁵ The *Drug Abuse Warning Network* (DAWN) is a project that compiled and published statistics on emergency room visits involving drug use for the years 2004 to 2011, and their estimates place the total number of visits for the use of MDMA, LSD, ketamine, or other “miscellaneous hallucinogens” at 210,089.¹⁵⁶ Over the same eight-year span, the *National Survey on Drug Use and Health* (NSDUH) reports 135,724,955 instances of psychedelic use,¹⁵⁷ placing the rate of use-to-ER-visit at .155%. Most people (69%) are treated and released within 24 hours of their visit. The other 31% were either hospitalized, transferred to another emergency unit, or left against medical advice.¹⁵⁸ So the rate of use-to-hospital-admittance is .048%. This is a remarkably low figure considering that all but a few uses of psychedelics each year occur without medical supervision, and speaks to the relative safety of psychedelic use. It may also indicate that the dissemination of psychedelic literature has allowed for more educated use of the drugs, thereby reducing their risk.

For comparison, DAWN shows that prescription antidepressants were responsible for 146,425 emergency room visits over the same span of time. Prescription benzodiazepines such as Xanax were implicated in a whopping 853,967 visits and opiates

¹⁵⁵ Teri S. Krebs and Pal-Orjan Johansen, “Psychedelics and Mental Health: A Population Study,” *PLoS ONE* 8, no. 8 (2013): 5.

<https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0063972&type=printable>

¹⁵⁶ Substance Abuse and Mental Health Data Archives, *Drug Abuse Warning Network* (DAWN), 2004-2011. <https://www.datafiles.samhsa.gov/study-series/drug-abuse-warning-network-dawn-nid13516>

¹⁵⁷ Substance Abuse and Mental Health Data Archives, *National Survey on Drug Use and Health*, 2004-2011. <https://datafiles.samhsa.gov>

¹⁵⁸ DAWN.

were involved in 943,020 emergency room visits.¹⁵⁹ While similar statistics from NSDUH are not available for these semi-legal drugs, the sheer number of emergency room visits is staggering in comparison to the wholly-proscribed psychedelics. Alcohol, the least-restricted of these drugs, was involved in the most emergency room visits at 2,542,271.¹⁶⁰ At the very least, these numbers show a need to reevaluate drug scheduling under the Controlled Substances Act.

¹⁵⁹ *DAWN*.

¹⁶⁰ *DAWN*.

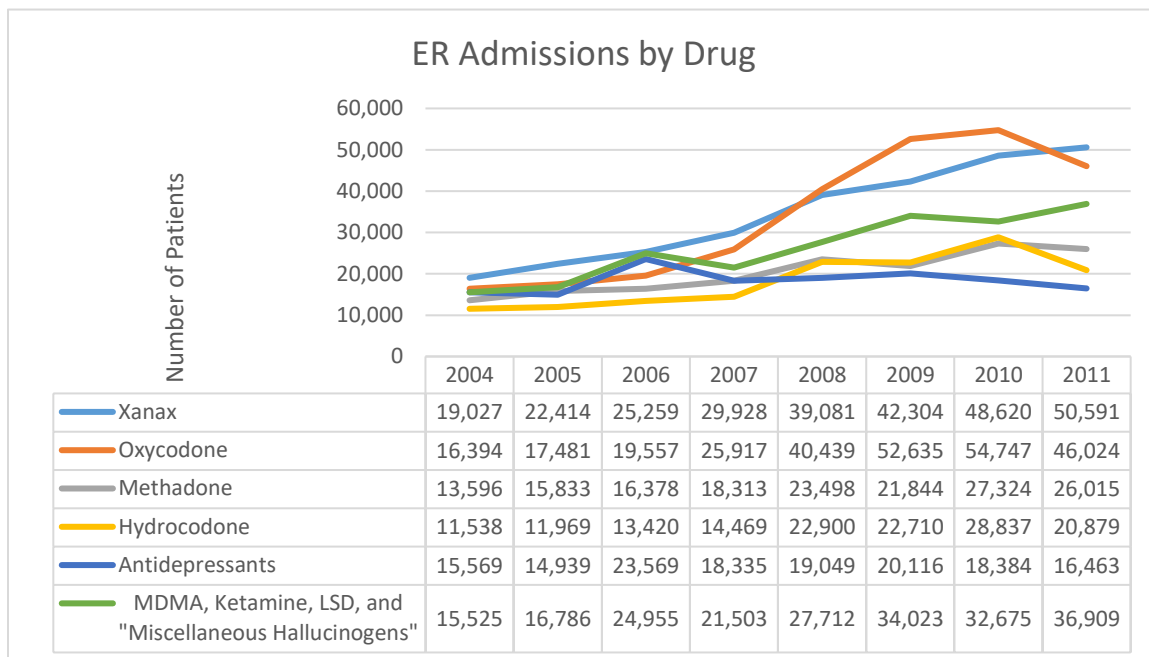


Figure 3. Number of emergency department visits for psychedelic users versus other "semilegal" drugs.

Substance Abuse and Mental Health Data Archives, *Drug Abuse Warning Network (DAWN)*, 2004-2011.
<https://www.datafiles.samhsa.gov/study-series/drug-abuse-warning-network-dawn-nid13516>

CHAPTER 4

PSYCHEDELICS BEFORE THE SUPREME COURT: TWO POTENTIAL AVENUES OF REDRESS AND THEIR RESPECTIVE LIMITATIONS

In a series of decisions, the Supreme Court has ensured that a direct challenge to the Schedule I status of psychedelics never receives judicial review. While such a legal strategy could incorporate the bounty of research discussed in the previous section, the

Court's decisions leave such information sidelined, judicially speaking. The Supreme Court has dealt with psychedelics both directly and indirectly. Indirectly, the Court struck two blows to psychedelic researchers by providing administrative agencies wide judicial latitude in *Weinberger, et al. v. Hynson, Westcott, and Dunning, Inc.* (1973) and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al.* (1984). The Court handled psychedelics directly in *Department of Human Resources v. Smith* (1990), which involved the respondent's sacramental use of peyote. In these cases, the Supreme Court raised important questions regarding the legitimacy of bureaucratic government and the liberty of individuals to engage in religious practices largely rejected by mainstream society. The latter issue raises the equally important question of whether cognitive liberty is a constitutionally protected right and the degree to which government may regulate that right.

Difficulties in Rescheduling Controlled Substances Under *Chevron* and *Hynson*

The combined efforts of the Court, FDA, and DEA have rendered the process of rescheduling a drug immensely difficult, if not impossible. Two major Supreme Court decisions have allowed the FDA and DEA virtually unchecked gatekeeping authority over drug hearings. These decisions not only allowed administrative agencies to determine the outcome of a hearing, they gave them the power to determine whether or not a hearing would take place at all. In 1973, the same year that New York dramatically raised the state benchmark for drug law enforcement with Rockefeller's drug laws, the Supreme Court decided *Weinberger, et al. v. Hynson, Westcott and Dunning, Inc.* This decision extended the power of summary judgment to the federal Food and Drug

Administration over whether the manufacturers or proponents of a drug are entitled to a hearing on the rights to market that drug.¹⁶¹ According to James O'Reilly, it eliminated judicial review from the decisions of administrative agencies: "Imagine... a criminal defendant seeking acquittal being forced to prove at the courthouse door that she did not commit the crime. If the defendant did not have enough proof, she would not receive a trial and, instead, simply get the penalty."¹⁶² Such a process is antagonistic to traditional notions of an adversarial legal system.

Eleven years later, the Court chipped away at another fundamental characteristic of the American legal system. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al.*, the Court determined that, in absence of the express direction of Congress on a certain matter, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."¹⁶³ Thus, the Court delegated what many consider to be its most important function to bureaucratic agencies by creating an exception to judicial review known as the "Chevron deference." This decision, as Charles J. Cooper astutely points out, flies in the face of one of the United States' oldest and most fundamental judicial principles: "It is emphatically the province and duty of the judicial department to say what the law is."¹⁶⁴ Cooper elaborates that this decision has essentially created an insulated new branch of government, one which exercises both judicial and legislative powers: the

¹⁶¹ *Weinberger, Secretary of Health, Education, and Welfare, et al. v. Hynson, Westcott and Dunning, Inc.* 412 U.S. 609 (1973), 617.

¹⁶² James O'Reilly, "Jurisdiction to Decide an Agency's Own Jurisdiction: The Forgotten Tale of the Hynson Quartet," *Administrative Law Review* 58 (2006): 834

¹⁶³ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al.* 467 U.S. 837 (1984), 844.

¹⁶⁴ *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803), 177.

Administrative State.¹⁶⁵ Aside from the enormous constitutional problem presented by affording bureaucracy the unchecked powers of two branches of government, this decision makes it extremely difficult to reschedule a drug.

In enforcing the Controlled Substances Act, the DEA determines whether the proponents of a drug may receive a hearing for its scheduling or rescheduling, its administrative law judge determines the outcome of the hearing, and the head of the administration is not bound by the judge's ruling.¹⁶⁶ After the DEA hearings on MDMA in 1984, Francis Young, the DEA's Administrative Law Judge, decided that "'accepted medical use in treatment in the United States' is not determined by... dis-approvals by the FDA. It is determined, rather, by what is actually going on within the health care community."¹⁶⁷ Finding that "there is a currently accepted medical use for MDMA... that there is not a lack of accepted safety for its use under medical supervision¹⁶⁸... and that the evidence does establish MDMA to have 'potential for abuse less than the drugs or other substances in Schedules I and II,'" Young recommended that the Administrator of the DEA place MDMA in Schedule III.¹⁶⁹ However, the Administrator ignored this ruling,¹⁷⁰ as was his prerogative per *Chevron*.

¹⁶⁵ Charles J. Cooper, "The Flaws of the Chevron Deference," *Texas Review of Law and Politics* 21, no. 2 (2016), 312. <https://heinonline-org.libsrv.wku.edu/HOL/Page?handle=hein.journals/trlp21&id=331&collection=journals&index=>

¹⁶⁶ Stafford, 63.

¹⁶⁷ Francis L. Young, *Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of Administrative Law Judge in the Matter of MDMA Scheduling*, May 22, 1986, 22.

¹⁶⁸ Young, *Opinion*, 39.

¹⁶⁹ Young, *Opinion*, 66.

¹⁷⁰ Stafford, *Encyclopedia*, 63.

A bureaucratic dictatorship governing drug laws is extremely problematic. First, concerns over “strangers at the bedside,” as advanced by those opposing what critics term “socialized medicine,” have become a reality; the whims of unelected officials with no medical expertise bear more weight than the authority of the medical community. Second, the judiciary is removed from drug control procedures, as seen in the example above. Cooper explains that life tenure and guaranteed salary are required for the exercise of judicial power under Article III of the Constitution. These safeguards were created to prevent the judicial branch from becoming overly powerful, but they are bypassed by federal bureaucrats under *Chevron*.¹⁷¹ Finally, once a drug has been banned, the burden of proof placed on researchers to show its effectiveness and low potential for harm is nearly impossible to meet.

Obtaining approval from the DEA and FDA is difficult (only 349 scientists were licensed to study Schedule I drugs in 2013), and studying illegal drugs often stigmatizes the scientists involved.¹⁷² Additionally, researchers must shoulder the astronomical cost of conducting research on Schedule I drugs. For example, psilocybin from a synthesis company in Boston is \$12,000 per gram.¹⁷³ Not only would researchers have to spend hundreds of thousands of dollars in order to obtain the substances under investigation, that company would have to jump through an obstacle course of hoops to obtain permission to supply the drug. The Multidisciplinary Association of Psychedelic

¹⁷¹ Cooper, “Chevron,” 311.

¹⁷² Marks, “Psychedelic Medicine,” 97.

¹⁷³ David J. Nutt, et al., “Effects of Schedule I Drug Laws on Neuroscience Research and Treatment Innovation,” *Nature Reviews: Neuroscience* 14, no. 8 (2013): 579.

https://www.researchgate.net/publication/237147196_Nutt_DJ_King_LA_Nichols_DE_Effects_of_Schedule_I_drug_laws_on_neuroscience_research_and_treatment_innovation_Nat_Rev_Neurosci_14_577-585

Substances (MAPS) offers a daunting example of the total cost of studying Schedule I drugs, as it is currently entrenched in a \$26.9 million campaign to make MDMA an FDA-approved prescription medicine.¹⁷⁴

In other words, administrative agencies require researchers to investigate illegal drugs extensively before they will reconsider their merits, hamper the investigation process with complex, time-consuming, and expensive regulations, and remain the final arbiter regarding the legal use of certain drugs. Due to the Chevron Deference, any reasonable interpretation of a statute made by an agency is considered law, “controlling even over a prior contrary ruling of a federal court... even if you can demonstrate the agency’s interpretation is wrong... you still lose.”¹⁷⁵ Advocates of psychedelic use in medicine would need to prove that the Schedule I status of a substance is unreasonable, and considering the real possibilities for harm, though minimal, judges are unlikely to rule in such a manner. Interestingly, one of the few times courts have ruled agency decisions unreasonable involved an EPA crackdown on power plant emissions.¹⁷⁶

Psychedelics and the Free Exercise Clause

The Free Exercise Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*.”¹⁷⁷ Historically, the Court has made few exceptions to these rights. In 1963, the Supreme Court signaled that it would be reluctant to abandon Free Exercise protections in *Sherbert v. Verner*. Adell Sherbert, a member of the Seventh-day Adventist Church,

¹⁷⁴ “MDMA-Assisted Psychotherapy,” Multidisciplinary Association of Psychedelic Drugs, last modified 2019, <https://maps.org/research/mdma>

¹⁷⁵ Cooper, “Chevron,” 307-308.

¹⁷⁶ See *Michigan, et al. v. Environmental Protection Agency, et al.* 576 U.S. ____ (2015).

¹⁷⁷ U.S. Const., amend. I.

was discharged by her employer for refusing to work on Saturdays and subsequently denied unemployment benefits by the State of South Carolina for failing “to accept ‘suitable work.’”¹⁷⁸ In the majority opinion, Justice Brennan reaffirmed that “the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs*,” and established that the government must demonstrate it had utilized the least invasive means in pursuit of a compelling interest in cases where it sought to regulate religious *acts*.¹⁷⁹ This application of strict scrutiny in cases involving state interference with religious practices governed Free Exercise cases for nearly three decades following *Sherbert*.

The Court found in favor of *Sherbert*, holding that denying her unemployment benefits essentially forced her to choose between her religion and employment, which unconstitutionally burdened her free exercise rights.¹⁸⁰ The Court also held that because a South Carolina statute specifically protected employees who refused to work on Sunday for religious reasons, denying Saturday Sabbath observers the same protections would constitute unconstitutional religious discrimination.¹⁸¹ Allowing *Sherbert* to receive unemployment benefits thereby “reflects nothing more than the governmental obligation of neutrality in the face of religious differences.”¹⁸² This religious neutrality mandate would appear incredibly important for psychedelic religious practices under First Amendment jurisprudence.

¹⁷⁸ *Sherbert v. Verner, et al.* 374 U.S. 398 (1963): 401.

¹⁷⁹ *Ibid.*, 402-403.

¹⁸⁰ *Ibid.*, 404.

¹⁸¹ *Ibid.*, 406.

¹⁸² *Ibid.*, 409.

In 1972, the Court built on *Sherbert* by finding that even though public education “ranks at the very apex of the function of a State,” such a compelling interest is not exempt from the balancing process required by Free Exercise concerns.¹⁸³ In *Wisconsin v. Yoder*, the Court found in favor of two Amish boys who challenged their convictions for refusing to attend school after the eighth grade due to religious conviction. In order for the government to constitutionally interfere with legitimate religious practices, “it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”¹⁸⁴ The Court found neither exception valid in this case.

Interestingly, Chief Justice Burger’s opinion relies almost entirely on the nature of Amish society and religion. He repeatedly references the fact that the Old Amish Order had been established for centuries and argues that in order for it to maintain its integrity, Amish children must not attend secondary school.¹⁸⁵ He finds Wisconsin’s assertion of a duty to protect children from ignorance insufficient to preclude First Amendment protections largely because members of the Amish community “are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.”¹⁸⁶ In other words, because the Amish hold a distinct and aged set of religious beliefs and are model citizens by Chief Justice Burger’s standards, their religious convictions outweigh the state’s interest in public education.

¹⁸³ *Wisconsin v. Yoder, et al.* 406 U.S. 205 (1972): 214.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*, 217.

¹⁸⁶ *Ibid.*, 222.

The Court abandoned strict scrutiny for Free Exercise cases in 1990 with *Employment Division v. Smith*. The case involved the denial of unemployment benefits to Alfred Smith and Galen Black, two members of the Native American Church, because they had been fired for sacramentally ingesting peyote.¹⁸⁷ In the majority opinion, Justice Antonin Scalia casually dismisses *Yoder* as a “hybrid” case involving multiple constitutional rights and relegates the *Sherbert* test exclusively to cases involving the Free Exercise Clause and denial of unemployment benefits in the absence of criminal legislation.¹⁸⁸ Instead, because the Oregon law was a generally applicable criminal statute and did not specifically target the religious beliefs of members of the Native American Church, Oregon could constitutionally deny unemployment benefits to those who violated the law, even for religious purposes.¹⁸⁹ Though Justice Scalia admits that this decision burdens religious minorities, he maintains that such is merely an “unavoidable consequence of democratic government.”¹⁹⁰ Here, majoritarian tyranny was declared preferable to exempting a few individuals from statutes outlawing practices necessary for the maintenance of their religion.

Justice Harry Blackmun, in dissent, admonished the Court for rejecting the “consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion.”¹⁹¹ He argued that the majority had provided no relevant basis for its determination that traditional Free Exercise Clause jurisprudence is inapplicable to criminal statutes and generally applicable state laws, and suggested that

¹⁸⁷ *Employment Division, Department of Human Resources of Oregon, et al. v. Smith, et al.* 494 U.S. 872 (1990): 874.

¹⁸⁸ *Ibid.*, 881, 883.

¹⁸⁹ *Ibid.*, 882.

¹⁹⁰ *Ibid.*, 890.

¹⁹¹ *Ibid.*, 907. Justice Blackmun, dissenting.

the decision may have been the product of an overreaction to the drug problems of the United States.¹⁹² Further, he argued that no government interest was pursued by Oregon in prohibiting the use of sacramental peyote by the Native American Church. The state never undertook any significant law enforcement activities against religious users of peyote, and the drug was not involved in the “vast and violent traffic in illegal narcotics that plagues this country;” the state thereby cannot have had any interest in prohibiting sacramental peyote use for the purposes of combatting the drug trade.¹⁹³

While this case certainly marks a potentially dangerous departure from free exercise protections for minority religious practices, *Smith* actually fits well with *Yoder* and *Sherbert* as far as psychedelic use is concerned. The majorities in the latter two cases and the dissent in *Smith*, each of which give stirring opinions defending religious freedom, rely heavily on the fact that the religions involved are well established, follow certain dogmatic principles, and are made up of at least “contributive” members of society. Concerning freedom of religious practices, the Court has repeatedly held that a religion must adhere to familiar religious forms in order to receive free exercise protections in cases where statutes either directly or inadvertently prohibit certain religious practices. In light of such a narrow categorization of religious practice, Justice Brennan’s guarantee of the courts assuming a neutral position on divergent religious practices (*Sherbert*) rings hollow. Even the most radical defense of religious practices, Justice Blackmun’s dissent in *Smith*, leans on the assertion that the Native American Church “generally advocates self-reliance, familial responsibility, and abstinence from

¹⁹² *Ibid.*, 908. Justice Blackmun, dissenting.

¹⁹³ *Ibid.*, 916. Justice Blackmun, dissenting.

alcohol,”¹⁹⁴ showing that a certain religion must adhere to Western cultural norms in order to invoke the First Amendment.

Overall, it appears that attempting to find a niche in prohibitory drug laws—whether through arguments for therapeutic use or on religious grounds—is an ineffective strategy for bringing about the reconsideration of psychedelic drugs. For this reason, Charlotte Walsh argues that considerations of psychedelic freedoms ought to eliminate the government from the conversation altogether:

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.¹⁹⁵

She finds the idea of cognitive liberty, or “the fact that individuals should have the right to autonomous self-determination over their own brain chemistry,” a more effective tool for reclassifying psychedelics than their therapeutic or spiritual properties.¹⁹⁶ Marc Jonathan Blitz echoes this argument, declaring that the constitutional right to “freedom of mind” requires government officials to refrain from regulating an individual’s ability to modify her own thought processes biologically.¹⁹⁷

Likewise, simply because an action is considered deviant by mainstream society (e.g. ingesting psychedelic drugs), it is not precluded from constitutional protections such as Blitz’s freedom of mind. Indeed, Chief Justice Burger supports this very argument in *Yoder*, despite his reliance on traditional notions of religion: “A way of life that is odd or

¹⁹⁴ *Ibid.*, 914. Justice Blackmun, dissenting.

¹⁹⁵ Walsh, “Psychedelics and Cognitive Liberty,” 83.

¹⁹⁶ *Ibid.*

¹⁹⁷ Marc Jonathan Blitz, “Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution,” *Wisconsin Law Review* 4 (2010): 1050.

even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”¹⁹⁸ Similarly, Walsh argues that legal moralism has no basis in a liberal society—individuals are at liberty to make choices that may be contrary to what the moral majority has deemed acceptable.¹⁹⁹ In contrast, Justice Scalia takes a far more limited view of human rights in *Smith*, arguing in typical slippery-slope fashion that a different ruling would “open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind,” such as compulsory military service, manslaughter laws, and animal cruelty laws, and that a morally totalitarian government is preferable to “a system in which each conscience is a law unto itself.”²⁰⁰ However, such a system is the very basis of individual liberty; its existence is woven into the fabric of a democratic society. The idea of bodily autonomy predates the existence of the United States and was essential for the first assertions of individual rights during the Enlightenment.²⁰¹

The idea that cognitive liberty is implied in the Constitution, and that it would permit citizens to alter their consciousness in any manner they chose is a potential silver bullet for drug policy reform. Unfortunately, the Court has yet to consider a fundamental “freedom of consciousness” inherent in the Constitution. Instead, it has abdicated its responsibility to protect the rights of citizens by delegating significant judicial powers to federal agencies and by abandoning its commitment to the protection of spiritual practices. These decisions have created a system that is nearly impossible to reform, despite a preponderance of evidence supporting the need for change.

¹⁹⁸ *Yoder*, 224.

¹⁹⁹ Walsh, 83.

²⁰⁰ *Smith*, 889-890.

²⁰¹ See, for example, Lynn Hunt, *Inventing Human Rights* (New York: Norton, 2008).

CONCLUSION

The purpose of this thesis is not to dissuade anyone from pursuing drug policy reform through the avenues of spiritual or cognitive freedom, administrative reconsideration, or any unmentioned method of bringing about policy change. The barriers to drug reform should be tested relentlessly. In fact, this project is not even limited to psychedelic or drug reform advocacy; instead, it questions societally mandated behavioral boundaries. It has surveyed the forces that constructed those boundaries, and it has evaluated a number of arguments from a minority seeking change. Hopefully, the research as presented necessitates questioning of a far broader and more significant nature than whether or not psychedelic drugs should be rescheduled. In consideration of all of the evidence discussed, one should find issue with the methods this society uses to

control deviant behavior and the power it affords its government to enforce such control. Alternatively stated, what limitations on the power of the majority are necessary to protect the interests of the minority, and are the existing controls sufficient to prevent majoritarian autocracy?

In the early twentieth century, the federal government announced a new plan for minority control in the form of the 1914 Harrison Narcotics Act. Targeting African and Chinese Americans under the guise of a tax measure, this law created a new class of federal criminals. Prior to the Harrison Act, none of the modern problems associated with drug use existed—juvenile addicts were unheard of, adult addicts were rarely imprisoned, and illicit traffic was naturally nonexistent.²⁰² After the Harrison Act, anyone who used cocaine or opium was labeled a criminal, which “increasingly created a *de facto* link between the use of such drugs and social marginality or criminality in general.”²⁰³ In this instance, the unfounded and blatantly racist suppositions of the majority became law, and none raised objections on the basis of wanton intent or disparate impact.

The federal government followed this trajectory with the Marijuana Tax Act in 1937 and the creation of mandatory minimum sentences for drug offenses in the 1950s. Once drug users, or users of the “wrong” drugs, became criminals, they were forever ousted from society. The treatment of drug offenders since the passage of the 1970 Comprehensive Drug Abuse Prevention and Control Act has only exacerbated the distinctions between a majority that rejects illicit drug use and the minority of citizens that does not. Felony drug offenders cannot vote in most states and comprise a distinct group of disenfranchised citizens. Because drug crimes are inextricably linked to poverty,

²⁰² Brown, “Opium,” 644.

²⁰³ Ibid.

and because poverty is similarly pervasive in communities of color, racial minorities have been disproportionately impacted by the reality of drug prohibition.

The framers of the Fourteenth Amendment unquestionably sought to protect a new, vulnerable, and racially distinct group of citizens after emancipation. Though the Equal Protection Clause prohibits state discrimination on the basis of race, state drug laws with demonstrably racial characteristics remain in effect. In such a situation, just how effective are the rights protections for minorities guaranteed by the Constitution?

In some instances, constitutional limits to the State's control over individuals only take effect when the actions of the State offend majoritarian sentiment. Such an exception to constitutional "guarantees" has allowed a racially discriminatory system of drug legislation to maintain the same force of law as the Amendment that explicitly prohibits its existence. For more than a century, the will of the majority regarding the use of certain drugs has dominated over minority rights. This minority was not only artificially manufactured, it has been subsequently disenfranchised, imprisoned, and rejected from employment through mechanisms such as drug tests and background checks. The users of illicit drugs have been removed from every aspect of a society that consistently seeks to further solidify the distinction. Is it acceptable for the State to create a subcitizenry, preclude them that State's political processes, and still exert control over them?

Psychedelic prohibition follows the same majoritarian structure, but with a very different minority profile. Those most effected by psychedelic prohibition are not the "hippies" of the 1960s or modern sacramental users of psychedelics. The war on drugs did not target psychedelic users, as they were overwhelmingly white, middle-class young adults. The Supreme Court's denial of a religious exemption for sacramental peyote use in *Smith* was promptly reversed by Congress through the Religious Freedom Restoration

Act of 1993, which stands as a powerful example of the need for majoritarian action in order to protect constitutional rights when they are violated by drug legislation. The true victims of psychedelic prohibition are the millions suffering from untreatable mental illnesses who could potentially benefit from psychedelic medicine. While no constitutional rights protect their interests in seeking the best medical assistance available to them, their plight is similar to the victims of other drug prohibition described above: the government was influenced more by hysteria than by scientific findings to prohibit a class of drugs potentially central to their lifestyle and bolstered the system with safeguards all but eliminating the possibility of reform. Just as illicit drug users are removed from the political process in a manner that reinforces the system by removing the natural dissenters, the potential beneficiaries of psychedelic medicine are precluded from political redress by an administrative system hostile to change.

In a society lacking adequate constitutional constraints on the will of a majority, an empathetic population with empathetic leaders could potentially provide the only necessary protections for minority groups. Charles A. Reich describes empathy as “the ability to hear and understand the feelings of others, the capacity to imagine what it is like to be poor, or black, or a mother on welfare, or a woman encountering job discrimination.”²⁰⁴ A public that remains misinformed about the history of drug policy and the minority groups harmed by it is ill-equipped to exercise the necessary empathy to bring about change. For this reason, the narrative presented in this paper must be retold as many times as necessary, until the myths surrounding psychedelic drugs and drug policy in general have been dispelled. Only then can the forces of oppression discussed in this

²⁰⁴ Charles A. Reich, “Law and Consciousness,” *Cardozo Law Review* 10 (1988), 78.

project disappear. Of course, drug prohibition is not the only instance in which a majority has trampled the rights of others. Countless other narratives must be told repeatedly, until a new majority is created—one that will reexamine the foundations of this society, and implement adequate safeguards against moral totalitarianism.

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