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Editors
Beatriz Caiuby Labate
Center for Economic Research
and Education (CIDE)
Aguascalientes, AGS
Mexico

Clancy Cavnar
Nucleus for Interdisciplinary Studies
of Psychoactives (NEIP)
San Francisco, CA
USA

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Foreword: Drug Use and Prohibition: Three Reform Traditions

The word “prohibition” connotes statutory bans on illicit services and products, especially drugs. Those caught making, transporting, selling, or using prohibited drugs are in legal jeopardy. Often, they are in serious jeopardy. Singapore’s immigration forms warn, in red capital letters, that drug traffickers face the death penalty. The threat is not an idle one.

Drug prohibition, though, has never been absolute. The 1961, 1971, and 1988 United Nations drug conventions permitted medical usage, as did their predecessor treaties. The first of these, the 1912 International Opium Convention, pledged its signatories to “control” narcotic manufacturing, distribution, and sale, not to forbid it. Then, as now, all parties understood control to exempt medical uses and research consistent with Western scientific norms.

These treaties, and the laws that gave them force, were fruits of the transnational progressive movement that shaped the regulatory state in the late nineteenth and early twentieth centuries. Reformers sought to “hold certain elements out of the market’s processes, indeed to roll back those parts of the market whose social costs had proved too high” (Rodgers 1998, p. 30). Progressivism boiled down to selective de-commodification. In some cases, such as children toiling in factories and mines, the ban was to be absolute. But blanket prohibition would not do for medically useful drugs, alcohol included. Instead, progressives sought a system of limited manufacture and prescription control.

These same reformers had little sympathy for native use of indigenous plant drugs like peyote, khat, or coca. They seemed vestiges of heathenism, barriers to civilized progress, and burdens on personal and racial health. Of course, the reformers felt the same way about non-indigenous drugs, particularly Indian opium, massive amounts of which had been illegally imported to China, whose exploitation became the great mobilizing issue of the antinarcotic campaign. However paternalistic their rhetoric may now seem, progressive reformers were at least consistent. They regarded nonmedical drug use as a threat to everyone. They wanted it curtailed, with as few exemptions as possible. And they were willing to battle mercantile, corporate, and imperial interests to achieve their humanitarian ends. They despised, in Axel Klein’s phrase, “the rapacious character of empire.”

The ideological starting point for the essays in this book is the second-generation progressivism—in American parlance, "liberalism"—that became a political force in the mid-twentieth century. More secular, utilitarian, and culturally relativist than first-generation progressives, liberals sought de-commodification without the evils of the black market or infringements of human rights. Their goal was to fine-tune drug policy by liberalizing it. That meant increasing the number of exemptions, medical as well as cultural.

Medical exemptions, particularly those involving the maintenance of narcotic addicts, had top priority. In the 1960s and early 1970s, liberals and their public health allies managed to establish, with an unexpected assist from the Nixon administration, methadone programs in the United States. Though methadone maintenance never fully escaped controversy and stigma, the innovation spread. By 2008, 55 nations had endorsed it (Schwirtz 2008). Many of these same countries permitted buprenorphine prescription for medically assisted recovery, the provision of sterile needles and syringes to narcotic users, injection rooms, and other harm-reduction measures.

Liberals also wanted to relax prohibitions against traditional drug use, which they viewed as minimally harmful—perhaps even beneficial—within its cultural context. The principal examples covered in this volume are coca chewing in Andean regions; the ritual use of peyote, ayahuasca, and *Salvia divinorum* in the Americas; khat chewing in the Arabian Peninsula and the Horn of Africa; and cannabis smoking by Rastafarians. Though advocates have had some success in protecting the ceremonial use of peyote and other native hallucinogens—drugs with unpleasant side effects and no mass market—they have not yet achieved any reform on the scale of the methadone breakthrough. Opposition remains formidable, especially with regard to coca and cannabis, drugs that have very large mass markets indeed. To the extent that cannabis reform has advanced, it has done so under the banner of medical marijuana or decriminalization, rather than the protection of religious rituals and other traditional practices.

This raises an interesting question: Given the growing sensitivity to the cultural patrimonies and rights of indigenous peoples, why, during the last half century, have liberals been more successful in expanding medical exemptions to drug prohibition than cultural ones? One answer is that medical liberalization has a concrete security and health rationale. Maintenance can be shown to reduce crime and overdose deaths. Sterile needles and syringes can be shown to reduce HIV and other infections. Cultural exemptions offer less tangible gains. Daily ganja smoking may bring Rastafarians closer to Jah. A dose of *S. divinorum* may bring memorable visions. "I thought I was made out of Legos," reported one man. That's interesting, but hard to translate into the language of public health.

There is, however, another argument for cultural exemptions that is both easy to express and intuitively powerful. For centuries, Europeans and their descendants ran roughshod over native peoples. They seized their lands, looted their burial sites, desecrated their temples, burned their codices, and enslaved or killed captives with impunity. Revulsion against such maltreatment, fostered by the ongoing humanitarian and rights revolutions, has fostered a sympathetic regard for foundational

native practices. "The least we can do," as Mark Brown puts it, "is to allow Indians to practice their religions."

Stated that way, cultural exemptions seem like compensatory justice. The rub is that, in a globalized world, native drug use has a way of spreading beyond its original cultural context. If ethno-religious groups enjoy privileged legal access, outsiders will attempt to join them for any number of reasons, from spiritual enlightenment with new drugs to immunity for using prohibited ones. Alternatively, they will, like Timothy Leary, establish their own religious groups and seek legal protection for what would otherwise be illegal activities. (The United States, a country with strong constitutional guarantees of religious freedom, has had a similar problem with neo-Nazis and religious sects. Instead of drugs in the church basement, officials worry about guns and hate pamphlets.) Even if no outsiders join the protected groups, their members may spread drug-taking practices through example, amplified by digital media. YouTube demonstrations of peyote preparation and rituals have become commonplace. So have editorials of the "Peyote: I Wish We All Could Be Members of the Native American Church" variety (NeuroSoup 2011).

The attentive reader will detect in these essays notes of impatience and frustration as well as hope and progress. Ethno-religious drug use remains stuck in a diplomatic and legal quagmire. Some of the issues—who is an indigene, what counts as religion, how long does it take to establish a tradition, what happens when newcomers borrow traditions or emigrants take them abroad—are probably unresolvable. At some point the legal controversy begins to assume the aspect of *Jarndyce v. Jarndyce*, the interminable Chancery case in Dickens's *Bleak House* that became so tangled as to be beyond the ken of anyone.

Shunning legalistic gradualism, some reformers have rejected drug prohibition *tout court*. Rather than regarding it as a flawed but amendable charter of humanitarian reform, they see it as a barrier to human freedom. If, as Charlotte Walsh puts it, you live in a "psychopharmacological North Korea," you don't want to reason with the regime. You want to get rid of it. Several contributors offer variations on this theme. They believe that the benefits of nonmedical drug use have been ignored. The risks have been created, not by drugs, but by prejudice, maltreatment, and by the law itself. They want an end to drug prohibition, not only to narrowly protect religious freedom, but also to broadly expand cognitive liberty and human rights.

Any good anthology offers a variety of perspectives, and this one is no exception. The essays fall along a continuum that ranges from cultural-exemption liberalism to full-throated libertarianism. Readers will judge for themselves which position is most persuasive, but the lack of agreement, even within the reform camp, should not come as a surprise. Of all progressive measures, drug control has spawned the most varied dissents. People may disagree over how often meat-packing plants should be inspected, but not on the desirability of getting tainted meat off the market. They may disagree over the legal age for factory work, but not that young children should be spared such labors. Progressive de-commodification has an assumed quality: Yes, by God, some things *should* be

held out of the market. Yet it is otherwise with psychoactive drugs, where fundamental questions of morality, fact, and policy divide old-school progressives who favor prohibition or strict regulation; liberals who favor accommodation or medicalization; and libertarians who favor the government keeping its hands off your stash. Complex and impassioned, the debate continues to draw strong interest from social scientists, legal scholars, and activists like those whose essays fill this fascinating book.

Jacksonville, Florida David T. Courtwright
March 15, 2013

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Controversies on the Regulation of Traditional Drug Use

Beatriz Caiuby Labate and Clancy Cavnar

This collection of texts arrives at a time when the wisdom of the so-called War on Drugs, and its accompanying policies and philosophies, is increasingly being questioned. The book contributes to this growing debate by addressing how the traditional uses of plants such as peyote, ayahuasca, coca leaf, cannabis, khat, and *Salvia divinorum* have been progressively incorporated and regulated in developed Western societies by both national legislation and the United Nations (UN) Drug Conventions. The drugs included are representative, but not inclusive, of a set of traditional substances whose cultural migrations were caught in regulatory limbo; unaddressed here are other psychoactive plants such as iboga, opium, betel nut, jurema, hallucinogenic mushrooms, and kava kava. The volume gives special attention to the disputes about the religious use of psychoactive substances—resting on finely drawn legal definitions of "religion"—which have arisen in court cases around the world. It further touches upon larger issues of human rights and cognitive liberty as they relate to the consumption of drugs. By contemplating conflicts between different legislations, such as those pertaining to drug regulation and religious freedom, the following chapters reflect on notions such as origin, place, authenticity, and tradition, thereby engaging drug policy with broader social science debates.

Within the 12 chapters of this collection, a wide range of disciplines is represented: anthropology, law, sociology, criminology, history, and international relations; with contributors hailing from the United States, Brazil, the UK, and the Netherlands. Despite the diversity of approaches and perspectives, all authors seem to share a common set of principles and references. First, they agree on the need to defend the right to indigenous and traditional use of certain psychoactive substances. These uses can often be found at the intersection of various areas of life, including politics, medicine, shamanism, religion, aesthetics, knowledge transmission, socialization, and celebration. Protecting these cultural practices is, in itself, an important stance, as such practices are both foundational and central to these societies. Second, the authors reflect on how Western societies have frequently considered all drug use as problematic and homogenous, failing to understand the nature of these medical and nonmedical uses of drugs. They point to challenges

Western nations face incorporating these substances into their biomedical drug categories and regulatory schemes.

While this collection emphasizes the ritual, traditional, medical, and religious uses of psychoactive substances in different cultures and historical periods, it is also useful to contemplate the consumption of drugs in contemporary societies. In fact, the chapters problematize the strict distinction between the traditional and nontraditional. They demonstrate that some of these substances have migrated to varied transnational contexts and that contemporary practices around them frequently involve spiritual and therapeutic aspects in dialogue with traditional contexts. They also shed light on the blurred distinctions between natural and artificial substances, thus rupturing dichotomies of little use in reflections about "drugs." As we will see, there are continuities and discontinuities between various modes of usage, from religious to profane, traditional to modern, and medical to aesthetic.

When viewed comparatively, the chapters present a fascinating scenario of hybrid modalities of drug use. They reflect on the Brazilian ayahuasca religions of Santo Daime and União do Vegetal (UDV), present in the United States and Europe; khat-using migrants in the United Kingdom; the pan-indigenous, partly Christian, and multi-ethnic Native American Church (NAC); Rastafarians in different countries; traditional and neo-traditional coca uses in South America; therapeutic and religious claims to the use of substances such as LSD and marijuana in the United States; recreational use of the Mazatec-based substance *S. divinorum*, and more. The contributions discuss the limitations of narrow legalism based on the UN Drug Conventions to deal with this multiplicity. As one chapter points out, the very concept of "culture" behind the Conventions is problematic: It seems to imply that culture is static and fixed, and not dynamic and transformative.

While the book focuses mainly on the challenges of regulating certain uses of psychoactive substances, it is also about placing drug use in general within a larger cultural and historical framework. Beyond the discourse of harm reduction, substance use is considered a phenomenon with cultural legitimacy in itself. As various chapters demonstrate, there are integrated, positive, and functional uses of a number of substances existing both within indigenous communities and outside of this context.

The chapters also challenge the biomedical reductionism that currently dominates the academic and public debate on drugs. We hope that this book adds to the discussion about the need for, and right to, scientific research with scheduled substances and for continued exploration of the therapeutic potentials of substances such as marijuana and the psychedelics. There seems to be a perverse circularity regarding the legality of some of these substances. The prohibition of many psychoactive substances was initially based on scant evidence and anecdotal reports, but the placement of certain substances into categories signifying "high potentials for harm" has made it difficult for researchers to obtain permission for scientific research in order to produce "objective," as opposed to "political," knowledge of the effects and health consequences of many of these substances.

Without more research, the uninformed scheduling of substances is likely to continue.

Re-thinking the current dominant drug policies and suggesting that reforms are urgent and necessary does not mean that new drug control mechanisms would automatically solve all problems connected to drug use. With a single exception, the chapters do not really delve into what a post-prohibitionist world would be like; this remains a significant challenge. The authors suggest that localized and ad hoc solutions provide important potential alternatives to the external, uniform, and universal rule of prohibition worldwide. They also suggest that strengthening cultural and informal controls is fundamental in the context of the current prohibitionist policies, which are linked to the spread of illicit and violent markets. In fact, prohibition tends to weaken local and informal means of controls.

The first chapter, by Boiteux, Chernicharo, and Alves, provides an excellent introduction to the key debates in the book. It offers an overview of the creation of the United Nations Declaration of Human Rights and the Drug Conventions. It presents the conflicts and inconsistencies that exist between the two of them, pointing out that the UN drug control bodies seem to be isolated from the rest of the UN. By analyzing the text of the Conventions and using empirical examples, the chapter discusses the lengths governments will go to when they put suppression of drug use and traffic above basic principles of human rights. Boiteux et al. point out the hazards to the health of those who live in countries where drug laws create barriers for the sick, who cannot access necessary pain medications, and where problematic drug users are rounded up, incarcerated, and beaten for their "crime," not to mention nations where the penalty for drug possession is death. The authors specify one important exception provided by the Charter for Human Rights, which they read as the right to personal possession of a drug for one's own use; a perspective that, although not new, has certainly been neglected in the debate. In the final section of the chapter, the laws preventing consumption of coca leaf are presented as clear examples of violations of cultural and human rights. The struggle over coca regulation can be seen as a paradigm of the need to balance out universal rights and multicultural perspectives. This chapter sends a strong message that human rights treaties should prevail over the drug convention rules that violate the UN's own standards.

Pien Metaal further explores the status of the coca leaf in chapter "Coca in Debate: The Contradiction and Conflict Between the UN Drug Conventions and the Real World." In keeping with the spirit of the previous contribution, she argues that the fight against traditional use of this plant has become one of the strongest illustrations of the inflexibility of the Conventions. Her chapter offers an historical panorama of the attempt to banish coca leaf chewing, beginning in 1961, and followed by the limited and abstruse exemption included in the 1988 UN Convention: "where historical evidence exists." She explores the social and cultural values that informed the legal discussion and public debate during these periods, such as the notions that the use of coca leaf use represents backwardness and is the cause of racial decadence. The stated intent to abolish traditional use of coca within 25 years of the adoption of the 1961 Convention was a clear indication that such customs

were not considered a significant part of cultural heritage, even when used for healing, ritual, or other purposes, such as to provide energy for work or for alleviation of altitude sickness. Metaal further discusses how different South American countries acknowledge and regulate their use of coca leaf, and the contradictions their national legislations pose in relationship to international treaty. The chapter also provides a vivid description of contemporary uses of coca leaf, in contrast to the stereotypes normally associated with cocaine users. These include uses by a population more urban and interested in the natural health benefits of moderate consumption, the plant's potentials for treating the problematic use of cocaine, its use as an extract in wines, as grist for flours, and as an alternative to the mild stimulation found in coffee or tea; substances that we do not normally see as "drugs."

Mark Brown's chapter addresses another well-known and controversial substance that is used traditionally and also has widespread nontraditional use: marijuana. The chapter follows the torturous legal trajectory of cannabis in the United States. Brown discusses legal definitions of religion and looks at a number of groups that have sought protection for their use of marijuana within a religious context. The chapter asks why marijuana fails to meet the legal standards for religious use, when peyote and ayahuasca, as discussed in the following chapters, are permitted within religious rites. The author notes that courts have repeatedly found that marijuana consumers are not sincere in their beliefs about their use; that there is a lack of a traditional basis; that the use is religious, but not essential to their practice; or that their practice poses too much of a problem for the authorities to control, as it would be very easy to divert the substance for recreational ends. Brown offers some hope for marijuana users wishing to claim First Amendment rights through an examination of two legal cases: one associated with a peyote church in Hawaii; and one involving Rastafarian claims of free religious exercise. Nevertheless, the chapter is not optimistic in its evaluation of the possibility that marijuana use will soon be permitted for religious rites, due both to its great popularity and to its relationship to the counter-culture and anti-war movements in the US. These aspects are discussed further in Landers' and Griffin's chapters.

The next chapter, by Kevin Feeney, provides a nice contrast with the previous one. The chapter is devoted to an historical and legal examination of the successful bid of the Native American Church to legally use peyote in its ceremonies. Such an exemption was obtained due to the "trust relationship" between Native Americans and the United States government; a relationship described as akin to that of "a guardian to his ward." Feeney reflects critically on the racial criteria underlying membership in the NAC, and the history of the debate regarding the use of "blood quantum" for establishing federally recognized tribal membership (in contrast to cultural membership). The author notes the paradoxes involved in the alleged preservation of the practice of peyote use within the context of a Native American religion, which in some cases relies on racial criteria that might actually weaken the peyote religion as a cultural institution, rather than protect it. As other authors in this collection have observed, permission for the NAC to use peyote has been the touchstone of several other groups' attempts to claim religious justification for their

use of illegal psychoactive substances. Feeney makes an interesting comparison to the efforts of the Brazilian ayahuasca religion, UDV, to seek permission to use hoasca (ayahuasca), and the case of a non-Indian leader of an "NAC" peyote church who claimed the right to use marijuana, under the protection of the NAC's peyote exemption. He dismisses the commonsense claim that allowing only Indians to use peyote and forbidding non-Indians the use of these, or other similar substances, would be "racism." This chapter is a good example of the fascinating and complex relationships that exist between law, ethnicity, identity, place, and culture when regulation of drug use is involved.

Moving on to a less conventional sacrament in the public's eyes, Melissa Bone, like Mark Brown, focuses on cannabis. She provides a provocative reflection on the intersection between race, politics, religion, and culture in the Rastafarian movement. The chapter looks at how Rastafarians are treated in the courts of the United States, South Africa, England, Italy, and the Commonwealth Caribbean. Bone analyzes the struggle of this movement to be recognized as a legitimate religion. She shows how courts have depicted Rastafarian beliefs and practices in very discriminatory terms and argues that Rastafarian rejection of authority and colonialism, paired with their use of cannabis and custom of wearing dreadlocks, predispose courts to ignore the validity of their spiritual path. Because it is also a political and racial movement, Rastafarianism complicates matters when simple "sincerity of belief" is the qualification, as one may sincerely believe in Rastafarianism's political or social agenda, while not being convinced of the religious aspect of the movement. Their loose organization makes accounting for sacramental use much more difficult; unlike the ayahuasca or peyote churches in which the sacrament is only consumed within the ritual, Rastafarians may keep cannabis with them at all times. Because of this, authorities claim it would be too complicated to survey and monitor their cannabis use and prevent its diversion to the black market. The chapter notes a progression in the way courts have classified Rastafarianism as seen in cases in South Africa and Italy; pertaining not only to the classification of distribution versus possession but also to its status as a bona fide religion.

The chapter by Feeney and Labate considers ayahuasca, which, like peyote, is classified internationally as an "hallucinogen." The authors discuss the UN Convention criterion that, to be allowed to exist, a practice involving scheduled psychoactive substances must have "historical evidence" of its past use and be circumscribed to a certain geographic territory and identifiable cultural population. Nevertheless, the Brazilian ayahuasca religions of Santo Daime and the UDV have spread beyond their birthplace in the Amazon to more than 30 different countries. The chapter reflects upon the transnational character of this new religious movement and its cultural and material links to Brazil. The authors analyze ideas of tradition, place, and authenticity related to legal matters involving the control of the brew in various countries and legal contexts. This leads to a critical reflection on the assumptions behind the Drug Conventions, such as the notion that substances with a longer history of use are somehow more authentic and valid than those with a more recent history; that cultures are static and remain within one geographical area; that traditional cultures will shrink rather than expand; and, finally, that pharmaceutical

drugs are safer and more effective than natural remedies. Concluding, the chapter makes it clear that the original idea of the naïve architects of the Drug Conventions—that modern beliefs of the industrialized nations would overtake and eliminate the worldviews of the lesser-developed peoples—has been proven wrong.

Shifting to another pharmacological family and continent, Axel Klein's chapter is about khat. Khat chewing is a traditional custom found in Yemen and Somalia, among other places in the Mideast and Africa. Klein describes the way khat is viewed within its original territory in contrast to how it is perceived outside of it, especially in relation to the immigrants who use it in England, where it has become associated with xenophobic suspicions already in place regarding Africans. Khat, Klein believes, falls into a category of drugs that provides simple pleasures, such as caffeine and tobacco, which were integrated into Western culture centuries ago. But, being a recent import and having a reverse transit circuit—brought by immigrants for their own use, rather than by explorers and traders for the tastes of a public hungry for new spices and sensations—khat has not been absorbed and adapted to European tastes. The chapter describes the interplay of development issues with khat regulation in England and other countries, and the tug-of-war between economic, religious, and political interests in the sale and use of this substance. Khat has recently appeared on the radar of drug regulators and is currently being categorized as a "drug" in need of regulation in different locations. The author cleverly analyzes how the association of khat with the drugs discourse sets its own path: a process that begins with the assumption of harm and proceeds with attempts to control. Cropping up from this new fertilization, treatment for khat addiction is now being offered. Khat's benefits, such as combating fatigue, or its properties for social cohesion of specific communities, particularly those existing in situations of war or exile, are not fully considered. In an analysis typical of the scholarship in this volume, Klein provides a perceptive overview of the process by which cultural use of a substance is identified, medicalized, regulated, and banned, with little understanding of its real effects on the people who use it, and little care for the impact on the traditional social and economic structures that have supported it use for centuries.

Hayden O. Griffin, III, deals with another substance on the edge of legality, *Salvia divinorum*. The chapter offers an important contribution to the debate on the so-called legal highs and the relationship between prohibitionist laws and the emergence of concentrated or synthetic variations of traditional plants. The author discusses the history of drug regulation in the United States, giving special attention to the Comprehensive Drug Abuse Prevention and Control Act of 1970. Griffin observes that hallucinogens are classified as Schedule I drugs, with no medical use and a high potential for abuse, despite the fact that these substances rarely result in overdose or abuse, and are not used by the population at large. According to Griffin, the scheduling of so many of the hallucinogens in the highest category is the result of the backlash against the counterculture movement of the 1960s. *S. divinorum*, a plant traditionally chewed by the Mazatec Indians in Mexico for diagnosis of illness and to locate lost objects, among other uses, has only mild hallucinogenic effects

when used in the traditional manner. It has become a small cultural phenomenon internationally in the form of smokable concentrates sold through the Internet, receiving increasing attention in the last two decades. The effects of this version of salvia are described as dissociative and intense, but short lasting. Griffin analyzes the attempts by different states in the United States to classify salvia as a dangerous drug, due to the fear associated with the label "hallucinogen," and to sensational media coverage of a few incidents. The rush to schedule *S. divinorum* seems to ignore that salvia is relatively safe, and that one of its active constituents, Salvinorin A, is being investigated as a treatment for depression, pain, and some kidney ailments, and also shows potential for research on schizophrenia and Alzheimer's disease.

Transitioning from the use of psychoactive plants in traditional settings, the chapter by Devin Lander addresses, with a pleasant literary style, the legal battles faced by Timothy Leary in the 1960s regarding his use of marijuana and LSD. This chapter is a good example of a larger set of initiatives in the sixties and seventies to create psychedelic churches with different "sacraments," using substances such as DMT, DPT, and 5-MeO-DMT. The story of Leary's passage from respected psychology professor to icon of the counterculture movement, and head of his own religion, is a fascinating reflection on how laws and public perceptions responded to psychedelics in that era. Lander's chapter begins with a description of how Leary was apprehended entering Mexico at the border and how his daughter was subsequently found to be in possession of a small amount of marijuana: a crime for which he assumed responsibility. Lander tells of Leary's decision to try to fight the charges based on a religious freedom defense, and his resulting conviction. We follow Leary's next adventure, commencing with his announcement that he was starting his own religion, the League of Spiritual Discovery (LSD), in an effort to follow in the footsteps of the NAC; a route attempted by others, as previously noted. Expressing his philosophy in the mantra "turn on, tune in, drop out," he advocated a retreat from secular life and encouraged seeking answers within, with the aid of psychedelics. Leary's case advanced to the Supreme Court and, though it did not influence regulators to change restrictions on marijuana or LSD use, Lander indicates that it led to a clarification of the intent and means of prosecution of marijuana smokers. Leary's character, as well as his influence on drug policy, has been highly debated and criticized. Independent of the sincerity of his religious claims, his decision to attempt a religious defense appeared to come from the belief in the natural right of man to control his own mind and body; values that are still strong and influential in the psychedelic movement and drug rights activism. The definition and limits of spirituality, as raised by this chapter, is a complex and ambiguous issue that deserves further investigation, as will be seen in Walsh's following contribution.

Amanda Feilding advances the discussion on marijuana and psychedelics. Her chapter reflects on the harms that the UN Drug Conventions have caused, as well as their lack of success in curtailing the use and sale of drugs worldwide. These Conventions, as other authors have suggested, have diminished the ability of indigenous people to continue their traditions, made it difficult for people in pain

to gain access to pain medication, and restricted the development of research into psychoactive substances. Feilding remarks that only 1 to 1½ percent of all of the illicit drug use in the world is comprised of drugs other than marijuana, making the point that the Drug War is mainly a war on marijuana. She turns her attention to the case of psychedelics, overlooked because, as noted by Griffin, they are seldom a concern for authorities and, as such, rarely addressed in the discussions at the UN. Partially due to this, Feilding believes, they have retained their place in Schedule I. The author describes some research with psychoactive substances supported by the UK-based Beckley Foundation that provides valuable insight into brain function, addiction, and treatment of PTSD; research that has frequently been fraught with delays and other bureaucratic difficulties due to the fact that drugs like psilocybin, MDMA, and cannabis are involved. This chapter offers some concrete suggestions for reform of the current UN Conventions drug laws and looks into the possibilities of changing the Drug Conventions themselves: This may prove to be a challenging task. The ability of the Conventions to respond to local needs and customs is limited, as are opportunities to experiment with regulations that could be more effective locally. The chapter ends by remarking upon the steps some Latin American countries have taken to liberalize drug laws, including Bolivia's stand for coca leaf chewing, and movements in this direction by Guatemala, Uruguay, Colombia, and Mexico.

The next chapter is by Charlotte Walsh, a lawyer who has been involved in fighting legal cases defending the right to use drugs. Walsh's chapter also focuses on psychedelics but, unlike the majority of the other chapters, gets more into the moral and legal foundations and merits of prohibition. The chapter questions the strict distinction between religiosity and spirituality and argues that most private use of psychedelics outside of religious settings is highly spiritual in nature. Walsh proposes that the inner world of each person is her or his own religious sphere, and its exploration via psychedelics is tantamount to religious use of these drugs, even if no dogma or church is involved. She argues that, beyond indigenous or religious rights to access certain substances, there is the right of all people, everywhere, to alter or maintain their consciousness however they see fit. Taking the discussion of human rights raised by Boiteux et al. in the chapter "Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws" to a further level, Walsh notes that Europe, unlike the United States, has a broad view of religious rights that covers a range of practices beyond traditional religions. She points specifically to the right to freedom of thought, conscience, and religion in Article 9 of the European Convention on Human Rights (ECHR). This right could also be named, broadly, "cognitive liberty." Walsh insists that it should be beyond the reach of the state to invade the corporeal and cognitive personal spheres by determining which drugs one is allowed to take. Blocking the freedom to take drugs, and punishing those who do, Walsh argues, interferes with personal autonomy and the pursuit of happiness. When freedom is to be restricted, the burden of proof ought to be on the restrictors to prove their case.

The final chapter is by Ross Coomber and Nigel South, whose previous work has inspired this book in many ways. This chapter contemplates how drug prohibition is

built on the idea that the consumption of drugs involves inherent objective pharmacological effects and harms. The authors analyze the category of "risk," which is often taken for granted in drug policy debate, as risk does not convert immediately into harm. They argue that risk should not be assumed or attributed to substances outside of a consideration of the culture in which they are consumed. In order words, they claim that drug use and any attendant risks must be understood within the set and setting in which they occur. A carefully measured dose of pure heroin, administered through a clean syringe in a protected environment, poses far less risk than a bottle of rum consumed behind the wheel of an automobile, for example. The authors explore the fear and misunderstandings surrounding drug use and argue that this atmosphere has created greater risks and less safe environments for drug consumers. Fear of "others" (e.g., Blacks, Mexicans, Chinese) and their cultures becomes fear of the drugs they favor. The chapter points out that policies adopted on the basis of irrational fear in long developed nations can have unreasonable effects on those practicing non-problematic traditional drug use in far off lands, and may also come back to haunt us in the form of destroyed eco-systems, destruction of individual and social rights, and jails full of citizens who decided to risk their freedom in order to exercise their freedoms.

By bringing remote substances and the contexts of their use into play, and by charting the history of the use of certain drugs, this book invites readers to rethink modern categories and classifications of "drugs." It also offers a gentle invitation to revisit our own relationship to certain psychoactive substances—be they tobacco, alcohol, coffee, tea, or something else. The distant, or sometimes not-so-distant, "others" discussed in this collection are a valuable reference in challenging our own pharmacological and cultural ethnocentrism. Finally, the varied uses of drugs portrayed present a rich opportunity to reflect upon the possibilities of alternate means and forms of drug control and regulation.

As has been convincingly argued in these chapters, the phenomenon of drug use is too complex to be addressed with mere pharmacological or punitive approaches; it is imperative to place drug debate in a broader sociological and ethical perspective. We present this book with the hope that it will help reclaim the role of social sciences in understanding drug use and call attention to the need for more reasoned, humane, and compassionate drug policies.

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Author's Biographies

Camila Souza Alves is currently enrolled as a master's student of sociology and law at Fluminense Federal University, with an emphasis on human rights. She received her law degree from the Federal University of Rio de Janeiro, and she received her Bachelor of Arts degree, with emphasis on linguistics, from State University of Rio de Janeiro. She is a member of the Research Group on Drug Policy and Human Rights at the Federal University of Rio de Janeiro Human Rights Laboratory. Her research interests include political discourses, especially those related to punitive measures, and the role of intellectuals in politics.

Luciana Boiteux received her law degree from the State University of Rio de Janeiro, and her J.D. at the University of São Paulo, and is currently an associate professor in criminal law at the Federal University of Rio de Janeiro, Brazil, where she coordinates the Research Group on Drug Policy and Human Rights at the Human Rights Laboratory. Her research interests include drug policy and international human rights treaties, with a focus on the relation between drug laws, penitentiary systems, and sentencing in criminal cases involving illicit drugs. She is also a member of many advisory boards of NGOs and professional societies in Brazil.

Melissa Bone [L.L.B. (Hons); M.Sc.; Ph.D. (pending)] is currently a Ph.D. student of law at the University of Manchester. Her thesis investigates whether there is a human right to consume legally restricted substances, how the UN drug conventions and provisions contained within the Misuse of Drugs Act 1971 could conflict with these rights, and how such conflicts could be resolved. She has helped found a drugs research group for academics within the law department at the University of Manchester and facilitates the group's collaborations. Her research interests include exploring the interplay between drug use and human rights and examining the effectiveness of drug treatment programs, as she worked with Leicestershire Probation's Criminal Justice Drugs team throughout her master's program.

Mark R. Brown was born in Louisville, Kentucky and graduated from the University of Louisville School of Law in 1984. He earned a B.S. from the University

of Dayton in1981. Following graduation from the University of Louisville, Professor Brown earned his LL.M. at the University of Illinois in 1988. He clerked for the Honorable Harry W. Wellford, Judge of the United States Court of Appeals for the Sixth Circuit, from 1984 to 1985, and also served as a judicial fellow at the Supreme Court of the United States in the October Term of 1993 under the Chief Justice of the United States. Professor Brown currently holds the Newton D. Baker/Baker & Hostetler Chair at Capital University. He has also taught at Stetson University, University of Illinois, Ohio State University, and Florida State University.

Clancy Cavnar is currently completing her postdoctoral hours in clinical psychology at the Marin Treatment Center, a methadone clinic in San Rafael, California. In 2011 she received a doctorate in clinical psychology (PsyD) from John F. Kennedy University in Pleasant Hill, California, with a dissertation on gay and lesbian people's experiences with ayahuasca. She attended New College of the University of South Florida and completed an undergraduate degree in liberal arts in 1982. She attended the San Francisco Art Institute and graduated with a Master of Fine Art in painting in 1985. In 1993, she received a certificate in substance abuse counseling from the extension program of the University of California at Berkeley and, in 1997, she graduated with a master's in counseling from San Francisco State University. In that same year, she got in touch with the Santo Daime in the USA, and has traveled several times to Brazil since then. She is also co-editor, with Beatriz Caiuby Labate, of two books: *Ayahuasca Shamanism in the Amazon and Beyond* (Oxford University Press, in press), and *The Therapeutic Use of Ayahuasca* (Springer, 2014).

Luciana Peluzio Chernicharo received her law degree at the Universidade Federal do Rio de Janeiro (UFRJ), where she is currently a master's law student, with an emphasis on human rights. She is a member of the Research Group on Drug Policy and Human Rights at the Federal University of Rio de Janeiro Human Rights Laboratory. Her research interests include drug policy, with focus on drug trafficking and gender, and the cultural impact of the ban of substances used by indigenous peoples, such as the case of the coca leaf in Bolivia.

Ross Coomber, Ph.D., is professor of sociology and director of the Drug and Alcohol Research Unit at Plymouth University (UK). He has been involved in researching a wide range of issues relating to drug use, drug supply, and formal and informal interventions in many societies around the world. He also has a strong interest in innovative research methods, particularly those involving qualitative research. He has published extensively within the field. His current research interests include: the sociology of fear, social supply and minimally commercial supply, the new "legal highs," drug market "mapping," the use of informal control to reduce harmful behaviors in problem gamblers, and integrating qualitative research into systematic reviews.

David T. Courtwright received a B.A. in English from the University of Kansas and a Ph.D. in history from Rice University. He is Presidential Professor in the Department of History at the University of North Florida, where he offers courses in

political, medical, social, and legal history. He has authored books on drug use and drug policy in American and world history; the special problems of frontier environments; and, most recently, the culture-war clashes that have roiled American politics since the 1960s. He is currently researching a book about capitalism, pleasure, and addiction in the modern world.

Kevin Feeney, J.D., received his law degree from the University of Oregon in 2005, and is currently a student of anthropology at Washington State University (USA), where he is studying the religious use of peyote in American Indian traditions. Other research interests include examining legal and regulatory issues surrounding the religious and cultural use of psychoactive substances, with an emphasis on ayahuasca and peyote, and exploring modern and traditional uses of *Amanita muscaria*, with a specific focus on variations in harvest and preparation practices. He is co-author, with Richard Glen Boire, of *Medical Marijuana Law* (2007).

Amanda Feilding is the director of the Beckley Foundation, UK. She studied comparative religions and mysticism at Oxford and later did extensive research into psychology, physiology, and altered states of consciousness. In 1998, she founded the Beckley Foundation to do pioneering research in the fields of human consciousness and to bring about global drug policy reform by creating evidence-based, health-orientated policies which recognize human rights. The Foundation's Scientific Program investigates meditation and the neurophysiology and pharmacology of psychoactive substances in order to better understand how these compounds work and to identify their potential therapeutic applications. Her latest research on psilocybin was recently published in the *Proceedings of the National Academy of Sciences*, with breakthrough data on its effects on the brain and how this might help in the treatment of depression and cluster headaches, and as an aid in psychotherapy.

O. Hayden Griffin III is an assistant professor in the Department of Justice Sciences at the University of Alabama at Birmingham. He has a Ph.D. in criminology, law, and society from the University of Florida, and a J.D. from the T.C. Williams School of Law at the University of Richmond. His research interests include drug abuse liability assessment and the history of and motives for the passage of drug laws and scheduling decisions regarding drugs. His research has been published in *Journal of Drug Issues*, *Journal of Psychoactive Drugs*, and *Journal of Drug Education*.

Axel Klein is a social anthropologist and has worked for both the charity sector (ISSD, DrugScope) and inter-governmental agencies (EC, UNODC) in different national and international settings. He has conducted fieldwork and evaluations in over 20 countries, including Afghanistan, China, Jamaica, and Nigeria. His interests include problematic and recreational substance use, the culture of consumption, drug policy, and criminal justice reform. He is currently developing a new model for the study of drug policy using systems analysis. This is an attempt to explain the continuous expansion of the drug control nexus in spite of perverse consequences

and poor outcome delivery. The approach seeks to identify the role of vested interests and the significance of cross-domain referencing. In addition to this, for the past five years, Dr. Klein has been looking at the production, distribution, and consumption of khat (*Catha edulis*), the latest psychoactive substance to become a globalized commodity. *Cannabis* production in the Caribbean and the convergence/divergence with cocaine trafficking are also interests of Dr. Klein.

Beatriz Caiuby Labate has a Ph.D. in Social Anthropology from the State University of Campinas (UNICAMP), Brazil. Her main areas of interest are the study of psychoactive substances, drug policy, shamanism, ritual, and religion. She is Visiting Professor at the Drug Policy Program of the Center for Economic Research and Education (CIDE) in Aguascalientes, Mexico. She is also Research Associate at the Institute of Medical Psychology, Heidelberg University, co-founder of the Nucleus for Interdisciplinary Studies of Psychoactives (NEIP), and editor of NEIP's website (http://www.neip.info). She is author, co-author, and co-editor of twelve books, one special-edition journal, and several peer-reviewed articles. For more information, see: http://bialabate.net/.

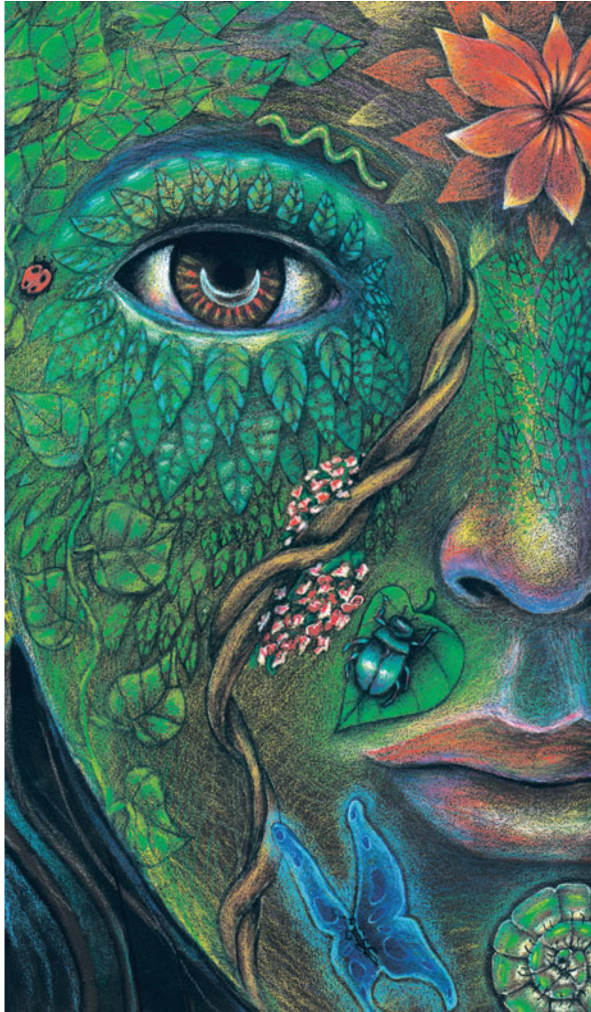
Devin R. Lander is an independent historian and author who specializes in post-World War II United States social, political, and cultural movements. He holds a B.A. in American history from the State University of New York at Plattsburgh and an M.A. in public history from the State University of New York at Albany. He currently works as deputy legislative and policy director and committee clerk for the New York State Assembly Committee on Governmental Operations. He is the author of "Start Your Own Religion: New York State's Acid Churches," published in the February 2011 edition of the journal *Nova Religion* and has consulted on the 2010 Timothy Leary biography *Lords of the Revolution: Dr. Timothy Leary* which aired on the VH1 network.

Pien Metaal has been a member of the staff of the NGO Transnational Institute (TNI) since 2002. TNI was established in 1974 in Amsterdam as an international network of scholar-activists committed to critical analyses of global problems, such as drug policies, environmental issues, military intervention, fair trade, and financial crises. Pien has studied political science, and in 1997 received a master's degree in international relations at the University of Amsterdam. She is an expert in the political economy of the drug market in Peru, Bolivia, and Colombia, and other parts of Latin America, focusing especially on the coca market. She is co-author, with Anthony Henman, of "Coca Myths" (TNI Series Drugs & Conflict Debate papers no. 17, 2009), and, with Martim Jelsma and Ricardo Soberon, of "Coca Yes, Cocaine No? Legal Options for the Coca Leaf" (TNI Series Drugs & Conflict Debate Papers no. 13, 2006), among other publications.

Nigel South [B.A., M.A. (Essex), Ph.D. (CNAA)] is professor of sociology at the University of Essex. He has taught at various universities in London and New York and, between 1981 and 1990, worked as a research sociologist at the Institute for the Study of Drug Dependence (now Drugscope) in London. Research interests

include: drug use and related health and crime issues; environmental harms and crimes; and crime, inequalities, and citizenship.

Charlotte Walsh (L.L.B. [Hons]; MPhil) is a legal academic at the University of Leicester School of Law, where she runs an undergraduate course on criminology. Her main research focus is on the interface between psychedelics and the law, viewed from a liberal, human rights-based perspective. She believes that drug prohibition conflicts with our fundamental right to cognitive liberty. Her articles have appeared in the *British Journal of Criminology*, *Criminal Law Review, International Journal of Drug Policy*, *Journal of Psychoactive Drugs*, and *International Journal of Human Rights*. Charlotte is actively involved in advising individuals prosecuted for activities involving plant psychedelics. She has also been assisting Casey Hardison—whose case is discussed in detail in her chapter in this volume—with his legal arguments for a number of years.



Plant Life by Clancy Cavnar 2003. © Clancy Cavnar

Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws

Luciana Boiteux, Luciana Peluzio Chernicharo, and Camila Souza Alves

Introduction

The relation between drug conventions and human rights is one of the most challenging topics nowadays, due to the coexistence of a very repressive international drug system dating from the last century, and still enforced by many countries, and recent developments and victories in human rights. While the international community has advanced significantly in elaborating treaties, and recognizing and trying to implement human rights based on the concept of human dignity, the drug control system is understood by its supporters as a hermetic system, apart from any influence from human rights laws. Despite many possible areas of influence and chances of integrating individual and social rights into the framework of drug conventions, there has been a very strong resistance from many countries.

In this chapter we propose to examine, from a normative point of view, the prevalence of human rights law and the need for respect of individual and cultural rights in applying drug laws. We intend to question if there can be any possible

L. Boiteux (✉)
Universidade Federal do Rio de Janeiro, Rua Dona Mariana 66, apto 502, Rio de Janeiro, RJ 22280-020, Brazil
e-mail: luboiteux@gmail.com

L.P. Chernicharo
Universidade Federal do Rio de Janeiro, Rua Constante Ramos, 70, apto 802, Rio de Janeiro, RJ 22051-012, Brazil
e-mail: lpchernicharo@gmail.com

C.S. Alves
Universidade Federal do Rio de Janeiro, Rua Pereira Nunes, 388, apto 305, Rio de Janeiro, RJ 20541-024, Brazil
e-mail: souzaalvescamila@gmail.com

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exception in international law that would prevent human rights standards and norms from being fully applicable in the field of drug control. In addition to this, we will discuss concrete examples of breaches in international human rights law treaties that are being ignored by those in charge of implementation of drug control treaties in international bodies and national states.

In order to explain the situation, we will begin with a general overview of the international conventions on drugs, and then address their relations to human rights treaties. Even though it is not our objective to analyze all possible human rights violations resulting from drug control treaties or their implementation, we will focus specifically on two relevant issues: one related to individual rights, such as the obligation (or not) to criminalize drug possession for personal use, and secondly, the inclusion of coca leaf as a prohibited substance by the UN and the collective right of the people from the Andean Region to cultivate and consume this plant in a traditional way.

An Overview of the United Nations Drug Conventions

Since 1912, 13 international instruments related to drug issues have been developed. Most recently, the modern drug conventions framework involves three main existing treaties. In general terms, the 1961 United Nations Single Convention on Narcotic Drugs prohibits opium smoking and eating, coca leaf chewing, cannabis resin smoking, and nonmedical use of cannabis, and instituted an international system of control imposing a repressive control on products regularly cultivated and used in many parts of the world.

It is important to place this convention within the context of the Cold War, particularly when discussing the coca chewing prohibition in the Andean Region, since at that time the two superpowers were establishing their areas of influence. It is also noteworthy that the 1961 Convention established deadlines for the gradual elimination of opium within 15 years and coca and cannabis in 25 years, something that never occurred, as we will see elsewhere in this paper. Despite its preamble announcing that the reason for the increase of control would be "a preoccupation with physical and mental health of the people," the only means offered to achieve this goal was the absolute prohibition of the use and trade of such substances and the prosecution of violators of this rule. However, amended few years later, the 1972 Protocol to the 1961 Single Convention highlighted the need to provide access to treatment and rehabilitation for drug abusers concomitantly or alternatively to imprisonment. Currently, there are 186 states that are parties to this convention, as amended by the 1972 Protocol and only nine states are not parties to the 1961 Convention.

The special relevance of this protocol is that it allows states to adopt less repressive measures with respect to users, notably the substitution of incarceration

for treatment. This serves today as a legal basis for European countries that adopt an alternative policy toward users, including treatment options and harm reduction.

Broadening the scope of the international system, the 1971 UN Convention on Psychotropic Substances[1] deals with the control of synthetic drugs. It is noteworthy that, so far, only narcotic drugs related to opium, cannabis, and cocaine were subject to international control, although other substances, such as stimulants, amphetamines, and LSD, until then unregulated, also had psychoactive effects. It was claimed at the time that the harmful effects of these new substances would justify the extension of the same controls available for narcotics. Thus, from 1976 on, when the convention finally entered into force, these new substances, as well as sedative-hypnotics and tranquilizers, were all submitted to international control. In addition, the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (United Nations 1988) focus mainly on drug trafficking and the need for criminalization of money laundering: the collateral effects of drug prohibition (or a direct effect of the illicit drug market, others would say). This convention was broadly accepted worldwide, and only eleven states have yet to become parties to it.

Its text was designed to be a repressive tool with the aim to "combat" drug trafficking organizations by expanding the hypotheses of extradition, international cooperation, and confiscation of financial assets of traffickers, while unifying and strengthening the existing legal instruments. It then created a system designed to oppose the military, economic, and financial power amassed by drug traffickers. It also proposed the standardization of definitions used in regard to drug trafficking, and state members were encouraged to increase the repression by tackling new techniques.

In its text, there is common use of strong terms like "danger of incalculable gravity," "eradication of illicit traffic," and "elimination of illicit demand." Article 24 allows parties to "adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic." Some countries commonly use this provision to justify capital punishment for drug crimes.

The 1988 Convention also dictates the eradication of coca cultivation, in a strong message to South American countries, reinforcing the 1961 Convention. Furthermore, it establishes the necessity of monitoring chemicals used in the production of drugs, and of increased efforts against illicit drug production. Specifically on criminal matters, the convention required states to adopt all necessary measures to establish, as a criminal offense in its domestic laws, all activities linked to production, sale, transport, and distribution of all listed substances (art. 3, § 1).

[1] There are, as of November 2011, 183 states that are parties to the Convention on Psychotropic Substances of 1971, according to the INCB. A total of 12 states have yet to become parties to that convention: three of them in Africa (Equatorial Guinea, Liberia, and South Sudan), one in the Americas (Haiti), one in Asia (Timor-Leste), and seven in Oceania (Cook Islands, Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu).

This framework created to control drug circulation includes some specialized bodies: the "political-legislative power" exercised by the UN General Assembly and the CND (Commission on Narcotic Drugs), under the structure of ECOSOC (Economic and Social Council), where drug policy should be debated and defined; the "judiciary," represented by the INCB (International Narcotic Control Board), an independent body with power to impose sanctions in case of non-compliance; and, finally, the "executive body": the United Nations Office on Drugs and Crime (UNODC), headed by an executive director. It is noteworthy that the repressive approach towards drugs is expressed in the very name of the specialized body, related to "drugs and crime."

Thus, control of illicit drugs is organized in a system of classification of substances divided into four tables, based on the need to impose more or less control of the substances therein, supposedly in light of the risks of abuse and addiction. These three international texts, ratified by 95 % of the countries in the world, apparently represent common (repressive) standards regarding the limits to use and produce certain substances, and are still in force today, more than 50 years later.

Since the beginning of the twentieth century, the international community has worked hard and expended a great amount of money to try to enforce these drug conventions provisions, with the main goal to achieve a "world free of drugs" by imposing on all countries the obligation to control and severely punish persons who use (proscribed) drugs and/or those who dare to sell them illegally. Based on voluntary compliance and cooperation of the world community, these treaties directly influenced many to create national laws and widely enforce crimes involving illegal drugs with severe penalties. Rather than being treated as a health issue, drug control became a matter of criminal law, with an emphasis on prohibition and criminal sanctions for all aspects of consuming, producing, and transporting illicit drugs.

Nevertheless, such efforts appear to have been insufficient or misguided when faced with the increased phenomena of cultivation, manufacture, traffic, and use of narcotic drugs and psychoactive substances all over the world. Half a century later, contrary to what was originally expected, the world drug problem has increased, especially in the developing countries that used to be considered only producing countries, and are now facing the situation of drug abuse; something that did not exist 50 years ago (Bassiouni and Thony 1998). At the same time that there is almost universal ratification and national implementation of drug conventions, with no impact on promoting health while applying them, this policy has created many collateral human costs.

Considering the unwillingness of the drug authorities to recognize the unintended consequences of such bad policies, as seen in the last meeting of the UN Commission on Narcotic Drugs in 2012, a human-rights approach is necessary and obligatory, and should prevail over repressive interpretations of drug conventions in international law. If enforcement of drug control obligations is interfering with individual and collective rights, perhaps it is time we discussed not only

normative conflicts between drug conventions and human rights treaties, and their hierarchy in the United Nations System, but also the humanitarian costs of the so called "War on Drugs."

In this article, we are going to first address the conflict between international human rights and drug control treaties, and then focus on important human rights violations arising from their implementation.

Human Rights and Drug Conventions Within the UN System

The United Nations (UN) was created in 1945 by representatives of 50 countries just after World War II, following the failure of the preexisting League of Nations, and currently has 193 member states.

The main purposes of the United Nations, according to article one of its charter, are to "maintain international peace and security (. . .) in conformity with the principles of justice and international law," "to develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of people," and "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, and religion" (United Nations 1945). Also, Article 55 of the charter says that it should promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Human rights law essentially rests on international treaties and conventions on the matter, as well as the case law of international bodies, such as the European and Inter-American Court of Human Rights.

In this sense, Cançado Trindade (2009) draws attention to a historical process, which he termed "humanization of international law," as a "gradual expansion of the material content of *jus cogens* in contemporary international case-law," with an obligation to protect the most vulnerable people "of the most complete adversity or vulnerability." It covers, among other important issues, the absolute prohibition of torture and of cruel, inhuman or degrading treatment, followed by the assertion of the fundamental character of the principle of equality and non-discrimination, and of the right of access to justice.

The notion of "humanization" of international law contrasts with an older international order based upon theories such as the voluntarism and unilateralism of the "*Raison d'État*" (or reason of state, meaning a purely political reason for action on the part of a government). The advent of this new primacy of "humanitarian reasons" instead, is the main characteristic of a world that recognizes international human rights law as *jus cogens* (or imperative norms of international law), constructed upon the basic principle of the dignity of all human beings. This recognition is part of a true international legal order, in which human rights violations are not acceptable, based on the same principle of humanity and

universal conscience that limits the old notion of sovereignty when human rights are being violated (Cançado Trindade 2009).

Taking into account this theory, we can say that while drug control treaties represent an old order based on the reason of state, human rights law is directly connected to humanitarian reasons, common to all humankind, irrespective of origin, gender, sexual orientation, nationality, religion, ethnicity, color, language, political opinion or any other discriminating criteria. The relationship between human rights treaties and international drug conventions is an essential issue that still needs special attention from international bodies as both human right treaties and drug conventions are under the same United Nations "umbrella"; however, they have been treated by international drug control bodies in separate ways, as if they had diverse sources.

This issue was officially brought to the attention of a UN drug control body for the first time in 2008, at the annual meeting of the Commission of Narcotic Drugs (CND), when the world celebrated 60 years of the Universal Declaration of Human Rights. A resolution entitled: "The proper integration of the United Nations human rights system with international drug control policy" was introduced by Uruguay, with the co-sponsorship of Bolivia, Argentina, and Switzerland, saying that, "international drug control activities must be conducted in conformity with international human rights law" (Blickerman 2008). Unfortunately, the representative of China fiercely opposed to it, saying that "discussion of political issues such as human rights are inappropriate at CND." He was joined by Pakistan, Japan, Nigeria, Iran, and Thailand. This example is representative of the objections some countries have to using the term "human rights" in written documents related to drug control.

Based on the UN Charter, it is undeniable that human rights are at the core of the UN system, despite this position. Together with development, and alongside peace and security, human rights represent "one of the three pillars of the United Nations enshrined in the UN Charter." From this statement, human rights, as one the most important goals of the international community, are hierarchically superior to other treaties, and should indeed prevail in case of possible conflicts or overlays with any other instrument, such as drug control treaties, for example.

The only possible conclusion here is that UN drug treaties and drug policies applied by members of the United Nations cannot violate individual and social rights provided for in the many international instruments that are assumed to be binding to state's interventions, as *jus cogens*. It would be totally against the UN Charter to say that a possible obligation to punish drug law violators established in a convention could be more important than a norm enshrined in the charter, guaranteeing respect for human rights. As correctly pointed out by Barrett (2010), human rights treaties "under the Charter take precedence over other international treaties, including the drug conventions (article 103). All member states have agreed to co-operate towards the achievement of these aims (article 56)."

In addition, the very text of the drug conventions refers to national constitutional guarantees and concurrent obligations in international law as limiting barriers for

determining the appropriateness of certain policies, in the form of a "safeguard clause" (for example, prohibiting the criminalization of personal possession of illicit substances, as seen in article 3 (2) of the 1988 Trafficking Convention), meaning that there is no unlimited scope for drug treaties to prevail over other hierarchically superior rights.

Human Rights Violations Arising from Drug Laws

Despite the recognized prevalence of human rights treaties over drug conventions in theory, the concrete application of drug laws can unlawfully impose grave breaches to human rights treaties and standards, as it has already been pointed out by academics, authorities, experts, and many non-governmental organizations (UN Economic and Social Council [ECOSOC] 2009; World Health Organization [WHO]/United Nations Office on Drugs and Crime [UNODC]/UNAIDS 2009; International Harm Reduction Association [IHRA] 2008; Chiu and Burris 2012).

First of all, as we'll see later on in this chapter, while prohibiting the private use of some substances, the person's right not to be subjected to arbitrary or unlawful interference with privacy, family or home (International Covenant on Civil and Political Rights [ICCPR] [United Nations 1966, art. 17]), and not to be discriminated against (United Nations 1966, art. 12), is violated in the name of drug treaties. (See also Walsh in this volume.) Moreover, the current drug control system may violate the individual right of "everyone to the enjoyment of the highest attainable standard of physical and mental health," based on article 12 of the International Covenant on Economic, Social, and Cultural Rights.

As already stated by Anand Grover, Special Rapporteur on the topic appointed by the United Nations Human Rights Council, states have an obligation to prevent epidemics, and countries that do not apply harm reduction measures, such as syringe distribution and other preventive measures, can create serious risks to health. In his conclusion to the report on criminalization of drug use, he says that the "so-called 'campaign for a drug free world' could actually result in violations of the right to health, as people who used drugs might not come forward to get the care they needed for fear of being arrested, or could be denied health care if they sought help" (Grover 2010). Nevertheless, there is no consensus among the UN bodies to include harm reduction as a preventive measure, at least in United Nations Office on Drugs and Crime (UNODC) official documents (see UNODC 2009).

There are also violations of the right to health when the international drug treaties provide for unnecessary limits in accessing essential medications (UNODC 2011a, b; ECOSOC 2010; WHO 2011), as the International Narcotics Control Board has already recognized: "Although the World Health Organization (WHO) considers access to controlled medicines, including morphine and codeine,

to be a human right, it is virtually non-existent in over 150 countries," said its president (INCB 2010).

Besides, the right to receive ethical treatment (United Nations 1982), and the World Medical Association's International Code of Medical Ethics (World Medical Association [WMA] 2006) is not provided for in the drug conventions. Many of these rights are frequently denied to persons accused, convicted or even suspected of drug offenses, especially in countries that adopt enforced treatment or coerced hospitalization for drug users. Recent examples of drug rehabilitation centers in horrible conditions, where drug users are beaten, whipped, and shocked with electric batons, were denounced by non-governmental organizations (Human Rights Watch 2011).

The topic of treatment as an alternative to conviction or punishment is actually being debated. Although here there is no space for further discussion on this subject, there are many important documents from UN and European bodies, including the UNODC, highlighting the importance of health care for drug offenders (UNODC 2010; UNODC/WHO 2009; EMCDDA 2005). Unfortunately, countries mostly apply punishment rather than voluntary treatment for drug abusers.

Due to this, another impressive example of violation of human rights in implementing drug laws is mass imprisonment. Especially in Latin America (Metaal and Youngers 2011), but also in the United States (Bewley-Taylor et al. 2005, 2009), exceptionally harsh drug laws, with long prison sentences, are a key factor in rising incarceration rates and prison overcrowding. Millions of people arrested for drug trafficking or even drug possession receive disproportionality severe penalties and this has a direct impact on the penitentiary system in the region.

Opposite the view of drug treaties that recommend imprisonment as a penalty for drug crimes, the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) when providing rules on crime prevention and the administration of justice, called on member states to "develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender."

In fact, very recently, the final text of CND Resolution 55/2012, on "alternatives to imprisonment for certain offenses as demand reduction strategies that promote public health and public safety," opted not to promote alternative imprisonment, as recommend by the Tokyo Rules. Basically, as some countries could not agree that "providing alternatives to imprisonment" could be "successful means of promoting social integration with full respect for human rights." the expression "for some member states" needed to be added to its text, meaning essentially that they could not reach an agreement on the subject.

Such rejection of alternatives to prison, together with repressive criminal drug policy, can be identified as the direct cause of mass imprisonment worldwide. In this sense, human rights treaties are being violated by enforcing drug treaties when

drug traffickers are confined in overcrowded facilities, violating their rights not to be subjected to cruel, inhuman or degrading treatment or punishment (United Nations 1966, art. 7).

The proportionality principle imposes differences in penalties that are not provided for in most drug laws around the world, especially regarding the seriousness criteria, i.e. when the offense is a preparatory act or an incomplete one. As for maximum limits of the state response, the interpretation of "severe" and "adequate" punishment also include references to international human rights legal instruments as existing and binding limits to penalties, such as the Universal Declaration of Human Rights and other international legal instruments. But drug laws are disproportionate and impose excessive punishment in most cases.

Furthermore, prisons have expensive costs, and by incarcerating so many non-violent drug offenders, public money is being diverted from prevention to repression. While displacing public policies from public health to law enforcement, effective public health-based interventions had their funds diverted to ineffective law enforcement and other repressive measures (Barrett 2010). It is also well documented that not only risky drug use with syringe sharing, but also imprisonment in overcrowded facilities, increases the exposure to HIV/AIDS contamination, confirming that repressive drug laws are violating people's rights.

Finally, while UN human rights bodies consider that capital punishment for drug offenses is in violation of international law, there are still many countries that apply this extreme punishment for drug traffickers, such as Indonesia. Historically, "the death penalty for drug offenses became more prevalent after the adoption of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (Gallahue et al. 2012). According to estimations, executions for drug offenses have taken place in 12–14 countries over the past 5 years (Gallahue et al. 2012). This means that such a policy does not comply with legal instruments on the abolition of capital punishment,[2] the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations 1975), and the 2nd Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of Death Penalty (United Nations 1984).

Drug-related offenses clearly do not fit the category of "most serious crimes" for which the death penalty can eventually be sought[3] before its abolition. Under international law and human rights jurisprudence, such as the Inter-American

[2] General Assembly resolution 2857 (XXVI) of December 20, 1971: Safeguards guaranteeing the protection of the rights of those facing the death penalty (Economic and Social Council resolution 1984/50 of May 25, 1984). Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution 3452 (XXX) of 9 December 1975). See also the Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice, ST/CSDHA/16.

[3] "High Commissioner calls for focus on human rights and harm reduction in international drug policy," press release, United Nations 2009; Report of the UN Secretary General, capital punishment and implementation of the safeguards guaranteeing protection of rights of those facing the death penalty, ECOSOC, 18.12.09.

Court of Human Rights 2005 (*Raxcacó-Reyes v. Guatemala* Case, para. 69), capital penalty is limited to the "cases where it can be shown that there is an intention to kill that resulted in the loss of life," as mentioned by Mr. Philip Alston, Special Rapporteur on extrajudicial summary or arbitrary executions (Alston 2007, para. 53).

The long list of human rights threats as a result of the application of drug laws also includes violations of individual guarantees in criminal cases involving drugs, and the prohibition of consumption of substances such as the coca leaf, traditionally consumed in the Andes in South America. We conclude this part by saying that the 1988 Convention and its repressive approach are an example of how drug laws, applied without limits, can trigger serious violations of human rights. It is not our objective here to relate exhaustively all the human rights breaches resulting from the application of drug laws, since there are many others to mention. In the next item we will touch upon two relevant issues; one related to an individual right, and another to a collective right: both violated as a result of drug laws.

Human Rights and General Treaties Obligations Regarding Drug Possession for Personal Use

As seen above, it is widely known that the three international conventions establish general obligations concerning drug control. That means that the countries that signed the treaties mentioned must take legislative and administrative measures to adapt their domestic law to the conventions' paradigms. The previous section demonstrated that part of the conventions conflict with human rights standards and norms. We will analyze now the provisions that deal specifically with the use and the possession for use of drugs, trying to understand if the obligations established by the drug conventions in relation to the mentioned topics are in consonance or not with the norms that form the core of the UN System. Along this path, we will explore the drug conventions system to examine its scope and to check if there is room for creating alternative drug policies. This section provides a general perspective on the topic; the discussion will be narrowed later when we analyze the Bolivian drug law and the traditional chewing of coca leaf.

As for the scope of the Conventions, the 1961 and 1971 Conventions' Preambles mention two important aspects that led the parties to sign these treaties: (a) health and welfare of mankind; and (b) the indispensability of the medical use of narcotic drugs for the relief of pain and suffering. The 1988 Convention extended the scope and brought more information about the reasons the parties decided to create a third convention on drugs. The 1988 Convention mentions illicit trafficking as an international criminal activity, the link between the traffic of drugs and

psychotropic substances and other criminal offenses, involvement of children in the drug market and, again, the serious threat to health and welfare of mankind.

We know preambles do not have a binding force; however, their importance consists of the fact they are a key for interpretation, as the 1969 Vienna Convention of the Law of Treaties conveys in article 31 (1). By the text of the preambles, we can say that one of the reasons that drug control was considered necessary by the international community was based on the damage drug use can cause: this damage is not only connected to public health, but it is related to social and economic development. These damages were pointed out by Resolution 39/141, and also by the Quito Declaration against the Narcotic Drugs and the New York Declaration against Drug Trafficking and Drug Illicit Use. In fact, the discussion the international community held on these occasions was important to raise the awareness of the General Assembly about the necessity of a new treaty on drugs.

From the 1970s to the 1980s, there was a switch from a liberal view on drugs, originating in the 1960s, to viewing them as an issue of national security and criminal law. In this context, the use of drugs was seen as a threat to the welfare of the society; in order to eliminate this danger a war was declared and the law was one of its weapons. If drug trafficking was one of the targets of this attack, the reason to combat it was a simple one: It provided drugs for people to use. According to Zaffaroni (1982), at the center of the issue was an idea that did not bear any relation to reality: Every drug user is addicted to illicit substances, and every person addicted to drugs will commit serious criminal offenses. He also asserts that Latin American laws inspired by the Drug Conventions—especially those concocted by the "drug war generation" in the late 1980s—are based on this stereotype of a "young addicted criminal drug user." Prohibiting the use of drugs was a way to guarantee social and economic security.

Therefore, it is no surprise that the Conventions' preambles emphasize that their purpose is to limit drug use to medical and scientific purposes only. The 1961 Convention's article 4 establishes the general obligation to "take such legislative and administrative measures as may be necessary. (2) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use, and possession of drugs." The 1988 Convention goes further and imposes penalization of some of the actions (when committed intentionally), meaning that all countries should turn them into criminal offenses.

Barring the use of drugs can be an arbitrary limitation to the right to privacy—protected by the UN Declaration of Human Rights and the International Covenant on Civil and Political Rights—especially because countries want to prohibit people from using drugs in their homes. Going beyond this perspective, those criminal offenses are mostly related to the offender and not to his acts. Users become one of the main legal concerns: They have to be dealt with either as offenders or addicts (in this sense, someone who needs health assistance).

Concerning more specifically the possession of drugs for personal use, the drug conventions proscribe the possession of drugs for the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the three drug conventions.

It becomes clear that the general obligation brought by the Single Convention does not oblige parties to consider drug consumption as a crime, not even by the 1971 or by 1988 Conventions. A close reading of the penal provisions of the treaties—article 36 of the Single Convention, article 22 of the 1971 Convention, and article 3 of the 1988 Convention—reveals the disconnection between this general prohibition-oriented obligation and the mandatory criminalization of certain conduct. In the list of actions that are to become criminal offenses in parties' domestic law, we cannot find the term *use* per se. Therefore, we can say that there is no specific obligation to criminalize the use of drugs within any the conventions.

The problem becomes more complex if our attention is directed to "possession for personal use." This is because possession is one the actions the parties must define as a criminal offense according to the actual drug conventions' system. However, there are two types of possession: possession for illicit drug trafficking and possession for personal use. There is no doubt that signatories are obliged to criminalize the first one, while the penalization of the second type is questioned.

Boister (2001) affirms, in relation to the Single Convention, that it "does not appear that article 36 (1) obliges parties to criminalize possession of drugs for personal use" (p. 81), since the main idea of the 1961 Convention is the prohibition of illicit trafficking of drugs and not the ban of use. Historical background information can also ratify Boister's opinion: the convention's draft originally entitled Article 36 "Measures against Illicit Traffickers" (United Nations 1973, p. 112).

The discussion becomes even more complex when we focus on Article 3 (2) of the 1988 Convention. A first reading can lead one to understand that the 1988 Convention obliges parties to turn possession for use into a criminal offense. It is a fact that the approach here is much more restrictive with less room for flexibility. Nevertheless, two considerations must be taken into account before one insists on the idea of a rigid, inflexible obligation.

Although it constitutes a grave paradox, the prohibition of the use of drugs—and, as a consequence, their very possession and cultivation—is contrary to long-standing human rights norms. Drug conventions did not take into consideration the violations they would promote when obliging several countries to bar drug consumption. This lack of attention to human rights standards was mitigated by the wording of the treaties, in the opening phrase of article 3, section 2: "Subject to its constitutional principle and basic concepts of its legal system." This fragment is called a "safeguard clause" (United Nations 1973, p. 81) and the reason for that is quite simple: A party would not violate the convention if its domestic law considers the penalization of possession of drugs for use unconstitutional or contrary to its basic principles.

We can say, therefore, that there is the possibility of a party overcoming the indication, found in article 3, section 2 of the 1988 Convention, by making use of the safeguard clause. One can justify non-criminalization by saying that, according to their domestic law system, prosecuting for drug possession for personal use is not within the interest of society, or that controlling what people consume or possess in their private homes would be a violation of the right to privacy, or that self-destructive behavior may not be subject to punishment (Bewley-Taylor and Jelsma 2012).

It is important to mention that the existence of an “escape clause” is quite rare. In fact, international law provides the opposite, that is, states cannot invoke their domestic legal system as a justification for not complying with international rules (art. 27 of the 1969 Vienna Convention). Highlighting the predominance of constitutional law and the basic principles of the parties’ legal systems, the 1988 Convention provided a way for parties to remain within the frame established by the treaty and yet create non-punitive policies in regard to possession (and also purchase and cultivation) of drugs for personal use. The 1988 Convention also establishes some alternatives to conviction and punishment, such as treatment, education, aftercare, rehabilitation, and social reintegration. However, these alternatives are offered only in cases in which the party considers the possession of drugs for personal use as a criminal offense.

So far, we have tried to demonstrate that the drug conventions do not express their intent to prohibit the use of drugs, even though the policies adopted and the measures required aim to limit or eradicate drug consumption. On one hand, their explicit main purpose is to control the trafficking of drugs. On the other hand, the treaties indirectly address the use of drugs by providing rules against the possession, purchase, and cultivation of drugs for personal use, which is in violation of human rights standards and norms. There is, however, room within the established system for countries to deviate from a punitive policy and adopt harm-reduction strategies related to drug consumption, since the 1988 Convention affirms the prevalence of domestic legal systems in cases of possession for use. Nevertheless, even the expression “harm reduction” is banned from all written documents from CND (see Crocket 2010). The next section is dedicated to a specific case of use and possession for use: The coca plant is another example of how drug laws can collide with collective human rights.

Coca Leaf and the Violation of Human Rights of Indigenous People

It is clear that drug policies have become harsher through the years, but in regard to coca leaf, since the first treaty on drugs (the 1961 Single Convention), the use of it—along with its alkaloids, cocaine, and *ecgonine*—has been prohibited. In this

section, we are going to contrast the strategy adopted by the drug conventions concerning coca leaf and human rights norms and standards.

We understand human rights policies as cultural policies (Sousa Santos 2002). Although human rights are put in a meta-juridical position because, apparently, they make it possible to combine a certain group of values—seen as universal principles—with the diversities of multiple cultures, as we have seen previously, the notion of human rights presents many inconsistencies compared to the realities these norms establish.

In this regard, one should establish the premise of the multicultural conception of human rights of Sousa Santos (2002) that, "when conceived of as universal human rights, will tend to operate as a kind of a hegemonic globalization for above, but, in order to operate in a cosmopolitan way, or as a counterhegemonic globalization from below, human rights "must be reconceived as multicultural" (p. 44). He concludes saying, "increasing consciousness of cultural incompleteness as much as possible is one of the most important tasks for the construction of a multicultural conception of human rights." According to the author, human rights, although conceived as universal and abstract, tend to be seen as "local" and not likely to provide for intercultural dialogues. In this sense, international charters' and treaties' values have a specific cultural identity in the Western tradition, which means that rules provided for in the drug conventions, such as the coca leaf ban, cannot be considered as universal, since they are related to specific Western societies, and they are imposed on Andean people without taking into account their meaning in the local culture.

Through the years, the intended universality had to make room for other ways of approaching the issue of use and trafficking of drugs. The proposed alternatives highlighted the differences between cultures as key factors in harmonic international cooperation, diverging from the strategy adopted by the Single Convention (The 1993 Vienna Convention is regarded as a landmark in the universalism–relativism discourse).

The Single Convention is based on a report written in 1950 by the Commission of Enquiry into the Effects of Chewing the Coca Leaf of the United Nations Economic and Social Council. The organization had come to the conclusion that the chewing of coca leaf was addictive and its effects should be considered negative. This report was severely criticized because it lacked technical and methodological accuracy and was racist in many ways. According to Metaal (in this volume), when the UN mission occurred, "advocates of the prohibitionist stance were dominant in the national discussion, where the mission has been more significant, and may have been perceived as allies by the representatives of the international narcotics control bureaucracy" (p. 27).

In this sense, the composition of this document did not provide for any "intercultural dialogue." In prohibiting the traditional use of the coca leaf, drug conventions are not open to mutual and intelligible understanding of another culture, different from a Eurocentric view. In brief terms, the authorities in Vienna

did not consider the opinion of Bolivia itself and the actors directly involved in chewing coca before establishing the prohibition regime.

According to Zizek (2007), cultural groups should not be the mere designates of norms. They should be active participants in the creation and interpretation of the law. If “the Other,” as the Andean people are seen, is capable of determining right and wrong in a specific cultural and historical context through the perspective of Kantian ethics, it is also capable of formulating questions that can define fundamental rights. Nevertheless, it is necessary to recognize the existing differences so that tacit civil rules may be addressed.

The 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was different from the previous conventions, especially in regard to the extension of its repressive purposes. While the 1961 and the 1971 Conventions focused on the inspection of imported and exported narcotic drugs and psychotropic substances, the 1988 Convention decided to add chemical precursors—that is, substances used during the production of drugs—to the list of prohibited substances. Plants that were the raw material of narcotic drugs were not ignored and the prohibition of their cultivation was absolute.

In an attempt to characterize the traditional use of coca plant, Bolivia and Peru negotiated article 14 (2) of the 1988 Convention. The article states that parties must take measures in order to prevent the cultivation of any plant containing narcotic or psychotropic substances, although it makes explicit reference to the opium poppy, coca bush, and cannabis plants. (See also Feeney and Labate in this volume.) The two signatories argued that this provision would violate human rights and their people had the right to use coca leaf for traditional purposes:

> Article 14 (2). Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.

This effort tried to overcome the Universalist model through intercultural dialogue that focused on isomorphic issues. This means that, although they derive from different universes, they can be transformed in a unit in which the values of the conflicting positions are mostly preserved. The fact that coca leaf produces cocaine—mainly a Western concern—does not mean it must be extinguished, especially since its use by another culture is involved (Sousa Santos 2002).

Since 1961, when the coca leaf was included in the list of prohibited substances and the conventions conveyed no proper distinction between the coca plant and cocaine, the Andean region has been suffering much damage. The Single Convention provisions are in opposition to the UN Declaration on the Rights of Indigenous People (2007), which aims to protect, respect, and value the cultural practices of native people. It undeniable that international documents contradict themselves since, on the one hand, the drug conventions put a negative value on the habit of

chewing coca leaf, establishing an obligation to eradicate the bushes; while, on the other hand, the declaration brings at least some minimum standards of respect for the culture of these peoples.

Article 8, section 1, of the Declaration states: "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." The process of ending the cultivation of coca leaf conflicts with the mentioned provision, and is an attempt of adapting their traditions to Western-Christian cultural standards. The same line of thought applies to article 11, section 1, and article 12, section 1, of the same document.

Other provisions, such as article 15, state that indigenous people were given the right to dignity and the diversity of their culture, traditions, and history. Parties may take measures in consultation and in cooperation with indigenous people in order to combat prejudice and eliminate discrimination, and to promote tolerance, comprehension, and good relations between indigenous people and other segments of society.

The Declaration on the Rights of Indigenous People became a landmark in matters of human rights since it established standards to be followed in regard to the subject of indigenous people. The international policies of drug control have not internalized these paradigms, although this is a field in which the life and rights of indigenous people are handled on a daily basis. The drug control policies are an example of how powerful agents can change the fates of individuals in countries that have a subordinate position in the international system. In addition, the International Covenant on Civil and Political Rights, article 18, section 1, is also a relevant document on the protection of the rights to freedom of thought, conscience, and religion. As a consequence of these rights, people may choose their religion or belief; profess their religious faith individually or collectively, publicly or privately; and manifest their religion or belief in worship, observance, practice, and teaching.

Paragraph three of the same article presents a restriction that can be considered a legal provision to criminalize certain practices of some religions. The article states that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others." One may think coca plant rituals could be restricted based on this provision; however, there is no scientific evidence that proves coca leaf chewing or coca leaf tea is a risk to public safety, order or health. Also, implementing restrictions based on moral standards is, at the very least, questionable.

The American Convention on Human Rights is also another important regional document in this discussion and its article 12, sections 1 and 2, assures the freedom of conscience and religion:

> Article 12. (1) Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. (2) No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. (Organization of American States 1969)

We notice that there is a great contradiction amid international drug convention and human rights standards and norms. Considering the serious harms coca eradication can cause, there is one problem that may be a less obvious one, but is certainly charged with symbolic importance: Today's international policies attribute a negative value to the ancient habit of cultivation, consumption, selling and trading, and the ritualistic, social and medical use of coca leaf. The relations between the different Bolivian actors connected by these activities were altered not because they wanted change, but because they were forced to change. Cultural relativism was not considered in the creation or implementation of these legal norms (Chernicharo and Boiteux Rodrigues 2012; Feeney and Labate in this volume).

Other contradictions are verified when we analyze the domestic law of certain countries. The Bolivian Constitution of 2009 recognizes Bolivia as a Plurinational State and establishes that the Bolivian State must protect coca leaf because it is a native plant that was cultivated by their forefathers; it is, therefore, a cultural and natural heritage, and a factor contributing to social cohesion. The constitution also states that production, trade, and industrialization of coca leaf are activities regulated by Bolivian law.

Bolivian Law 1008, passed in 2008, established procedures to treat coca leaves and to control certain substances. The State of Bolivia clearly demonstrated its intention to punish the illicit trafficking of drugs. Due to international pressure, the country has significantly increased the penalties for crimes related to drug trafficking: The first drug law (1962) provided for penalties of between 3 and 10 years of imprisonment; the actual antidrug law (2008) provides for penalties of between ten and 25 years of imprisonment.

The disproportionate nature of the penalties established by the Bolivian antidrug law become even clearer when they are compared to the penalties for other criminal offenses. In 1962, while the penalties for drug trafficking were of 3–10 years of imprisonment, the penalty for homicide was 20 years of imprisonment. In 1988, homicide had penalties of 1–10 years in prison, while drug trafficking had penalties of 10–25 years in jail. In 2012, the homicide penalty was increased to from 5 to 20 years of imprisonment; the penalty for drug trafficking is still more severe: 10–25 years in jail.

These comparisons reveal the disproportionate system of penalties stated by the Bolivian antidrug law, *Ley* 1008/2008, necessitating a consideration of the damage caused and the legal interests protected. Homicide is the taking of a life; nevertheless, penalties for this are less serious than for drug trafficking. It is obvious that Bolivia takes part in the prohibitionist drug policy and the "War on Drugs" promoted by United States of America and the United Nations. Yet, Bolivia protects the use of coca leaf for traditional purposes. This protection became clear in March 2009, when the President of Bolivia, Evo Morales, sent a letter to the UN General Secretariat asking for the suspension of paragraphs 1C and 2E of article 49 of the Single Convention. These provisions permitted the traditional chewing of coca leaves on the condition that measures were taken in order to end the habit in 25 years:

> Article 49. (1): A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories. (C): Coca leaf chewing; (2): The reservations under paragraph 1 shall be subject to the following restrictions: (E): Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41. (United Nations 1961)

Seventeen countries, headed by the United States of America, contested the Bolivian amendment proposal. The failure to remove coca leaf from the list of illicit drugs led Bolivia to withdraw from the Single Convention in July of 2011. A new attempt at adjustment was made, and the country has successfully re-acceded to the Single Convention again, in January of 2013, with reservations concerning the requirement that "coca leaf chewing must be abolished." With this move, the country has reconciled its international obligations under the drug control system with its 2009 Constitution, which recognizes coca leaf as part of Bolivian cultural patrimony.

It is high time the international community corrected the historical mistake in relation to the coca leaf chewing tradition and eliminated the Single Conventions' provisions that prohibit this ancient practice. It is important to mention that there are a great number of documents that can scientifically elucidate this issue. One of these documents is the 1994 INCB Annual Report that highlights the importance of solving the conflict between the Single Convention's provisions and Andean Countries' laws, as the latter never regarded the use of coca leaf as a criminal offense. Moreover, the document pointed out the necessity of scientific investigation on the real effects of chewing coca leaf and drinking coca tea.

In 1995, the World Health Organization concluded, "the use of coca leaves appears to have no negative health effects and has positive therapeutic, sacred, and social functions for indigenous Andean populations" (Transnational Institute 2012). Consequently, to assure the control over cocaine, it would be enough to include "concentrated coca leaf" as a general term for base paste or coca paste and remove the term "coca leaf" from the Single Convention's list of prohibited substances. By doing so, the problem of cocaine would be placed where it really belongs: away from the indigenous people and closer to the Western world.

This discussion is not only about culture. Assuming that all areas in the life of a group of people are deeply connected, the prohibition of the cultivation and circulation of coca leaf brought, in addition to cultural disrespect, also economic collapse and changes in the social structure and in the solidarity of the Bolivian people. The massive exodus from the areas where coca plants became illegal to places where cultivation continued to be licit conduct reveals that cultural interferences can destroy the basis of a society (Chernicharo and Boiteux Rodrigues 2012).

It is essential that the international community think over the issue of coca and cocaine. It is certainly difficult to live with cultures that are based on different moral standards than our own, and maybe their values are contrary to the reality of the dominant economic order. There is no legitimacy for the international system to destroy the symbolic structures and culture of any peoples. In relation to coca, it is

about time that a democratic-pluralist policy was implemented; a strategy that would respect human rights, allow decriminalization of indigenous culture, and legitimate their own social control mechanisms (including the penal ones). Then human rights notions and a multicultural perspective would be united and mutually comprehended.

Conclusions

The UN drug control system is seen by inside actors as a body isolated from the rest of United Nations, despite the fact that there is no normative base for this assumption. It intends to be a uniform model of control that submits prohibited substances to a strict international prohibition regime, with very limited space given to the therapeutic and medical use of controlled substances, focusing on the criminalization of drug possession and trafficking, with imprisonment as a primary option. Treatment and prevention of illicit drug abuse are considered of less importance, with a very strong rejection of other possibilities, such as alternative sanctions and harm reduction measures. In addition to other human rights violations, the drug control system shows no recognition of the cultural rights of original communities and indigenous peoples in relation to the use of traditional substances, such as coca leaves.

Even if a critical reading of the conventions' terms allows less repressive views, at least with regard to criminalization of drug possession, in reality, its discourse always goes in favor of a repressive solution, rather than accepting decriminalization or non-custodial alternatives. The humanization of the international drug control system is imperative, in order to put the complex figures of human beings at the center of it: recognizing rights, promoting public health based on understanding, information, and respect for others. The framework of the United Nations was based on peace and human rights, and it is not reasonable to believe that we could accept an authoritarian system built only to promote a War on Drugs and to violate human rights under the same institutional umbrella.

A human rights approach to drug laws is essential to avoid and reduce injustice and violations of human dignity. When applying drug laws, the effective acknowledgment of individual and social rights will allow a real transformation in the actual drug control system, and may lead to its replacement with a new one: humanitarian, democratic, and respectful of rights. There is not, nor can there be, any justification or possible exceptions for not recognizing human rights when applying drug conventions. As a matter of hierarchy and human values, human rights treaties will always prevail over drug conventions rules that violate any of its standards. It is time a new order for drug control was recognized and applied, based strictly on humanitarian reason.

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Coca in Debate: The Contradiction and Conflict Between the UN Drug Conventions and the Real World

Pien Metaal

Introduction

The dynamic controversy around coca is definitely the best contemporary example of a psychoactive plant and its traditional uses managing to perpetuate the global drug policy debate. As evidenced by a number of events in the unfolding debate about the UN drug control conventions, the question of whether coca leaf should remain subject to international drug control mechanism or not is unresolved today, and traditional use of coca has become a symbol of the inflexibility of the global drug control system. The question of how to deal with traditional coca use has been central to more than 50 years of continuously repeated discussions.

From its alleged harmfulness to its tremendous marvels, this plant has kept the minds and hearts of policy makers, academics, and activists busy for many decades. The issue has been addressed in series of multilateral meetings and treaties and, most importantly, taken to a high level of global policy debate by governments. It has become a stated military target in the region it is cultivated in. Coca is also the only psychoactive plant whose very existence is guaranteed by a national constitution, the 2009 Constitution of the Plurinational State of Bolivia, and its traditional use is protected under a number of national laws. Most interestingly, the way coca is used in the original cultural setting of the Andean Amazon region has never ceased, but it has undergone changes that challenge the concept of the traditional claim itself. A variety of new uses of the leaf in its natural form are thriving and developing, with a variety of cultural connotations. Potentially, coca leaf use can be a useful vehicle in the debate on the validity of the need for the concept of traditional use.

This chapter will first give an overview of the history of attempts to control coca, its cultivation, and use, by looking at how it ended up in Schedule 1 of the 1961

P. Metaal (✉)
Drugs and Democracy Programme, Transnational Institute (TNI), De Wittenstraat 25 1052 AK, P.O. Box 14656, 1001 LD Amsterdam, The Netherlands
e-mail: pmetaal@tni.org

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Single Conventions, and then tell the story of a number of fruitless efforts that were made to change coca's fate. It will then continue to examine legal situations in countries were coca is consumed on a daily basis. The variety of cultural settings of its use, and the manner in which societies have dealt with it, will be treated there. A newly emerging market for coca, outside the traditional regional and cultural setting, will be the subject of the final part of this chapter.

Coca refers to the plants that belong to the family *Erythroxylaceae*, native to the western Andean Amazon region, cultivated for at least the past 2,500 years. There are two main species of coca that are cultivated, each with two varieties: *Erythroxylum coca* (*E. coca* var. *coca* and *E. coca* var. *ipadu*) and *Erythroxylum novogranatense* (*E. novogranatense* var. *novogranatense* and *E. novogranatense* var. *truxillense*). Coca is known throughout the world for its psychoactive alkaloid, cocaine, and to a far lesser extent, for its traditional uses. One needs a considerable amount of leaves to produce cocaine, since the alkaloid content of coca leaves is negligible (varying between 0.25 and 0.75 %) and the extraction of cocaine from coca entails processing the leaves with several chemicals.

Coca in the UN Drug Control Treaties

Coca, together with cannabis and opium, became one of the main control targets of the 1961 Single Convention on Narcotic Drugs, with special restrictions on cultivation, proscribing the phasing out of traditional use within 25 years and listing the coca leaf as "a substance liable for abuse" in Schedule 1. The 1961 Convention was meant to simplify the existing drug control machinery by turning all existing treaties into a single instrument. Its main purpose was to limit the production of raw materials for drug production. According to scholars studying the history of this treaty, the Single Convention on Narcotic Drugs represents a significant break with the regulative focus of the preceding multilateral treaties; a shift towards a more prohibitive outlook that, within international relations terms, can be regarded as a change of regime rather than the straightforward codification of earlier instruments. One clear example of this was the "abolition of drug use that for centuries had been embedded in the social, cultural, and religious traditions of many non-Western states" (Bewley-Taylor and Jelsma 2012, p. 1).

The scientific evidence for its inclusion came from an Economic and Social Council (ECOSOC) mandated study, published in 1950 as the Report of the Commission of Enquiry on the Coca Leaf, that recommended suppressing "the harmful habit of chewing coca" (ECOSOC 1950, p. 54) within a few years. It was considered a pressing issue at the first sessions of the newly created Commission on Narcotic Drugs; in 1946, the issue was put on the agenda. The report and its recommendation to proscribe coca was based on a field trip, and biographically incomplete research, upon invitation of the Peruvian government, to grasp the use of the leaf in its cultural context and witness its use in practice.

It was at that time that the historic debate between defenders and opponents of coca leaf chewing again caused intense national polemic in Peru. Academia and medical professionals were deeply divided on whether coca chewing should be prohibited or tolerated, as had been the case since colonial times. At one extreme, it was considered that progress towards a modern Peru was impeded by the coca-chewing Indian part of the population, considered as backward, while those defending it claimed "the coca habit contributed significantly to successful acclimatization in Highland Peru, without causing any detrimental health problems" (Gagliano 1994, p. 170). The commission also briefly visited Bolivia after its trip in Peru.

At a time of the UN mission, advocates of a prohibitionist stance were dominant in the national debate, and may have been perceived as better allies by the representatives of the international narcotics control bureaucracy. This coincided with increased international desire to control non-medical and scientific use of the cocaine coming from Peru and other Andean countries. The coca and cocaine producing countries were requested to provide the League of Nations with figures on the extensions of coca fields with the aim to formulate proposals to limit these to levels needed for medicinal and scientific purposes as early as the 1930s.

Undoubtedly, the inquiry commission came with a predefined mindset, as became clear from a press statement from the head of delegation, Howard B. Fonda, in an interview in Lima in September 1949, before beginning his work:

> We believe that the daily, inveterate use of coca leaves by chewing ... not only is thoroughly noxious and therefore detrimental, but also is the cause of racial degeneration in any centers of population, and of the decadence that visibly shows in numerous Indians—and even in some mestizos—in certain zones of Peru and Bolivia. Our studies will confirm the certainty of our assertions and we hope we can present a rational plan of action ... to attain the absolute and sure abolition of this pernicious habit. (El Comercio 1949)

Traditional use in that period of time was perceived by the local elites as a negative force, a shameful spot on the progressing of the nation, representing backwardness and a lack of cultural values. Its use was seen as a consequence of the bad living conditions of "Indians" and their general lack of modern standards and education. This was widely reflected in the UN report used for the proscription of coca, and also reflected in several reports of the UN Commission of Narcotic Drugs (CND) during the 1950s.

During these years, between the publication of the report and the emergence of the 1961 Single Convention, the issue surfaced at the World Health Organization (WHO); according to procedure, the entity entitled to establish which substances are to be included into the convention schedules for control. The WHO Expert Commission on Drugs Liable to Produce Addiction discussed the issue in two sessions, in 1952 and 1954. Confronted with the ECOSOC study that had defined coca chewing as a habit, it reviewed the question at its meeting held in 1952, and concluded:

> The Report of the Commission of Enquiry on the Coca Leaf shows that coca chewing is detrimental to the individual and to society and the Committee therefore concluded that

> coca chewing comes so closely to the characteristics of addiction... that it must be defined and treated as an addiction. (WHO 1952, p. 10)

At the second meeting, they similarly stated that:

> (The Committee) had drawn to its attention evidence on the absorption of cocaine during the chewing process. It was pointed out that there is a wide variation in the amount of cocaine ingested by the coca chewers, just as there is among individuals who take pure alkaloid for non-medical purposes. The term cocainism is applicable to the latter and... coca chewing (cocaism) must be considered a form of cocainism. (WHO 1954, p. 10)

In the reports of the 12th session of the Commission of Narcotic Drugs (CND) in 1957, the Peruvian Minister of Health explained that:

> The Indians persisted in coca chewing because their social and economic conditions were poor, and they relied on the coca leaf to make up for their inadequate diet and to provide a stimulus that would give them the energy required to work in farms and mines high in the Andes. (UN 1957, p. 4)

The proscription of coca in the 1961 Single Convention was not limited to the inclusion of the plant into the controlled substances schedules, but also had numerous articles that established how parties should control the illicit cultivation and use of the plant (i.e. non-medical and scientific purposes). But most importantly, it included an obligation to abolish coca chewing. The original ECOSOC study initially proposed a ban on chewing to be effective after 8 years, but this was perceived as unrealistic. Meant as a transitional reservation, this article 49 points at phasing out the traditional use of all plants brought under the control of this treaty, setting the number of years before this prohibition would enter into force:

> A Party may, at the time of signature, ratification or accession, reserve the right to permit temporarily in any one of its territories: a) the quasi-medical use of opium; b) opium smoking; c) coca leaf chewing; d) the use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes; and e) the production and manufacture of and trade in the drugs referred to under a) to d) for the purposes mentioned therein. 2. The reservations under paragraph 1 shall be subject to the following restrictions: a) The activities mentioned in paragraph 1 may be authorized only to the extent that they were traditional in the territories in respect of which the reservation is made, and were there permitted on 1 January 1961; b) no export of the drugs referred to in paragraph 1 for the purposes mentioned therein may be permitted to a non-party or to a territory to which this Convention does not apply under article 42; c) only such persons may be permitted to smoke opium as were registered by the competent authorities to this effect on 1 January 1964; d) the quasi-medical use of opium must be abolished within 15 years from the coming into force of this Convention as provided in paragraph 1 of article 41; e) *coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41* (my emphasis); f) the use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible, but in any case within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41; g) the production and manufacture of and trade in the drugs referred to in paragraph 1 for any of the uses mentioned therein must be reduced and finally abolished simultaneously with the reduction and abolition of such use. (UN 1961, p. 29)

Two formal reservations upon signing the treaty were made by Argentina and Peru, both countries where coca-chewing populations are numerous, but both withdrew these in the years after. Bolivia initially did not sign at all and only acceded to the treaty in 1976, without making a formal reservation. This has recently changed when, in July 2011, Bolivia denounced the 1961 Convention, and wanted to reenter with a reservation on traditional coca use, which we will see later in this chapter.

In plain contradiction to the Single Convention, the Convention on Psychotropic Substances, drafted a decade later, took quite a different approach to traditional use of plants from which alkaloids could be extracted. Though not relevant for coca, and for good, but never well-explained reasons, the 1971 Convention did not condemn traditional and ceremonial uses of the plants containing psychoactive ingredients that were included in its schedules. In the words of the Mexican delegate at the 1971 conference while talking about traditional use of the peyote cactus:

> (The) religious rite had not so far constituted a public health problem, still less given rise to illicit traffic.... It would clearly be extremely unjust to make the members of those tribes liable to penalties of imprisonment because of a mistaken interpretation of the Convention and thus add an inhuman punishment to their poverty and destitution... (UN 1973, pp. 106–107)

The 1988 Trafficking Convention and Coca

Signals of protest to the coca proscription came later, in the 1980s. In both Peru and Bolivia, political winds blew from a somewhat different direction, and international recognition of human and indigenous rights had become politically correct. But of greater significance, the region had become a target in the US-led "War on Drugs," aimed at reducing illicitly cultivated crops by force, using aerial herbicide spraying and the forced uprooting of coca plantations. Coca producing regions in Peru, Bolivia, and Colombia became a target in decades of military operations, where the enemy was a plant, and those who cultivated it treated as criminals. Generally, coercive policies replaced persuasive ones (Tokatlían 2009, p. 340), and foreign—US and EU—interventions in national drug policies were the rule.

During the height of this period, hundreds of farmers lost their lives as a result of the violence accompanying eradication operations, and tens of thousands of farmer families saw their livelihoods threatened. Peasant unions started to organize and a movement surfaced claiming the right to defend their livelihoods, with particular organizational strength in Bolivia and Peru. The coca leaf became a banner of their movement, defending it as a sacred plant, and as a symbol for their livelihoods. Programs known as "alternative development" were devised to replace coca with substitute crops as part of the global supply reduction strategy; most of these were doomed to failure.

In the midst of this, the 1988 Convention against Trafficking of Narcotic Drugs and Psychotropic Substances was negotiated, and reflected the hardline positions taken by governments to deal with the growing recreational drug markets and growing coca cultivation for cocaine production. This treaty added further confusion to the issue of traditional use, since it included a direct but ambiguous reference to it. The debate around it was interesting, as reflected below.

The article in question dealt with measures to eradicate illicit cultivation and to eliminate illicit demand. The article itself was an outcome of the polemic debate on the balance between the concerns of the producing, consuming, and transit countries. Here, traditional use became an issue in which a division along several lines became clear. A 12-country amendment[1] "intended to correct certain misunderstanding… with regard to traditional and legitimate uses of plants containing psychotropic or narcotic substances" (UN 1988c, para. 12, p. 297), was presented to ensure the convention was "not to penalize the licit cultivation of coca bushes and the licit traditional uses of coca leaf and its consumption." Those opposing "felt that the notion of traditional uses should not be so expanded as to legitimize drug abuse" (UN 1988a, para. 20, p. 297), which was taken up as a request to further define traditional use. The difference between traditional opiate and coca use became more evident when, at the suggestion of the Algerian delegate to refer to "the domestic socio-economic use of licit crops in their natural state, which have not been subject to chemical processing" (UN 1988c, para. 50, p. 299), another delegate remarked that all traditional use in many countries had been subject to elimination because of the dangers involved. The Indonesian delegate even went so far as to question using the term "traditional use" at all, since "it was difficult to prevent traditional use from becoming illicit use, and it was important to be consistent in combating the illicit use of narcotics in all forms" (UN 1988c, para. 11, p. 300).

A separation between these two practices made sense from one perspective, but caused yet another problem. The Andean representatives tried very hard to negotiate an exceptional status for coca, but did not succeed. Traditional opium or cannabis use was not explicitly defended by any delegation during these negotiations, or at least not reflected in the official commentary. While for the Andean countries, the inclusion of a reference to traditional coca use was meant to be a relief valve, after the transitional reservations of article 49 of the Single Convention had closed off all roads to traditional uses of controlled substances, other members negotiated to ensure that all provisions previously agreed to would remain intact. In the words of the UK delegate, "not mentioning this would create confusion about the status of coca" (UN 1988c, para. 28, p. 302).

In the final edition, Article 14 started by saying that its provisions should not derogate any of the obligations under the previous drug control treaties, meaning the 1961 Single Convention, and mixed the legal status with the concept of

[1] Bahamas, Bolivia, Colombia, Costa Rica, Cuba, Guatemala, India, Jamaica, Mexico, Panama, Paraguay, and Peru.

tradition, weakening the final compromise. The concept of traditional illicit use created confusion and contradiction, since all licit uses under the UN drug conventions are either medicinal or scientific:

> Each party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush, and cannabis plants cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment. (UN 1988b, para. 14.2)

Bolivia made a formal reservation to the 1988 Convention, emphasizing that its "legal system recognizes the ancestral nature of the licit use of the coca leaf which, for much of Bolivia's population, dates back over centuries." Colombia made no reservation, but declared formally upon ratification:

> It is the view of Colombia that treatment under the Convention of the cultivation of the coca leaf as a criminal offense must be harmonized with a policy of alternative development, taking into account the rights of the indigenous communities involved and the protection of the environment. (Government of Colombia 1994)

Peru also reserved the right to legal cultivation, without specifying which plant is concerned: "Peru formulates an express reservation to paragraph 1 (a) (ii) of article 3, concerning offenses and sanctions; that paragraph includes cultivation among the activities established as criminal offenses, without drawing the necessary clear distinction between licit and illicit cultivation" (UN 1988c; Government of Peru 1988).

In the second part of this chapter, we will look how these countries tried to harmonize their domestic legislation with these provisions, and to what extent the reservations made reflected an already-existing legal status of traditional coca use.

The Role of the INCB

The International Narcotic Control Board (INCB), the entity of the UN drug control body that oversees and monitors the implementation of the UN drug treaties, noted the contradictions that accompanied the coca issue on a number of occasions in its annual reports during the 1990s. Confronted with the campaign for re-evaluation, led by the governments of Peru and Bolivia, the INCB stressed in its 1992 annual report:

> The liberation of coca leaves and products of coca leaves from control measures and to be internationally commercialized for other (than medical and scientific) goals would require a radical change in the attitude of the international community as well as the modification of the 1961 Convention. (INCB 1992)

During the 36th session of the Commission on Narcotic Drugs (CND) in March 1993, a Bolivian representative requested lifting existing restrictions on the coca leaf under the international conventions. The request was noted but, since the CND could not undertake action in his direction, it was left there. The INCB did decide to

organize a mission to visit the Andean countries where "…traditional use of coca leaf was permitted by national legislation, which was contrary to the provisions of the 1961 Convention." The mission reported that:

> Research and multidisciplinary studies were being carried out in one of the countries to assess the potential value of the coca leaf for nutritional and health purposes, and would be presented in time in accordance with the procedure established by the treaties. (INCB 1993)

In its 1994 report, it stressed that:

> The conflict between the provisions of the 1961 Convention and the views and legislation of countries where the use of the coca leaf is legal should be solved. There is a need to undertake a scientific review to assess the coca-chewing habit and the drinking of coca tea. (INCB 1994a)

A supplement to the 1994 report dedicated one section to "Coca Leaf: A Need to Clarify Ambiguities," calling for "a need to examine the situation regarding state parties to the 1961 Convention that have made reservations under article 49 of that Convention. A true assessment of the habit of coca leaf chewing is urgently called for" (INCB 1994b, para. 46).

This rather propositional tone of the board and its openness to hear different perspectives on the issue changed dramatically in the 2000s, as we will see later. There seems to have been a genuine intention to clarify the confusion around coca, and an historical opportunity to change its fate. The call for a true assessment of the chewing habit was never properly followed up, but coca chewing did become part of a study on cocaine that the WHO undertook in collaboration with the United Nations International Crime and Justice Research Institute (UNICRI) in the first years of the 1990s.

The Role of the WHO

As noted above, the WHO played quite an important role in sealing coca's legal fate in the UN conventions. The health experts reviewed "the problem of coca chewing" in two of its sessions, accepting the conclusion that "coca leaf chewing is detrimental to the individual and society" (ECOSOC 1950, p. 10) of the Report of the Commission of Enquiry on the Coca Leaf without questioning it. At its first and second meeting, it declared coca chewing a form of cocainism, since it was brought to the Commission's attention that cocaine was absorbed during the chewing process. It took 40 years before this hot potato returned to their plate again.

At the 1992 meeting of the WHO Expert Committee on Drug Dependence (ECDD), coca leaf reappeared on the agenda at the request of the Bolivian government, and was added by the WHO secretariat to a list of ten substances to be considered by the Committee for a critical pre-review. During this ECDD meeting, it was noted "coca chewing was still prevalent… and that the dependence-producing properties of chewed leaf, its social role, and the health consequences of its use should be studied." Still, and quite contradictorily, it concluded that, "the

coca leaf is appropriately scheduled under the Single Convention on Narcotic Drugs, 1961, since cocaine is readily extractable from the leaf. The Committee did not recommend coca leaf for critical review" (WHO 1993, p. 11). The pre-review stage, however, appears to have been used to prevent a more thorough review of the scientific evidence. This defensiveness on the part of the WHO Expert Committee on Drug Dependence is perhaps understandable: An examination of the original rulings which supported the 1961 Single Convention would show that little or nothing was made of the extractability argument at the time, and the arguments which were then used—coca's links with malnutrition, or its potential to cause addiction—today have limited scientific credibility. In other words, the grounds for maintaining coca leaf in Schedule 1 of the Single Convention have been changed, but—and this is the important point—without a critical review on the part of the WHO Expert Committee on Drug Dependence. Here, as argued by some analysts (Henman and Metaal 2009, p. 8), their defensiveness verges on dishonesty, and even implies a degree of professional misconduct: the failure to fulfill a scientific role entrusted in good faith to the WHO by the international community.

This process took place almost simultaneously with the "Cocaine Project," an extensive study by WHO and the United Nations Interregional Crime and Justice Research Institute (UNICRI) on the variety of cocaine uses around the world, carried out between 1991 and 1995, with case studies of 22 cities in 19 countries on five continents performed by 45 expert researchers. It also included the use of coca leaf by chewing in three case studies, since there exists no scientific doubt that this form of ingestion involves the absorption of trace amounts of natural cocaine present in the leaves.

The WHO/UNICRI Cocaine Project underscored that the traditional use of coca appears to have no negative health effects and that it serves positive therapeutic, sacred, and social functions among indigenous groups in the Andean region.

The scientists who participated in the WHO/ UNICRI study made the following recommendations:

- Although there is a possibility that use of the coca leaf may be linked to certain health problems that have not yet been detected, this is unlikely. It would be much more interesting to determine whether chewing coca could have positive health effects.
- The WHO should investigate the impact that drug control legislation and measures have on individuals and specific populations.
- The WHO should investigate the therapeutic benefits of the coca leaf and whether these effects could be transferred from traditional contexts to other countries and cultures.

On March 14, 1995, the WHO announced the publication of the WHO/UNICRI Cocaine Initiative to the international press. Shortly thereafter, on May 9, 1995, in Commission B of the 48th World Health Assembly in Geneva, the US representative said he was:

> surprised to note that the package seemed to make a case for the positive uses of cocaine, claiming that use of the coca leaf did not lead to noticeable damage to mental or physical health, that the positive health effects of coca leaf chewing might be transferable from traditional settings to other countries and cultures, and that coca production provided financial benefits to peasants. (WHA 1995, p. 229)

He added that his government would suspend financial support if the WHO did not dissociate itself from the study's conclusions and if it adopted a position justifying coca production. In response, the WHO secretariat said that the study was an extensive, objective analysis of data gathered from many countries, and that it had been carried out by international experts, while its conclusions did not reflect the position of the WHO. The US representative replied that the study was not extensive or objective, and that it should be subjected to peer review in accordance with the WHO's own strict guidelines. It was in this peer review procedure the Cocaine Project died a quiet death, and was never published.[2]

Recent Attempts at Change Within the UN Drug Control Framework

In the past 5 years, the Bolivian government has presented two initiatives to reconcile its international treaty obligations with the traditional use of coca, and to harmonize its domestic legal instruments. These attempts to get traditional use recognized by the UN drug treaties were necessary, since in the past decade a number of legal instruments and political declarations have appeared firmly embedding indigenous peoples' rights into national and international law.[3]

The 2007 UN Declaration on the Rights of Indigenous Peoples states, "Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions" (UN 2007, p. 11). In April 2010, the Permanent Forum on Indigenous Issues, an advisory body to the UN Economic and Social Council (ECOSOC), welcomed Bolivia's amendment on the traditional use of the coca leaf. "The Forum recommends that Member States support this initiative" (UN Permanent Forum on Indigenous Issues 2010, para 35). In May 2009, the Forum stated that it "recognizes the cultural and medical importance of coca in the Andean region and other indigenous regions of South America" and recommended:

> The amendment or abolishment of the sections of the Convention relating to the custom of chewing coca leaf that are inconsistent with indigenous people's rights to maintain their traditional practices in health and culture enshrined in Articles 11, 24, and 31 of the Declaration. (UN Permanent Forum on Indigenous Issues 2009, para. 89)

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[2] Much of the material produced can be consulted at: http://www.tni.org/article/who-cocaine-project.

[3] See for a more detailed discussion on the contradictions around the legal UN framework on human and indigenous rights, see Boiteux et al. (in this volume).

With the August 2009 Presidential Declaration of Quito, all South American nations expressed support for the Bolivian proposal, requesting that the international community respect the ancestral cultural practice of coca leaf chewing. Many other declarations followed; the latest from the 2012 Ibero American Summit celebrated in November 2012 in Cadiz, Spain. Still, the UN drug control treaties lagged behind, and the first attempt to get into sync with reality was made in 2009, when Bolivia requested an amendment to the 1961 Single Convention article 49, paragraphs 1 c) and 2 e) of the Single Convention on Narcotic Drugs of 1961, as modified by the Protocol of 1972. In their own words:

> The objective of the Bolivian proposal of amendment to the Single Convention is to eliminate the obligation to prohibit the chewing of coca leaf in order to enable countries where there is evidence of this ancient, cultural, and religious tradition to preserve its own millenarian indigenous cultural practice; based on grounds that it does not cause any harm to people's health nor any kind of disorder or addiction. (UN 2012, p. 1)

Interestingly enough, in this *Aide Memoir* Bolivia sent to the Secretary General of the UN, they also acknowledged the fact that coca use was no longer an exclusively indigenous practice:

The inclusion of coca into the 1961 convention…

> was a failure easily explained and justified since the consumption of coca leaf is a deeply rooted and necessary cultural practice in the Andes. Moreover, chewing and drinking coca leaf have extended not only to non-Andean indigenous peoples, but also to non-indigenous sectors of the region. (Plurinational State of Bolivia 2010)

The UN procedure establishes an 18-month period in which all parties to the treaty can express their nonconformity or disagreement to such a requested amendment. A total of 18 countries formally notified the UN Secretary General that they could not accept the proposed amendment: the United States, the United Kingdom, Sweden, Canada, Denmark, Germany, the Russian Federation, Japan, Singapore, Slovakia, Estonia, France, Italy, Bulgaria, Latvia, Malaysia, Mexico, and Ukraine. The U.S. convened a group of "friends of the convention" to rally against what they perceived to be an undermining of the "integrity" of the treaty and its guiding principle to limit the trade and use of narcotic drugs exclusively to medical and scientific purposes.

The second initiative followed after this failure, when Bolivia decided to denounce the 1961 Single Convention in June 2011, and presented its renewed adhesion to the treaty, this time with a formal reservation, deposited to the UN on January 10th of 2012, that reads:

> The Plurinational State of Bolivia reserves the right to allow in its territory: traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state for cultural and medicinal purposes; its use in infusions; and also the cultivation, trade, and possession of the coca leaf to the extent necessary for these licit purposes.

Again, with this much criticized move, Bolivia tried to find an appropriate balance between multiple concurrent and conflicting international legal obligations. A reservation on the 1961 Single Convention was the most reasonable and proportionate way to address this conflict (Barrett 2011, p. 1).

The clearest sign of disapproval came from the INCB, who had taken a stronger stand on the issue of traditional coca use in their annual reports from 2005 onward. In the preface of the INCB's report for 2011, board president Hamid Ghodse expresses his regrets on Bolivia's "unprecedented step" and calls it "contrary to the fundamental object and spirit of the Convention." Mr. Ghodse even contended that "the integrity of the international drug control system would be undermined and the achievements of the past 100 years in drug control would be compromised" (INCB 2012) if denunciation and re-accession with reservations were to become a mechanism used by other state parties.

The fate of Bolivia's reservation and re-entering into the treaty was decided upon on January 10, 2013, one year after the official request. If more than one-third of all parties to the convention would have opposed the reservation, it would not have been accepted. As it turned out, only 15 countries presented a formal objection to the entrance of Bolivia with this reservation, all basing their argument around the procedure Bolivia used: denunciation and re-adherence with a reservation, allegedly creating a precedent other countries could follow. Some countries used other arguments, and just one country, Sweden, made a clear reference to the traditional use itself:

> The United Nations' drug control conventions are the cornerstones of the international legal framework for the fight against drugs. An exemption for coca leaf chewing and the growing of coca plants for this purpose risks to undermine this system and to weaken the control over cocaine production. Furthermore, the ambition expressed in the convention is the successive prohibition also of traditional uses of drugs; the chewing of coca leaves being explicitly mentioned. (UN 2012)

The small victory Bolivia has achieved, having acquired acceptance of their reservation, can be hailed as just a tiny step towards UN Convention reform.

As reflected in this chapter, the history of the legal status of coca within the UN drug control mechanisms and institutions is a conflicted one, filled with contradictions that reveal the ugly face of international drug control. In the Andean Amazon region though, coca chewing and coca tea drinking have continued to be widespread habits, inextricably linked to the identity of its inhabitants, and the cultural and medicinal practices of daily life. Moreover, domestic laws acknowledge and guarantee these expressions in a number of ways we will look into now.

Domestic Laws and Traditional Coca Use

All countries in the Andean-Amazon region have signed and ratified the UN drug conventions, and several have made reservations concerning traditional coca use, though in some cases these were withdrawn afterwards. Their domestic legislation

on drugs is modeled after these conventions, containing all the provisions that proscribe the activities surrounding the controlled substance. There are four countries in the region (Argentina, Bolivia, Colombia, and Peru) that have explicitly dedicated domestic legislative articles on cultivation, use, and possession of coca for traditional use, three of which (except Argentina) are involved in the production and export of cocaine. Furthermore, a few other countries in the region (Ecuador and Chile) tolerate generally traditional uses, in all cases for a specific defined part of the population; namely, indigenous people.

Of course, in all three coca-growing countries, the coca destined for the traditional market and those leaves that end up in a maceration pit for the extraction of their main alkaloid, cocaine, come from the same plant. Legislative distinctions are made by setting geographical limitations, or restricting the number of plants or area that can be planted, or linking its use to a certain part of the population.

In Peru, coca cultivation itself is not proscribed, but when the harvest is due, all revenue becomes illicit if farmers fail to deliver it to a state agent that directs the output to licit uses. A system of licensing is used to permit cultivation and sale, regulated exclusively through the state agency *Empresa Nacional de la Coca* (ENACO). In this case, although it formally constitutes no criminal offense to grow coca, growers without a license can lose all their crops. Peru has always maintained a legal coca market under its domestic law and, in 2005, declared coca chewing as cultural patrimony.

In 2003, a national survey (INEI-DEVIDA 2004) was done to estimate the amount of coca needed for the national licit market in Peru. The amount established was 9,000 Metric Tons (MT), and this same amount is still used to indicate the approximate volume of the licit market. The UNODC crop monitor report of 2012 mentions this same number. In the National Drug Strategy 2012–2016, a new study will estimate the volume of coca needed to meet national demand for traditional and other licit needs. Interestingly, targets set for ENACO in the National Drug Strategy from year to year include the 9,000 MT figure in their distribution network, showing that its “monopoly” has not worked: Less than one-third of the legal coca market is part of their distribution network, leaving no doubt about the size of the current gray market for coca leaf, which most probably is increasing, as we will see later.

Coca is widely available and consumed by large shares of the populace as an infusion, while an estimated three million people practice the chewing of coca leaves, mainly in rural and mountainous parts of the country. Most of the urban elites and middle class dwellers consider chewing a backward Indian practice, something due to disappear once a certain level of economic and cultural wellbeing is reached. This “modernization thesis” is still the position defended by Peruvian elites. Unlike neighboring Bolivia, it is uncommon to meet people on the streets of Lima or other coastal towns chewing coca.

In the case of Colombia, only officially registered indigenous territories are allowed to grow and market coca, and coca users themselves are identified as indigenous people. Much of the long history of coca chewing in Colombia has

been subject to the efforts by Colombian governments to link the coca leaf to cocaine, and by doing so, not just ignoring the reality of coca use in its territory, but worse, giving coca a bad name. In domestic law, the recognition of the relationship between indigenous traditions and the coca leaf is found in article 7 of Law 30 of 1986, which indicates that: "The National Narcotics Board will regulate the cultivation of plants used for the production of narcotic drugs and the consumption of these by the indigenous population according to the uses and practices derived from their culture and traditions." Through this disposition the government had to call off its public campaign called "*la mata que mata*": "The leaf that kills."

Based on various articles of the national constitution that protect the ethnic and cultural identity of indigenous communities, there have been a number of favorable rulings in the 2000s by the Supreme Court against restrictions imposed by the national drug control agencies designed to curb the sale of natural coca products in the whole country. A number of these rulings have used Art.14 b of the 1988 Convention as an indication of international recognition of traditional use. This jurisprudence came at the same time that an increase was seen in the sale of coca tea and other coca products in the country. Still, the number of people using coca in the traditional way, by chewing, is currently estimated at only 100,000.

Domestic legislation in Bolivia defined certain regions in its territory as coca producing areas and established a limit on the total area under cultivation, calculated on the basis of the amount necessary to meet local demand for traditional use. The designation of these areas has been influenced both by historical evidence of coca production from colonial times, and by internal political dynamics. The legislation makes the curious distinction between coca and coca *iter crimenis*, as to refer to coca used for the production of cocaine, defined as a crime. The amount needed to satisfy the local market—plus the north of Argentina where the growing conditions are insufficient—was estimated at 12,000 hectares in 1986. Currently, a new survey long due should provide for new measurements that will help separate the licit from the illicit market. A reform of national law is currently in progress, and it will separate all coca leaf production and distribution.

Coca was taken up as a national flag for the indigenous cause by the Bolivian government in 2005. Bolivia is definitely the country with the largest share of its population consuming coca in a traditional manner, and coca tea drinking is a common daily practice. The earlier described efforts in the international arena to get traditional use recognized, and "repair the historical error" made by including coca as a controlled drug, reflect this change, although previous non-"indigenous" governments had made similar efforts. The 2009 Constitution states that: "The State protects the original and ancestral coca leaf as part of the cultural heritage, renewable natural resource of Bolivia's biodiversity, and as a factor of social cohesion. In its natural state, it is not considered a drug" (Plurinational State of Bolivia 2009, Art. 384).

Argentina decriminalized coca leaf in 1989 by inserting the following exemption article in its own law: “The possession and consumption of the coca leaf in its natural state, destined for the practice of ‘coqueo’ or chewing, or its use as an infusion, will not be considered as possession or consumption of narcotics.” Argentina is a special case: It is the only country without coca cultivation history and a relatively recent history of popular use. In addition to the considerable migrant communities in Buenos Aires, locals from all social classes, though mainly masculine, have practiced coca chewing in the northern provinces of Salta and Jujuy for more than half a century. This accounts for a fascinating example of how a predominantly indigenous and poor mans’ habit was internalized by the middle and upper classes, offered for sale, and practiced in public spaces, to an extent unknown in some of the places from which it originates (Abduca 2010). All coca consumed in northern Argentina comes from Bolivia, and is a pending legal loophole, since no exportation is allowed under the international conventions.

Argentina has been among the countries targeted by the INCB as being “in breach with the international conventions” in a number of its annual reports, for allowing coca chewing in its national territory. The use of coca is both traditional in its form, and non traditional in its users’ profile. It challenges many concepts around its use, and the way it has been defended as an indigenous issue. The government of Argentina has defended coca use, but has not been very proactive in resolving the issue at the international level.

Parts of the Chilean north have a coca-consuming Aymara population, estimated to be around ten thousand people. Coca here is not visibly part of the culture. Chilean law does not formally allow coca to be traded or sold, but in practice will not prosecute Aymara people who are in possession of coca leaves. It is not difficult to find coca as an infusion. It is significant though, that in April 2003, a law was proposed that would establish a legal allowance to possess, carry, and consume coca leaf and alcohol for religious celebrations in diverse cultural contexts. Indigenous organizations have been trying to get some kind of legal exemption; so far, without success.

In Ecuador, the country where evidence of coca consumption dates back at least 2,500 years, the habit has almost completely disappeared since the seventeenth century, when the Spanish Inquisition prohibited its use. Nowadays, some indigenous groups use it as a traditional medicine, not sanctioned by law, within a traditional use context. Small areas with coca plantations are regularly found in the regions bordering Colombia, resulting from a spillover effect of coca cultivation for cocaine production.

In the Brazilian eastern Amazon, coca leaf is known as Ypadú, and is cultivated by indigenous people of the Tukano family along the Vaupés River on the border with Colombia, and by a mestizo population in Tefé, between the Peruvian border and Manaus (Metaal et al. 2006, p. 18). The plant is naturally occurring in the jungle and has been used by different indigenous groups as a medicine and natural stimulant for centuries, remaining within that cultural context. The plants growing

in the lower Amazon Basin have lesser quantities of the naturally occurring cocaine alkaloids, making it unattractive for cocaine production. Some toast and grind the leaves to flour, thus obtaining a larger amount to be "chewed," and mix this with plant ashes to facilitate the extraction of the active substances.

As this overview shows, coca leaf consumption is widespread in several South American countries and is reflected in their domestic legislation and legal practice. This situation has caused conflicts within the international legal framework designed to counter the cocaine trade by continuing to define coca and its traditional use as a practice that needs to be abolished. Many of these countries have seen the emergence of a market for novel forms of coca use, which we will look into now. A global market for coca leaf is developing, despite the global prohibitionist regime.

New Interpretations and Uses of Coca in the Global Markets

Before the emergence of a global prohibitionist regime on coca, the plant already had a history of industrial uses in products other than cocaine. A famous first use emerged in France at the second half of the nineteenth century when, during the "Belle Époque," a Corsican pharmacist Angelo Mariani (1838–1914) produced a wine containing a coca leaf extract, known as *Vin Mariani*. During his research he read an essay on the virtues of coca by the Italian medical anthropologist Paolo Mantegazza, published in 1859 after his return from Peru and Argentina where he had practiced medicine. Mantegazza referred in his work to coca not only as a medicine, but also as an item of food. The Indians, he wrote, enjoy coca as a nutriment and a restorative. Vin Mariani became extremely popular, and many poets, painters, and popes attributed extreme benefits to this "Elixir of Life" (Windsant 2007, p. 12).

In 1885, John Smyth Pemberton prepared his first coca beverage in the United States. He called it "French Wine Coca," and it quickly became popular, particularly among those enraged about alcoholic beverages. He changed his "ideal tonic" into a temperance drink by adding an extract of kola nut to his coca brew and by replacing the wine with a sweet syrup; Coca Cola was born one year later. Pemberton was said to use up to five ounces of coca leaf per gallon of syrup: quite a significant dose. This changed quickly under the influence of local, national, and international pressure, based on alleged abuse and health problems. The company started to use "spent" leaves, containing only trace amounts of cocaine, and still does so today. Allegedly, Coca Cola played a pivotal role in advocating the inclusion of one article in the 1961 Convention that provides for the use of coca containing no alkaloids as a flavoring agent.[4] Recent data on the legal import of coca leaves shows that the US is by far the leading country: Of the total 140.000 kg of coca leaf used for medicinal and scientific purposes in 2011, under which its

[4] See Cortés (2012).

industrial use as a flavoring agent is listed, only 7 kg of coca leaf are accounted for by other countries.[5] It is known that these leaves, with their alkaloid content suppressed, are used for the production of Coca Cola. An Italian liquor that is still sold in liquor stores today, called *Coca Buton*, is another famous example of European coca leaf use dating back to the nineteenth century. The recipe was adapted as to fit the international standard when coca became proscribed, and a decocainized extract is allegedly still used to produce it.

After the proscription of coca by the 1961 Single Convention, most classic traditional use has managed to survive in the places it was practiced before. From the 1980s onward, a rich variety of coca leaf products entered the market, but only in the past decade has it taken a significant turn to an extended market, with the Internet as one of its main propagators. This process, known as the "industrialization of coca," was made into public policy by both the Peruvian and Bolivian governments. Coca tea is the best-known example, and although proscribed, it is quite easy to find and order by mail. A simple search will shows dozens of hits for websites that offer coca tea for sale, finding its market niche as a health product with an increasing variety of other coca products also becoming available.

The promotion of coca on the modern global market as a health product is based upon long-standing claims for its therapeutic properties as described in modern times in full detail by many authors, with the study of American doctor William Golden Mortimer ranking as the most impressive account of the medical virtues of coca.[6] More recently, it has been declared a useful treatment for various gastrointestinal ailments, motion sickness, laryngeal fatigue, as a useful aid in programs of weight reduction and physical fitness, and coca may work as a fast-acting antidepressant (Weil 1981, p. 367–376).

Its value in treating dependence on cocaine or other stronger stimulants also has several defenders, but is hardly developed scientifically. Some research (Hurtado-Gumucio 2000; Llosa 1994) shows there may be a case for therapeutic uses, and exploring the options in this sense would be interesting, especially since there exists a well-acknowledged deficit in treatment options for problematic stimulant users. The taboo on using controlled drugs for treatment, such as natural coca extract, was broken recently by a study on the sporadic use of amphetamines to treat cocaine dependence. The existing "biases against using controlled substances as a treatment for cocaine dependence should be challenged, much in the way the use of antagonist treatment transformed the treatment of opioid dependence despite initial resistance from the field" (Mariani and Levin 2012). A case could be made for using coca, with no known adverse side effects, as a natural, weaker variant of a similar substance.

A popular, relatively new, form of use is coca leaf flour: ground leaves used as a food supplement. Historically, traditional coca leaf use never replaced proper nourishment, though such an accusation, i.e. that it was a cause for malnutrition,

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[5] From the INCB (2011), p. 92.

[6] Mortimer (1901).

surfaced in the 1950s in the aforementioned ECOSOC report. Particularly in urban Peru, this product is absorbing increasing parts of the illicit coca crop harvests, and is abundantly available in the markets. At the Lima airport, one can purchase fancy packaged coca flour to bring along as a local regional curiosity, and locally the consumption of the flour has taken a huge flight. Anecdotally, prices paid for the leaves by local companies to coca farmers or intermediaries are said to be higher than the prices paid by the drugs traffickers who buy leaves at the farm gate for cocaine production. Coca flour is also one of the products on sale at the dozens of Internet shops, responding to the global demand for health products.

One of the many myths that surround the coca leaf—myths ranging between the two extremes of “intoxicating” and a “panacea for world hunger”—is that this product could play a significant role as a nutritional supplement, useful to many different population groups and many diverse diets (Henman and Metaal 2009). However, it cannot be stated too often that the principle benefits enjoyed by coca consumers are those of its well-documented, historically attested applications as a stimulant and herbal medicine.

In conclusion, it is irrefutable that traditional leaf chewing is also in the process of transplanting into new cultural contexts, and has the potential to be accepted as a natural and healthy alternative to cocaine consumption in Western cultures. Its known stimulating properties have already caused this kind of transformation in the Andean Amazon region itself, where previously the chewing habit was predominantly practiced in rural areas, linked to labor activities such as mining and agriculture for its stimulant and energy-enhancing effects, and linked to indigenous communities, religious rituals, and celebrations such as weddings and funerals or applied as a medicine. Today, urban populations such as students and professional drivers use chewing of coca to enhance their energy output, using coca as an alternative to coffee and tea. The recent developments of new groups using coca as a natural stimulant can be considered the first step in bridging the gap between traditional use and modern forms of use. The traditional technique of Ypadú use, as described earlier, has been employed by some pioneers to develop a modern variation, using coca with higher alkaloid content, and increasing its accessibility to moderns users, thus making a case for a “re-education of demand,” meant to divert cocaine use towards coca use (Metaal et al. 2006, p.16). By allowing the use of coca as a natural stimulant, and by lifting the restrictions on it in the global markets, the use of cocaine and other potentially hazardous stimulants could be reduced, causing a probable shift that is beneficial for public health. In order to make this possible, the UN drug control treaties will need to be challenged and changed, since they are currently reflecting outdated and erroneous conceptions.

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Marijuana and Religious Freedom in the United States

Mark R. Brown

America's Regulation of Marijuana

Marijuana first fell under legislative scrutiny in the United States during the early twentieth century (*Gonzales v. Raich* 2005). Before that, neither American states nor their national government expressed much interest in regulating it. Indeed, to the extent marijuana was at all relevant, it was considered a vital war commodity. Hemp, after all, was needed to produce rope, a necessary ingredient to successful navies and armies.

By 1913, however, several States had passed laws prohibiting the possession and sale of marijuana (*Gonzales v. Raich* 2005). The impetus behind these laws ostensibly was the drug's debilitating effect. It was considered, not unlike opium and other narcotics, to be dangerous to users.

Because of its limited authority under the Constitution of the United States, Congress's regulation of marijuana proceeded cautiously. Unlike the American states, Congress does not possess general legislative powers.[1] Instead, it must ground its laws in specific grants found in the Constitution. By and large, modern Congresses have used Article I's "interstate commerce clause" to support their wars

[1] The National government, for the most part, finds its powers in Article I of the United States Constitution. These powers include regulating commerce between the states and with foreign nations, as well as collecting taxes, creating postal roads, outfitting a navy, and raising an army. Missing is any authority to generally enact criminal law or regulate drugs. To the extent the national government has enacted criminal drug laws, it is today understood to fall under its Article I power to regulate commerce between the states (*Gonzales v. Raich* 2005). And under this power, the regulated drugs and criminal activities no longer have to actually cross state lines. It is enough that they, in the aggregate, somehow "affect" interstate commerce (*Gonzales v. Raich* 2005). The Supreme Court in *Gonzales v. Raich* (2005) ruled that this principle allows Congress to regulate marijuana production and consumption that is confined to a particular state.

M.R. Brown (✉)
Newton D. Baker/Baker & Hostetler Chair, Capital University Law School, 303 E. Broad Street, Columbus, OH 43215, USA
e-mail: mbrown@law.capital.edu

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on drugs, the argument being that drugs "affect" interstate commerce and therefore fall within congressional reach.

But before 1937, the reach of the Constitution's interstate commerce clause was quite limited according to the Supreme Court of the United States. It could not be used to support labor legislation, limits on manufacturing, or agricultural measures, like growing marijuana (*Carter v. Carter Coal Co.* 1936). Thus, Congress, believing it could not simply regulate or prohibit drugs like marijuana, turned to alternative measures to restrict their use. One such measure was taxation. The Constitution authorizes Congress to tax commodities and producers; so that is exactly what Congress did with drugs. Another alternative used by Congress was its plenary power to prohibit the movement of commodities across state lines. Thus, through taxation (and its incidents, like record-keeping and reporting) and prohibitions on the movement of drugs, Congress in the first half of the twentieth century began its war on drugs.

For example, as early as 1906, Congress (with its Pure Food and Drugs Act) imposed labeling restrictions on certain medications and prohibited the manufacture or shipment of "adulterated" or "misbranded" drugs that would be moved across state lines. In 1914, Congress enacted the Harrison Narcotics Act, which sought to control narcotics and cocaine by requiring producers, distributors, and purchasers to register with, and pay taxes to, the Federal Government. Violations were treated as crimes; thereby bringing America's drug trade under the auspices of the national government's criminal justice system for the first time.

Congress's Marihuana Tax Act followed in 1937, taking a similar form. Like the Harrison Act, the Marihuana (as it was spelled in 1937) Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, or selling marijuana, and required the payment of annual taxes in addition to transfer taxes whenever marijuana changed hands. Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with burdensome administrative reporting requirements that were ancillary to the tax laws. Violations were treated severely, with large fines and prison terms available. Thus, as with opiates and cocaine a generation before, marijuana (albeit indirectly) fell under the national government's criminal umbrella.

After 1937, the Supreme Court's interpretation of the Constitution's interstate commerce clause broadened (*National Labor Relations Board v. Jones & Laughlin Steel Corp.* 1937). Congress was, under this new interpretation, allowed more power to regulate and criminalize just about anything throughout the United States. No longer did goods and services have to actually cross state lines; rather, goods and services could be regulated and criminalized by Congress wherever in the United States they were found (*Perez v. United States* 1971).

Armed with this broader interpretation of its power, the inherent limitations found in the Harrison Act and Marihuana Tax Act, and what was perceived to be the wishes of America's "silent majority," in 1970, the Congress and President Richard Nixon, as part of the national "War on Drugs" (and contempt for the youthful counter-culture in America), rewrote America's drug laws. The Comprehensive

Drug Abuse Prevention and Control Act, also known as the Controlled Substance Act (CSA), passed by Congress in 1970, repealed most of Congress's earlier drug laws, such as the Marihuana Tax Act, in favor of a comprehensive regime to combat international and domestic drug abuse (*Gonzales v. Raich* 2005).

In order to effectuate this goal, Congress created a closed regulatory system, making it unlawful to manufacture, distribute, dispense, or possess any "controlled" substance, except as specifically authorized by the CSA. "Controlled" substances were catalogued in five "schedules," based on their accepted medical uses, potentials for abuse, and psychological and physical effects on humans. Each schedule or group was then afforded different controls regarding manufacture, distribution, and use. Schedule I drugs, under this regime, are simply illegal; they cannot be possessed or used for any purpose. Schedule II drugs, and so on down the line, can ordinarily be obtained and put to medical uses, often requiring some sort of written script from physicians.

In 1970, Congress classified marijuana as a Schedule I drug, meaning it cannot be possessed within the jurisdiction of the United States. Schedule I drugs, according to the CSA, have a high potential for abuse, lack accepted medical use, and are unsafe for use in medically supervised treatment. Many narcotics, in contrast, were labeled as Schedule II substances, meaning they could be obtained and put to medical uses. By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, Congress insured that the manufacture, distribution, or possession of marijuana anywhere in America became a federal criminal offense (*Gonzales v. Raich* 2005).

One point often misunderstood is that the national and local governments in the United States are separate sovereigns. Consequently, whether marijuana possession in any given state is legal or illegal is not relevant to the authority of the federal prosecutors to bring charges based on marijuana possession[2] (*Gonzales v. Raich* 2005). Even if marijuana possession, distribution, and use is perfectly legal under local law, it is all still criminal under the CSA. There can be no local immunity to prosecution by the national government.

Of course, this "separate sovereign" point proved largely academic in the years immediately following passage of the CSA in 1970. States uniformly stepped up efforts to enforce existing drug laws, including those criminalizing marijuana possession, and passed new drug laws modeled on the CSA. Consequently, for the first 20–30 years following passage of the CSA, marijuana possession in the United States was criminal under both the CSA and local laws. Both the national

[2] This is not to say that local authorities must lend helping hands. They need not. The Supreme Court has concluded that the national government cannot force local governmental officials to enforce Congress's laws (*Printz v. United States* 1997). The national government's inability to fully police the CSA throughout the United States, then, is largely a matter of limited resources. It simply does not have enough drug agents. Consequently, in a jurisdiction like California, which has relaxed its marijuana laws, users enjoy a practical right to purchase and use marijuana. This flows from California authorities' unwillingness to enforce the CSA and the practical inability of federal agents to do so.

and local governments were on the same page and both routinely prosecuted marijuana users.

Change came slowly, but by the 1990s, several American states passed laws authorizing the "medicinal use" of marijuana. California, for example, passed its medicinal use exception to the criminalization of marijuana possession in 1996 (*Gonzales v. Raich* 2005). Still, notwithstanding the relaxation of marijuana laws on the local level, Congress has steadfastly stood behind the CSA. And in 2005, the Supreme Court of the United States ruled that Congress' ban on marijuana possession and use continues to trump any relaxations found in local laws (*Gonzales v. Raich* 2005). Domestic laws throughout the United States therefore still criminalize marijuana possession, distribution, and use, no matter the location.

Freedom of Religion Under the First Amendment

The First Amendment to the United States Constitution guarantees the "free exercise" of religion. Although the text of this amendment speaks directly to Congress, and hence the national government, by the middle part of the twentieth century the Supreme Court had concluded that it applies to the several states, too (*Cantwell v. Connecticut* 1940). Neither the national government nor state governments can constitutionally abridge the free exercise of religion.

The devil in this constitutional limitation lies in its details. What does "free exercise" mean? Indeed, what is "religion"? For the most part, the Supreme Court has interpreted "religion" broadly to include not only one's belief in and relationship to a supreme being (*Torcaso v. Watkins* 1961), but also ethical and moral considerations that guide one's life[3] (*United States v. Seeger* 1965). In two cases addressing the scope of the conscientious objector exemption to America's draft laws, for example, the Supreme Court interpreted the federal statute to protect atheists as well as moral and ethical objectors. Lower courts have read this to mean that even in the First Amendment context atheists can claim religious protection just like Christians, Muslims, and Jews (*Kaufman v. McCaughtry* 2005).

Novel religions, too, qualify for constitutional protection under the First Amendment. In a famous mail fraud case, where the defendant claimed he was acting pursuant to his religious principles, the Supreme Court explained that religious protection couldn't be neatly confined to longstanding, traditional beliefs that focus on a supreme being:

[3] *United States v. Seeger* (1965), and a later case, *Welsh v. United States* (1970), involved the statutory meaning of "religion" for purposes of conscientious objector status under the Universal Military Training and Service Act of 1948. These precedents are today accepted to mean that "religion" under the Free Exercise Clause extends beyond conventional and historical understandings of religion.

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. (*United States v. Ballard* 1944).

In a later case, the Supreme Court went so far as to identify several religions that qualify for protection under the First Amendment notwithstanding their lacking any singular deity in the conventional, American sense: Buddhism, Taoism, ethical culture and secular humanism (*Torcaso v. Watkins* 1961).

Given its broad definition of religion under the First Amendment's free exercise clause, the Supreme Court has cautioned lower courts to avoid questioning the veracity of particular religions. The constitutional question, instead, is whether someone—usually a criminal defendant—credibly and sincerely believes the religion's tenets. If so, then whatever is "arguably religious" qualifies for constitutional protection (Tribe 1978). Of course, as explained below, the Supreme Court's amorphous definition of religion has not resulted in many successful defenses. Lower courts have employed various techniques to deny freedom of religion defenses, including simply concluding that a defendant's claim to a religious use of illicit drugs is not sincere or credible. Under this latter approach, the court assumes that a religion incorporating drug use exists, but then concludes the defendant does not truly believe it. With new and non-traditional religions, this technique has proven very effective.

The vague nature of the religion inquiry has caused many lower courts to pass over it and focus on the equally difficult problem of "free exercise." Broadly interpreted, of course, this language could cause anarchy. People might claim they believed in human sacrifice, and that laws prohibiting murder abridged this right. The Supreme Court therefore has historically avoided a broad definitional solution to the problem, and instead has opted for a narrow analytical approach. For example, in one famous case the state of South Carolina refused to pay unemployment insurance benefits to a worker who was fired from her job after she refused to work on Saturday (*Sherbert v. Verner* 1963). The worker practiced the Seventh Day Adventist faith and claimed that Saturday was her day of rest within the meaning of the Judeo-Christian Bible. The Supreme Court ruled that in the absence of a "compelling" justification for its denial, South Carolina's denial of unemployment benefits violated the worker's right to freely exercise her religion.

The *Sherbert* case marked a significant development for the free exercise of religion. Prior to *Sherbert*, the Supreme Court had employed a belief-action distinction that allowed government to regulate conduct as it saw fit[4] (*Reynolds v. United States* 1878). In the Supreme Court's words, "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country"

[4] *Reynolds v. United States* (1878) dealt with the Utah Territory's prohibition of polygamy. The Supreme Court concluded that it complied with the First Amendment and did not violate the religious rights of practicing Mormons. The Court reasoned that Mormons were free to believe whatever they liked; they simply could not practice these beliefs. The Mormon Church subsequently abandoned the practice of plural marriage.

(*Davis v. Beason* 1890). Consequently, the national government was free to outlaw plural marriage throughout the Western Territories.

The Supreme Court's 1963 decision in *Sherbert* radically broke from this precedent.[5] It ruled, contrary to teachings of earlier cases, that civil and criminal laws that adversely impact religious practices are constitutionally suspect under the free exercise clause of the First Amendment. Laws like these can only survive First Amendment scrutiny if they can pass "strict scrutiny," which requires that the law prove absolutely necessary to some compelling justification. The Supreme Court reiterated this point in a later case that invalidated as infringing religious liberty a Wisconsin law requiring that children be schooled until the age of sixteen (*Wisconsin v. Yoder* 1972). As applied to Old Order Amish, the court ruled, Wisconsin had no compelling reason for the requirement. The religious beliefs and practices of the Old Order Amish required that children be reared outside the classroom. The law's contrary command violated this free exercise of religion.

Sherbert was handed down in 1963, meaning that it was in force during the cataclysmic cultural revolution of the 1960s and early 1970s. While war raged in Southeast Asia and race riots rocked major American cities, recreational drug use skyrocketed. The so-called Woodstock Generation embraced numerous drugs, of course, but marijuana became a particular favorite. Although it had been used for generations in America, marijuana now found itself the poster-child of illicit drugs. Indeed, in some East and West Coast locales its use even became fashionable, if not fully tolerated.

But this was hardly the case in Middle America, where marijuana use was understood to threaten the very essence of Western civilization. Merle Haggard sang in his 1969 country music hit, "Okie from Muscogee":

We don't smoke marijuana in Muskogee;
We don't take our trips on LSD;
We don't burn our draft cards down on Main Street;
We like livin' right, and bein' free.

America's heartland, like Merle Haggard, equated marijuana with hippies, dissent, disgust, and all that ailed the country.

The federal government, for its part, hardly turned a blind eye to marijuana use during this turbulent period in American history. The prosecution (persecution?) of Dr. Timothy Leary, an icon of the youth movement, proves the point (*Leary v. United States* 1967). Leary and his daughter were arrested for marijuana possession when they attempted to return from Mexico across the Texas border (Brown 1983). Border guards noticed a few seeds (later proved to be marijuana) on the floor of Leary's car, which led to additional searches and the discovery of more marijuana.

[5] This break was foreshadowed by *Cantwell v. Connecticut* (1940), which ruled that a state law barring the public distribution of religious literature without a license violated the First Amendment. Although the court's discussion included the free exercise clause, Cantwell can be better understood today as free speech case.

(See chapter by Devin R. Lander in this volume for more information.) Leary was prosecuted all the way to the Supreme Court of the United States, which eventually reversed his conviction on technicalities.[6]

States, too, continued to enforce marijuana laws; either because they truly believed marijuana to be dangerous or because they feared the emerging youthful counter-culture. With the national government's adoption of the CSA in 1970, and the continuing onslaught of prosecutions, freedom of religion was perhaps the only effective defense.

The Native American Church's experience with peyote, the bud of a cactus plant, has provided the model for defenses against marijuana prosecutions. The Native American Church, which includes a collection of tribes, traces its use of peyote to pre-Columbian times. More recently, it has incorporated Biblical teachings—in particular, that part of the Bible that speaks of a root grown from dry ground—to reinforce the prominence of peyote in its belief system (*People v. Woody* 1964). When ingested, this cactus bud (which contains mescaline) has psychedelic effects not unlike those associated with marijuana. And because of these psychedelic effects, peyote has long been criminalized in the United States. Indeed, as early as 1926, Montana successfully prosecuted peyote possession, notwithstanding a Native American's freedom of religion defense (*State v. Big Sheep* 1926).

In 1964, The California Supreme Court ruled that California's criminal prohibition on peyote could not be applied to members of the Native American Church (*People v. Woody* 1964). The court found no compelling justification for refusing a religious exemption to the Native American Church. Peyote, after all, is not a truly marketable drug: its physical effects (including nausea) are unpleasant and production is apparently difficult. The Native American Church, moreover, has a 400 year history and uses peyote as a ritualistic sacrament, as opposed to encouraging recreational use.

California courts subsequently extended this religious exemption for peyote use to others, even though they were not members of the Native American Church (*In re Grady* 1964). They steadfastly refused, however, to apply the same logic to marijuana. In a series of opinions beginning in 1966 and culminating in 1975, California courts ruled that the religious use of marijuana enjoyed no First Amendment protection (*People v. Mitchell* 1966; *People v. Collins* 1969; *People v. Werber* 1971; *People v. Mullins* 1975). A clear line was drawn in California; peyote enjoyed religious protection while marijuana did not.

[6] Leary was prosecuted under the Marihuana Tax Act, which was in force at the time of his arrest. The act did not completely ban marijuana importation and possession, as does the modern CSA. Rather, the Tax Act allowed the transfer and possession of marijuana so long as one complied with reporting requirements and paid applicable taxes. The Supreme Court ruled that the reporting requirements violated the Fifth Amendment's privilege against self-incrimination (*Leary v. United States* 1969). (See chapter by Devin R. Lander in this volume for more information.) Reporting his transfer of marijuana to the federal government, after all, would have likely resulted in his being prosecuted under Texas law by local authorities.

Additional states, and the national government, followed California's lead. Arizona courts, for example, ruled that peyote possession by members of the Native American Church is protected (*State v. Whittingham* 1973). Oklahoma courts, meanwhile, ruled that, while peyote possession is protected (*Whitehorn v. State* 1977), marijuana use by members of the Universal Life Church is not (*Lewellyn v. State* 1971). North Carolina likewise ruled that members of the Neo-American Church enjoy no protected right to use marijuana (*State v. Bullard* 1966). This same result followed in Missouri for members of the Aquarian Brotherhood Church (*State v. Randall* 1976), in New York for practicing members of the Church of the Missionaries of the New Truth (*People v. Crawford* 1973), and followers of the Ethiopian Zion Coptic Church in Florida (*Town v. State ex rel. Reno* 1979).

The national government likewise rejected religious defenses for marijuana (*Randall v. Wyrick* 1977; *United States v. Middleton* 1982), while fashioning a regulatory exemption for peyote use by the Native American Church (21 C.F.R. § 1307.31). In 1994, Congress statutorily extended this exemption for peyote use to all Native American Tribes (42 U.S.C. § 1996a[b][1]). Even Timothy Leary, who claimed that he believed in Hinduism and followed the Brahmakrishna religion (which led him to use marijuana for enlightenment), failed in his attempt to assert a freedom of religion defense (*Leary v. United States* 1967). The United States Court of Appeals rejected his claim out-of-hand. (See chapter by Devin R. Lander in this volume for more information.)

Retraction of Constitutional Protection

In September of 1983, Galen Black, a drug and alcohol abuse counselor in Oregon, ingested peyote during a Native American Church ceremony. When his employer learned of this, Black was discharged. He sought unemployment benefits under Oregon law, only to have the state conclude that his discharge was proper based on his misconduct. Peyote, after all, remained illegal in Oregon (*Employment Division v. Smith* 1990).

Black appealed the state's refusal to the Oregon Supreme Court, which in 1987 ruled that Black's use of peyote was protected by the First Amendment's freedom of religion defense, just as Sherbert's refusal to work on Saturday was protected back in 1963. Following the California Supreme Court's holding in *Woody*, the Oregon Supreme Court concluded that the state's action substantially burdened Black's free exercise of his religion.

Because the Oregon Supreme Court's holding was consistent with existing American precedent—that is, courts had commonly ruled that peyote use by Native Americans was protected by the First Amendment—it came as something of a surprise when the United States Supreme Court chose to intervene. In 1990, reversing the Oregon court's holding, the Supreme Court of the United States ruled that religious practices would no longer be immune to criminal laws

(*Employment Division v. Smith* 1990). Rather, states are free to substantially burden religious practices so long as their criminal laws are "general" and "neutral."

By way of contrast, the Supreme Court ruled 3 years later that laws "targeting" religious practices remain subject to strict First Amendment scrutiny under *Sherbert*. The case originated in south Florida, where followers of the Santeria faith practiced ritualistic animal sacrifice (*Church of the Lukumi Babalu Aye, Inc. v. Hialeah* 1993). The City of Hialeah passed an ordinance banning the practice, while otherwise allowing for the slaughter of animals for other purposes (and in accord with other religious beliefs). The Supreme Court concluded that because the ordinance specifically targeted the Santeria faith and its "ritualistic" practice, it differed from the neutral criminal law found in *Smith*. It was therefore subject to strict scrutiny and required a compelling government end—a rare event with American constitutional law—to survive.

In the wake of *Smith*, compelling interests need not justify general criminal prohibitions on drug use, even when they completely prohibit sincere religious practices. And no exceptions need be made for any particular religion or group. The Supreme Court noted in *Smith* that although the national government had exempted the religious use of peyote by Native Americans from the prohibitions found in the CSA, it was not constitutionally required to do so. (See chapter by Kevin Feeney in this volume for more information.) Likewise, even though several states, like California, had immunized the religious use of peyote from applications of their drug laws, they did not constitutionally have to do so. Consequently, religious exemptions for drug use in America following Smith were left to the political process; they were no longer a matter of constitutional law.

Statutory Protections for Religion

This United States Supreme Court's decision in *Smith* sent shock waves through America's religious communities. Not because it removed First Amendment protection from Native Americans, but because it threatened the religious practices of mainstream religions. What if a state, for example, were to prohibit alcohol use? Could this be applied to the Catholic Church's use of sacramental wine?

The religious firestorm that erupted quickly caused passage by Congress of the Religious Freedom Restoration Act of 1993 (RFRA). This law restored religious protections in America to where they stood in 1989, before the Supreme Court intervened. Under RFRA, both local and National laws that substantially burden sincerely held religious beliefs and practices must be justified by compelling governmental interests. Peyote use was again protected: not by the First Amendment, but by RFRA.

The Supreme Court again intervened. In 1997, in a case involving a Catholic Church's efforts to expand its premises, the Supreme Court ruled that RFRA's application to state and local governments violated federalism principles contained in the United States Constitution (*City of Boerne v. Flores* 1997). The result was

that local zoning officials in Texas could deny to the church its requested variance, even though the denial interfered with the church's practice of its religion.

As with the passage of RFRA following *Smith*, Congress quickly responded to this result in 2000 by passing the Religious Land Use and Institutionalized Persons Act (RLIUPA) (*Cutter v. Wilkinson* 2005). RLIUPA specifically protects religion by requiring that local governmental land use decisions impacting religious properties pass strict scrutiny. In an odd bargaining twist, the statute extends similar religious protections to inmates across the United States. In 2005, the Supreme Court ruled that this law was a proper exercise of congressional power[7] (*Cutter v. Wilkinson* 2005). Whether RLIUPA protects the rights of inmates to receive and use sacramental drugs like peyote, hoasca, and marijuana in prison has never been decided by the Supreme Court. To date, no court in the country has ruled that RLIUPA commands such a result. In light of the modern cases described below, which uniformly reject the right of free Americans to use marijuana as part of their religious ceremonies, it is quite doubtful that any court will hold in favor of inmates under RLIUPA in the future.

The result of these federal statutory efforts is this: The national government itself remains bound by RFRA. States and their local subdivisions, meanwhile, cannot be required to follow RFRA's commands. States and their local subdivisions, however, are now governed by the limited land use and inmate protections found in RLIUPA; which is of little to no use in the context of religiously employed drugs. American states are free to apply neutral drug laws to religious practices. Peyote use and marijuana use find no protection in federal law; neither that found in the First Amendment nor that created by RFRA.

While states now are free to ban drug use, Congress and its agents must comply with RFRA. This means that federal laws that interfere with sincerely held religious beliefs and practices must be justified by compelling concerns. In 2006, the Supreme Court explored this problem in the context of a domestic religious group's (O Centro Espírita Beneficente União do Vegetal) attempt to import hoasca, a sacramental tea made from two plants unique to the Amazon region of South America (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006). One of the plants, *Psychotria viridis,* contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *Banisteriopsis caapi*. The compound is listed as a Schedule I substance under the CSA (like marijuana) and thus cannot be possessed in the United States, let alone imported.

O Centro Espírita Beneficente União do Vegetal (UDV) is a Christian Spiritist religion based in Brazil with a small following in the United States of just over 150 members (Labate and Feeney 2012). In 1999, United States Customs inspectors

[7] The Supreme Court's ruling focused on whether RLIUPA violated the Establishment Clause of the First Amendment (*Cutter v. Wilkinson* 2005). It concluded it did not. Although the Supreme Court's decision specifically addressed only the Establishment Clause, conventional wisdom has it that RLIUPA also survives federalism concerns, since it addresses the finite problem of religious organizations using their land (*Cutter v. Wilkinson* 2005).

intercepted a shipment of three drums of hoasca sent from South America (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006). The Supreme Court of the United States ruled that the UDV's receipt and use of hoasca is protected by RFRA. The national government, the Supreme Court explained, has long exempted peyote use by the Native American Church from criminal prosecution under the CSA, and in 1994 even extended this protection to all Native American tribes. Hoasca is similar to peyote in that there is no identifiable commercial market. Thus, the government has no compelling interest in preserving a uniform ban on the substance. Put another way, there was no absolute need to ban the religious use of the drug in order to avoid undercutting any recreational market.

In the wake of RFRA, several states passed similar measures offering protections to religion. Commonly, the laws require that any significant interference with sincere religious practices be justified by compelling governmental interests. Arizona, for example, passed a law with commands that were almost identical to those found in RFRA (*State v. Hardesty* 2009). While local measures like these have been applied to protect peyote use, however, their protections have not yet been extended to marijuana. Because of the "disparate magnitudes of the illicit use and trafficking of peyote as opposed to marijuana," the Arizona Supreme Court concluded, differential treatment of the two is justified by compelling governmental concerns.

Post-RFRA Results

Modern American courts continue to refuse to provide protection for marijuana use even after the adoption of RFRA and similar local laws. In contrast to the religious use of peyote, no state provides a specific exemption for the religious use of marijuana. Marijuana is thus treated quite differently than peyote, which, when used by Native Americans, is specifically exempted by congressional statute as well as the positive laws of several states. Nor are state and federal courts sympathetic to extending religious exemptions to marijuana use. A United States Court of Appeals summarized the results found in federal courts:

> Every federal court that has considered this issue has accepted Congress' determination that marijuana poses a real threat to individual health and social welfare and has upheld criminal penalties for possession and distribution even where such penalties may infringe to some extent on the free exercise of religion. Defendant has not persuaded us that a broad religious exception from the laws dealing with the possession and distribution of marijuana is constitutionally required. (*United States v. Greene* 1989).

State courts have reached this same result. Both before 1990, when states were operating under the First Amendment's compelling interest test, and after, when they were given free license by the Supreme Court of the United States to apply their neutral drug laws to religious practices (*Rheuark v. State* 1992), states uniformly rejected religious exemptions for marijuana use. Even in states that exempt peyote and otherwise provide a state constitutional or statutory freedom

of religion defense, marijuana use does not qualify for protection (*State v. Hardesty* 2009).

Why marijuana use, unlike the uses of peyote and hoasca, has failed to achieve religious protection in the United States presents a complex question. Marijuana, after all, is much like peyote and hoasca in the sense that it is organic with a largely hallucinogenic effect. It is not a narcotic or stimulant. While its health effects for long-term use are still being debated, it would not seem that marijuana use is that different than peyote use in the context of general health. Still, American courts have found relevant differences justifying disparate treatment.

First and foremost, courts have questioned whether marijuana use is truly a religious practice. As early as 1966, though they had extended religious protections to peyote, California courts refused to immunize marijuana (*People v. Mitchell* 1966). The reason was simple; no organized religion in California used marijuana for religious purposes. Criminal defendants at best claimed personal religious beliefs that courts found to be less-than-convincing (*People v. Mullins* 1975). In the absence of an organized religion, those who sought to use marijuana were commonly found to be insincere.

Indeed, many courts, contrary to the Supreme Court's teachings on the meaning of religion, rejected "personal" religious beliefs out-of-hand. The New Mexico Supreme Court, for example, concluded that in order to find protection under the First Amendment, religious practices must not only be embraced by organized groups, they must be "traditional" (*State v. Brashear* 1979). Newly emerging religions that expressed religious beliefs in marijuana simply could never succeed under this standard.

It was largely the lack of a relevant marijuana-based "tradition" that led Oklahoma and North Carolina courts to reject the religious defenses of the Universal Life Church (*Llewellyn v. State* 1971; *State v. Carignan* 2006), Missouri courts to reject claims of the Aquarian Brotherhood Church (*State v. Randall* 1976), and New York courts to reject defenses raised by the Church of the Missionaries of the New Truth (*People v. Crawford* 1973). None of these churches was proven to be relatively ancient, and none of them could point to traditional religious beliefs revolving around marijuana.

The Neo-American Church, which asserted that the use of "marijuana is most advisable" (*State v. Ballard* 1966), doubly sabotaged itself. First, it chose to insert "neo" in its name. Next, it chose for its motto, "Victory over Horseshit!" It also used a three-eyed toad as its church symbol, and selected "Puff, the Magic Dragon" and "Row, Row, Row Your Boat" as church hymns. In dismissing the church's religious defense to marijuana charges, the United States District Court in Washington, DC noted its "inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term" (*United States v. Kuch* 1968).

Along these same lines, the Church of Cognizance, which based its sacramental worship of marijuana on "Neo-Zoroastrian tenets," had little chance of success under Arizona's religious freedom law (*State v. Hardesty* 2008). And the Church of

Marijuana in Wyoming probably had an even smaller chance (*United States v. Meyers* 1995).

Three religious organizations in America have been recognized as professing sincere, legitimate, "traditional" beliefs in marijuana. The Ethiopian Zion Coptic Church in Florida has been found to be a long-standing religion that professes a sincere belief that cannabis is the mystical body and blood of Jesus (*Town v. State ex rel. Reno* 1979). Marijuana use, it claims, brings members closer to their God. Florida courts have thus recognized that members of this church are engaged in legitimate religious practices.

Similarly, the Oklevueha Native American Church (NAC), with approximately 500,000 members in 100 branches throughout 24 States, has been found to possess a legitimate religious interest in marijuana (*Oklevueha Native American Church of Hawaii, Inc. v. Holder* 2012). This branch of the Church, according to its members, is an earth-based healing religion, the primary purpose of which is to "administer sacramental ceremonies." These ceremonies involve the consumption of drugs, including both peyote and marijuana. Like peyote, marijuana is claimed to be a crucial part of this branch's tradition; its members consume marijuana as a sacrament in their religious ceremonies and rites in addition to, or as a substitute for, peyote. Based upon these representations, a United States Court of Appeals sitting in California concluded that the church could at least attempt to a free exercise of religion argument under RFRA.

The case, however, was not, strictly speaking, a criminal matter. Rather, it was a civil proceeding initiated by the church against the United States to recover marijuana that had been seized by federal agents. The trial court dismissed the entire action, but the United States Court of Appeals reversed in part, holding that the church should be allowed to press its religious claims under RFRA for declaratory and injunctive relief. Although it was not going to retrieve the marijuana, which had already been destroyed, or recover money damages (since the United States is immune from monetary relief), the court concluded, it could proceed with the litigation in an effort to prevent future seizures. It is not clear as of this writing that the argument proved successful or was rejected by the trial court on remand from the United States Court of Appeals.

Rastafarians, too, have been recognized as a legitimate religious organization that worships marijuana. (See chapter by Melissa Bone in this volume for more information.) Rastafarianism is a religion that first took root in Jamaica in the nineteenth century (*United States v. Bauer* 1996). Since then, it has won thousands of followers in the United States. Standard descriptions of the religion emphasize the use of marijuana in cultic ceremonies designed to bring believers closer to the divinity. Functionally, marijuana—which is called ganja by the religion's followers—operates as a sacrament. "Like bread and wine are the body and blood of Christ, marijuana is the 'spirit' of Christ" (*Loop v. United States* 2006).

Of course, gaining recognition as a legitimate religion with a traditional belief in marijuana is only the first step. It does not ensure religious freedom under the First Amendment, RFRA, or local analogs. Both the First Amendment, prior to the Supreme Court's decision in *Smith* in 1990, and RFRA thereafter require that

governmental action *substantially interfere* with religious practices to run afoul of the freedom of religion defense. It is not enough that a law marginally or tangentially interferes with religion. The law, moreover, must significantly impact a "central" religious practice (Brown 1983).

Many courts have turned to this requirement to reject religious defenses to marijuana-based charges. A California court, for example, noted that while the defendant "subjectively holds a belief in marijuana, with respect to its being used for religious purposes," he "does not worship or sanctify marijuana, but employs its hallucinogenic biochemical properties as an auxiliary to a desired capacity for communication" (*People v. Collins* 1969). For this reason, the court concluded that it was not "indispensable" to his religion, but was only helpful. And because it was not indispensable, California's criminal prohibition on marijuana use did not significantly interfere with his central religious practice.

This same result has been achieved with Rastafarianism. In one case, a practicing Rastafarian (Loop) had his marijuana pipe and paraphernalia seized by court personnel when he entered a federal courthouse (*Loop v. United States* 2006). Loop thereafter sued to retrieve the items, only to lose because the court was not convinced that the pipe and paraphernalia were religiously needed to be in Loop's possession at all times. "Loop has made no showing that he would be substantially burdened by having to leave his marijuana pipe and other related items at home during his brief visits to the courthouse. In addition, because Loop has not asserted that the marijuana pipe and case are irreplaceable, Loop has not been substantially burdened by the seizure of these items by federal defendants" (*Loop v. United States* 2006).

Another example is found in Hawaii, where a state court rejected a freedom of religion defense asserted against a marijuana charge by a follower of Hindu Tantrism (*State v. Blake* 1985). The court observed that, notwithstanding the claims of the defendant to the contrary, "the role of marijuana in Hindu Tantrism is in fact optional," that marijuana has merely a "peripheral role . . . in Hindu Tantrism," and that "followers of Hindu Tantrism can freely practice their religion without marijuana." Based on these findings, application of the state's criminal prohibition on marijuana possession did not significantly interfere with the defendant's religious practices. Put another way, because marijuana was not central to his religion, but was only optional, the defendant's free exercise defense could not succeed.

Lastly, even when a criminal prohibition significantly interferes with an established religion's traditional religious use of marijuana, it will always survive scrutiny when supported by a compelling governmental interest. Even in those jurisdictions that have adopted statutory protections for religion like those found in RFRA, criminal penalties can be imposed on religious uses of marijuana when supported by compelling justifications. And courts eagerly have searched for compelling reasons.

For example, although Florida courts have recognized the Ethiopian Zion Coptic Church as an established religion with a traditional worship of marijuana, these same courts have also concluded that the state of Florida has a compelling interest in eradicating marijuana use (*Town v. State ex rel. Reno* 1979). Unlike peyote

consumption by Native Americans, which is isolated and occasional, the Coptics marijuana use, the court observed, was constant. Florida's overarching concern in preventing recreational marijuana use—which was indistinguishable from Coptic use—was therefore found to be compelling (*Town v. State ex rel. Reno* 1979). Federal courts have reached similar results in cases involving Coptics (*United States v. Middleton* 1982). Indeed, federal courts have commonly come to this same conclusion with little to no analysis, often simply stating that marijuana is simply not protected:

> The government's compelling interest in upholding the drug laws and protecting the public health and safety laws is more than evident. Indeed, the governmental interest in prohibiting the possession and distribution of a Schedule I substance is "of the highest order," because use of these substances 'poses a substantial threat to public health, safety and welfare.' (*United States v. Jefferson* 2001).

Other federal courts have pointed to the inherent dangers that accompany marijuana use:

> It is well established that the absolute constitutional protection afforded freedom of religious belief does not extend without qualification or limitation to religious conduct. Religious conduct remains subject to regulation for the protection of society. Congress may control the use of drugs that it determines to be dangerous, even if those drugs are used for religious purposes. (*United States v. Greene* 1989).

In sum, the vast majority of jurisdictions and courts in the United States, including, importantly, the national government and its federal courts, have rejected a freedom of religion defense for marijuana use. In many states, this result is justified by the Supreme Court's 1990 decision in *Smith*, which held that neutral drug laws are not subject to a freedom of religion defense. With the national government, which is subject to the statutory protection afforded freedom of religion found in RFRA, courts have consistently concluded that marijuana use is either not part of a protected religious belief system, is not central to that belief system, or is otherwise overcome by compelling governmental interests in eradicating recreational drug use. States that have enacted measures similar to RFRA have come to these same conclusions. And even if they did not, the CSA would still uniformly outlaw marijuana use with or without religion throughout the United States.

The Future?

While marijuana has fared poorly in the First Amendment arena, at least two courts have offered a measure of hope for more egalitarian treatment. In 1996, a United States Court of Appeals ruled in a case originating in Montana that Rastafarianism expresses a traditional belief in marijuana that might enjoy religious protection under RFRA (*United States v. Bauer* 1996). At least in the context of simple possession of marijuana, as opposed to its distribution or importation, which courts

have uniformly held are not central to Rastafarianism (*Guam v. Guerrero* 2002), freedom of religion may insulate adherents from criminal prosecution. It therefore reversed a lower court's conclusion to the contrary and sent the matter back for a full trial on the merits, where the defendant would be entitled to present his freedom of religion defense.

In 2012, this same court ruled that a branch of the Native American Church should be allowed to make this same argument under RFRA (*Oklevueha Native American Church of Hawaii, Inc. v. Holder* 2012). Whether either religious organization prevailed is not clear; the former case has no documented history following the Court of Appeals holding, and the latter has of this writing not been concluded.

A similar result was achieved in New Mexico, where a state appellate court refused to reverse a lower court's holding that the defendant, charged with marijuana possession, would be allowed to present a freedom of religion defense under local law (*State v. Augustin M.* 2003). The appellate court, however, refused to decide whether a freedom of religion defense exists under New Mexico law. As with the two cases mentioned above, no documented history following the appellate court's holding establishes that the defense proved successful.

Challenges have also been pressed under the Fourteenth Amendment's equal protection clause, which generally prohibits disparate treatment based on race, ethnicity, and the exercise of fundamental rights. As described above, the national government and several states exempt the religious use of peyote by Native Americans. Non-natives, to date, have unsuccessfully argued that authorizing religious peyote use by Native Americans is unconstitutionally discriminatory under the Fourteenth Amendment (*Peyote Way Church of God, Inc. v. Thornburgh* 1991). (See chapter by Kevin Feeney in this volume for more information.) Followers of other religions, like the UDV, have made this same argument, again unsuccessfully, in the context of other drugs, like hoasca (*O Centro Espírita Beneficente União do Vegetal v. Ashcro*ft 2002). Lower courts have so far willingly embraced the government's rejoinder that Native Americans are unique and can be treated differently.

Interestingly, this argument under the Fourteenth Amendment's equal protection clause would seem to have been bolstered by the Supreme Court's interpretation of RFRA (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006). There, the Supreme Court ruled that the UDV's receipt and use of hoasca was protected by RFRA in the same way that Native Americans' religious use of peyote was protected by its federal exemption. The Supreme Court rejected the government's claim that Native Americans are unique in the American constitutional scheme. Extrapolating from this statutory holding (which applies only to the national government), future progress may be made under the Fourteenth Amendment.

In the end, unfortunately, it appears that even this small measure of egalitarian hope has not withstood what many courts see as the government's compelling interest in eradicating recreational marijuana use. One federal court, for example, after recognizing that marijuana has not been established to be any more harmful than other illicit drugs (like peyote), concluded that a compelling interest still exists in criminalizing marijuana's use, even for religious purposes:

> The actual abuse and availability of marijuana in the United States is many times more pervasive . . . than that of peyote.... The amount of peyote seized and analyzed by the DEA between 1980 and 1987 was 19.4 pounds. The amount of marijuana seized and analyzed by the DEA between 1980 and 1987 was 15,302,468.7 pounds. This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana. (*United States v. Lepp* 2008).

That marijuana is an *extremely* popular recreational drug, according to the weight of authority, thus precludes recognizing religious exemptions. If it were any other way, the exemptions would swallow the criminal rule.

Conclusion

Does the American experience with marijuana make religious and constitutional sense? Probably not. Excusing some organizations, like the Native American Church, from criminal penalties for some drugs, like peyote, smacks of religious discrimination, which has generally been deemed a violation of egalitarian principles found in the First Amendment's Establishment Clause (*Board of Education of Kiryas Joel School District v. Grumet* 1994). Indeed, one might credibly claim that providing religious exemptions *at all* violates the First Amendment's Establishment Clause, though the Supreme Court has ruled to the contrary (*Cutter v. Wilkinson* 2005). Nonetheless, today's precedents establish that when groups and drugs differ, different rules can be applied to them. Picking and choosing among religious groups, then, is constitutionally permissible as far as drugs of choice are concerned.

Notwithstanding their many similarities, marijuana differs from peyote (and hoasca) in several ways. First and foremost, as explained by numerous courts, marijuana is marketable. Peyote and hoasca, in contrast, do not draw large audiences. Given negligible recreational markets (*United States v. Lepp* 2008), states and the national government can easily and efficiently provide religious exemptions for the latters' use (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006). At least doing so does not compromise the uniform enforcement of drug laws. Exempting marijuana (for any reason), in contrast, could swallow the criminal prohibition completely. Everyone, the government argues, would convert to religions that follow the god of marijuana!

Second, though courts will not often admit it, the groups that choose marijuana are distinct from those that worship peyote. The Native American Church, for example, includes a collection of Indian tribes that, in part, have incorporated Biblical teachings to justify their use of peyote (*People v. Woody* 1964). Courts first began exploring religious exemptions for Native Americans in the 1960s and 1970s, when Eurocentric Americans were first coming to grips with the genocide practiced by their ancestors on the natives. The "civilizing" influence of the Western Bible, too, likely played a part. Confronted with an emerging modern recognition of past wrongs practiced on its natives, mainstream America proved

comfortable with a religious exemption: "The least we can do is allow Indians to practice their religions."

Contrast marijuana use, which was thrust back to the forefront in the 1960s and 1970s by the revolutionary youth movement during a turbulent, chaotic chapter in American history. The Vietnam conflict was raging, young adults were protesting, African-Americans were rioting, and the United States, according to President Nixon's "silent majority," was on the verge of anarchical collapse. "Law and order" was Nixon's promise, and criminalizing the "hippies" and their drug of choice, marijuana, easily fit the theme in 1970. Marijuana was demonized, in significant part because of the groups that preferred it.

Any religious uses for marijuana, meanwhile, proved isolated and unique to fringe religious groups with few connections to Western cultures. Rastafarians and Coptics came to the United States from Caribbean islands, like Jamaica, and had, most Americans believed, "foreign" belief-systems. Indeed, America's Eurocentric mainstream continues to view these island-based religions as something closely approaching "voodoo"[8] (*Church of the Lukumi Babalu Aye*, *Inc*. *v*. *Hialeah* 1993). Rejecting religious exemptions for the practices of Rastafarians and Coptics was accordingly, and remains to this day, quite easy.

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[8] *Church of the Lukumi Babalu Aye*, *Inc*. *v*. *Hialeah* (1993), for example, involved the criminalization in southern Florida of the Santeria practice of ritualistic animal sacrifice. The Santeria faith originated in the nineteenth century when hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba. Their traditional African religion there absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." Although the Supreme Court of the United States overturned the ordinance, the fact that it could be passed in the first instance illustrates the antipathy many Americans show toward these "island religions."

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Peyote, Race, and Equal Protection in the United States

Kevin Feeney

Ever since American Indians first received a federal exemption for religious use of peyote in 1965, many groups seeking legal protection for the religious use of psychoactive substances have sought to capitalize on this exemption in the form of an Equal Protection challenge, arguing that their religious use of psychoactive plants is parallel to the American Indian use of peyote.[1] These efforts have repeatedly failed due to the special status of Indian tribes in the United States, and because of the unique relationship that tribes, as semi-sovereign entities, maintain with the federal government.

Challenges to the exemption are largely premised on the notion that "special" treatment of American Indians is based upon a fundamentally racial categorization, and is therefore constitutionally intolerable. While the federal government clearly has the power to both implement regulations and pass legislation singling out Indian tribes for differential treatment, the peyote exemption has generally been interpreted by the government as limited to members of federally recognized tribes with a 25 % Indian blood quantum. Although the government's purported aim is to preserve and protect traditional Indian religious practices, these limitations on the exemption introduce several barriers to this goal. First, the limitation of the exemption to members of federally recognized tribes ignores the historical and cultural nature of the peyote religion as a pan-Indian institution. Second, the limitation by blood quantum not only prevents Indians with strong cultural claims from legally participating in peyote ceremonies, it also asserts the dubious notion that biology and religious belief are related.

[1] See Lander, this volume, for a discussion of how the NAC came to be seen as a model for others, including Timothy Leary and the Neo-American Church, for establishing a religious right to protect controlled substance use.

K. Feeney (✉)
Washington State University, College Hall #215, Pullman, WA 99164, USA
e-mail: kevinmfeeney@gmail.com

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Despite these questionable criteria, courts have continued to uphold the peyote exemption as a permissible political classification, often based upon debatable findings regarding the ethnic composition of the Native American Church (NAC), the dominant peyote religion among American Indians. Serious questions regarding the government's asserted criteria remain, such as whether the exemption, premised upon the preservation of traditional Indian religions and culture, can properly exclude practitioners who embody the cultural beliefs, values, and rituals of the peyote religion, but who may not qualify for the exemption due to insufficient blood quantum.

The objective of this chapter is to explore and explain the legal contours of the peyote exemption in light of the special relationship between the Indian tribes and the federal government, to examine the racial implications arising out of the federal exemption, to address the conflicting findings regarding the ethnic composition of the NAC, and ultimately, to examine how government imposed restrictions, both federal and tribal, may impact the future of peyotism.[2] To conclude, recommendations will be made suggesting how the exemption can be tailored in a way that rationally and reasonably furthers the goal of cultural preservation without dividing the NAC along narrow tribal and ethnic lines, and without opening the door to a panoply of fraudulent cultural and religious claims.

In order to begin this examination, it is first necessary to provide the reader with some background regarding the origins of the NAC, the adoption of the peyote exemption, the Constitutional parameters of Equal Protection, and a basic understanding of the unique relationship between the tribes and the federal government: a relationship that forms the foundation of the trust responsibility.

The Native American Church and the Peyote Exemption

The Native American Church (NAC) is a modern permutation of the sacramental and religious use of peyote in North America; a practice that archaeological evidence suggests is several thousand years old (Adovasio and Fry 1976; Bruhn et al. 1978; Terry et al. 2006). While evidence indicates that some American Indian groups have practiced a form of peyote religion, or peyotism, for several hundred years, the expansion of these religious practices across the United States did not take place until the late nineteenth century (Anderson 1980; La Barre 1975; Slotkin 1956; Stewart 1987). At this time peyotism emerged as a popular pan-Indian religious movement, one that allowed American Indians to maintain a sense of cultural heritage and identity while simultaneously adapting to an environment where their populations had been devastated, their tribal customs crippled, and one

[2] *Peyotism* generally refers to the sacramental use of peyote as practiced among some American Indian groups. *Peyotist*, a variant of this term, refers to one who practices peyotism, or the peyote religion.

where many tribal groups had been removed to desolate reservations to face an unknown future.

The first modern account of the peyote ceremony was provided by the ethnologist James Mooney, who first observed the ritual among the Kiowa in 1891. Mooney described an all-night ceremony where “worshippers sit in a circle around the inside of the sacred tipi, with a fire blazing in the center,” eat peyote, pray, and take turns singing and drumming (Mooney 1998, p. 32, *reprinting* Mooney 1896). Generally, the peyote ceremonies are held for prayer, meditation, and healing, and while varying from congregation to congregation, typically follow one of two ritual formats: One is known as the Half-Moon ceremony or the Comanche Way, and the other is known as the Cross-Fire ceremony (Long 2000; Maroukis 2010). In either format the night-long ceremony is usually presided over by a roadman, who leads the ceremony. Other ritual roles are fulfilled by an official drummer, a cedarman, and a fireman, who tends the ceremonial fire (Slotkin 1956). Additional features of the American Indian peyote religion that should be mentioned include an emphasis on sobriety, reverence of peyote as a deity, and proscriptions on the use of peyote outside of ceremonial and healing contexts.

As peyotism spread rapidly among the tribes of the United States, missionaries reacted strongly, perceiving the popular indigenous religion as a threat to their work. As a result, the missionaries worked closely with the Bureau of Indian Affairs (BIA)[3] to eradicate Indian use of peyote (Long 2000; Stewart 1987). The first prohibition of peyote was implemented on the Kiowa-Comanche Reservation in 1888, and similar prohibitions were repeated on a number of other reservations (Stewart 1987, p. 128), but no significant federal efforts to prohibit peyote were taken up until 1918 when extensive hearings on the dangers of peyote were held before Congress. In response, a coalition of peyotists from among the Apache, Arapaho, Cheyenne, Comanche, Kiowa, Oto, and Ponca tribes came together to determine how best to protect their ceremonies against a potential federal prohibition (Long 2000; Maroukis 2010). James Mooney, who had worked among the Kiowa and Cherokee as an ethnologist, urged the coalition to incorporate as a “church” in order to situate the traditional use of peyote within a Western religious framework (Moses 2002; Stewart 1987).[4] The name “Native American Church” was finally settled upon in order to emphasize intertribal solidarity and the pan-Indian roots of peyotism, a point also addressed in the Articles of Incorporation:

> The purpose for which this corporation is formed is to foster and promote the religious belief of the several tribes of Indians in the state of Oklahoma, in the Christian religion with the practice of the Peyote Sacrament as commonly understood and used among the adherents of this religion… (Long 2000, p. 14)

[3] The agency title *Bureau of Indian Affairs* was only adopted in 1947, but the title is used here, for simplicity sake, to refer to all previous permutations of the agency, including the *Office of Indian Affairs* and *Indian Services*.

[4] In retribution for his participation in the incorporation of the NAC, Mooney was subsequently banned from returning to the Kiowa reservation by the BIA (Moses 2002).

Established in Oklahoma, this initial church is often referred to as the "Mother Church," and currently encompasses more than 20 churches or congregations within the state of Oklahoma (Long 2000; Maroukis 2010). The NAC of Oklahoma briefly became the NAC of the United States in 1944, but split in 1949 into two different organizations: the NAC of Oklahoma and the NAC of the United States. The NAC of the United States changed its name in 1955 to the NAC of North America (NACNA) in order to broadly represent both its U.S. and Canadian chapters. NACNA, which tends to be the most politically active of the major churches, currently has chapters in Canada, Mexico, and 24 states in the U.S.[5] The NAC has two other major epicenters: one is the Azee' Bee Nahaghá of Diné Nation (formerly the NAC of Navajoland), which encompasses around 92 chapters within the Navajo (Diné) Nation, and the other is the NAC of South Dakota, which contains several chapters within that state (Long 2000; Maroukis 2010). The NAC can be broadly characterized as a confederation of these four central churches, as well as the individual congregations and chapters that they encompass. As a result of this unique structure, no centralized authority exists that can speak on behalf of the entire NAC, and among the individual congregations there are a broad range of practices, beliefs, and rituals, although core principles and ritual structures tend to be consistent.

Despite Congressional efforts to outlaw peyote in 1918 (the bill passed the House but faltered in the Senate), and repeated efforts to criminalize peyote in the following years, no federal prohibition would be adopted until 1965, with the passage of the Drug Abuse Control Amendments (DACA). The peyote exemption, a key focus of this chapter, was originally promulgated by the Department of Health, Education and Welfare (HEW), shortly after passage of DACA, as a means to allow the religious use of peyote by American Indians to continue. Significantly, the language used in the exemption is broad and ambiguous, referring vaguely to *members* of the Native American Church, wording which would ultimately become a point of contention in subsequent legal disputes:

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. (DEA 1971)

In 1970, during hearings for what would become the Controlled Substances Act, a representative of the Bureau of Narcotics and Dangerous Drugs (later the Drug Enforcement Administration) was asked whether religious use of peyote by American Indians would continue to be exempt. The representative responded in the affirmative, declaring that:

[5] Little has been written about the history or activities of the NAC in Canada or Mexico. References to the NAC in Mexico have been generally obscure, but for a brief history of the NAC in Canada, see Dyck and Bradford (2012).

> We consider the Native American Church to be sui generis. The history and tradition of the church is such that there is no question but that they regard peyote as a deity as it were, and we will continue the exemption. (DACA Hearings 1970)

This regulatory exemption, while not explicitly invoking the trust responsibility, demonstrates a clear intent on behalf of the federal government to preserve the cultural and religious practices of American Indians who practice peyotism. Although the language of the regulatory exemption refers broadly to "members of the Native American Church," the Department of Justice, specifically the Drug Enforcement Administration (DEA), has consistently interpreted the exemption as limited to members of federally recognized tribes who can claim a minimum of 25 % Indian blood (*Peyote Way Church of God v. Smith* 1983; *Peyote Way Church of God v. Thornburgh* 1991; *United States v. Boyll* 1991; *United States v. Warner* 1984). This exemption remained the primary protection for Indian peyotists until 1994, and was the basis for a number of Equal Protection challenges.

Equal Protection and the Trust Responsibility

The principle of Equal Protection is found in two places in the Constitution. The phrase "equal protection" occurs explicitly only in the 14th Amendment, which applies specifically to the states, but in principle has been interpreted as also arising out of the 5th Amendment's guarantees of Due Process, which apply to the federal government. Essentially, Equal Protection stands for the principle that "all persons similarly situated should be treated alike" (*City of Cleburne v. Cleburne Living Center* 1985, p. 439, citing *Plyler v. Doe* 1982, p. 216). However, the government has flexibility to treat groups differently depending on the level of interest the government has in a particular law or regulation, and depending on what type of classification is employed to achieve those ends.

Under the Supreme Court's Equal Protection jurisprudence, any law that sets apart different groups based on race,[6] national origin or religion for separate treatment calls for strict scrutiny analysis. Strict scrutiny is a legal test that requires the government to demonstrate that it has a *compelling* interest in treating two groups differently, and that the law in question has been *narrowly tailored* to meet the government's specific interest. There are two lower levels of analysis applied in Equal Protection cases involving other types of classifications: intermediate scrutiny and rational basis review. Intermediate scrutiny applies to classifications based

[6] While race continues to be used as a legal category, and has some significant applications in protecting traditionally marginalized groups, the concept of race continues to be problematic. Specifically, the concept of race tends to equate biology with behavior and culture. For purposes of this paper, I have attempted to restrict my use of "race" to contexts where it is used as a legal category or principle, and to use the term "ethnicity" in all other places. Ethnicity has the advantage of acknowledging traits shared within a group, such as language, custom, dress, religion, and cuisine, without implying a biological basis to these traits.

on sex and child illegitimacy, and requires that the law in question bear a *substantial relationship* to an *important* government interest. All other classifications are subject to the lowest level of scrutiny, rational basis review, which requires that the law in question be *rationally related* to a *legitimate* government interest.

The Equal Protection challenges questioning the constitutionality of the peyote exemption are based on the idea that the challenging groups are "similarly situated" to members of the Native American Church, and that the peyote exemption constitutes unlawful racial discrimination. (Such an assertion, if valid, would require the federal government to defend the exemption against the standards of strict scrutiny.) At their foundation, these Equal Protection challenges can be seen as threatening the unique political status of American Indians, embodied in the trust responsibility, which provides the foundation for much of federal Indian law, including most of Title 25 of the United States Code.

The trust responsibility, as a legal doctrine, is generally traced back to two early Supreme Court cases, *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832). In the first of these cases, Chief Justice John Marshall explained that the relationship of the tribes "to the United States resembles that of a ward to his guardian," and further characterized the Indian tribes as "domestic dependent nations" (*Cherokee Nation* 1831, p. 18). Because the tribes are legally viewed as dependent upon the United States, as a ward is to his guardian, the United States is likewise seen as having a reciprocal guardian-ward obligation to protect the interests of Indian tribes. While the trust responsibility has been traditionally invoked to address issues of fiduciary duty or to promote tribal self-governance, the preservation of Indian cultures and religions has also been found to be "fundamental to the federal government's trust relationship with tribal Native Americans" (*Peyote Way Church of God v. Thornburgh* 1991, p. 1216; see also *Rupert v. Director, U.S. Fish and Wildlife Services* 1992). Much of federal Indian law is premised on the trust relationship, which is the foundation upon which distinctions are made between Indians and non-Indians for legal purposes.

The nature of this unique relationship was further clarified by the United States Supreme Court in the case of *Morton v. Mancari* (1974), where non-Indian employees of the Bureau of Indian Affairs (BIA) challenged a hiring preference for Indians as racially discriminatory. In addressing this issue, the Supreme Court came up with a test for determining whether special treatment for Indians was based on invidious racial discrimination or whether it was premised on the federal government's trust responsibility. The test, which the Court elucidated, can be broken down into two parts: first, the goal behind the classification must be within the purview of Congress' trust responsibility; and second, the classification must be reasonable and rationally designed to further that goal. The court explained that classifications that pass this test would be considered political rather than racial classifications.

The employment preference at issue in *Morton* was found by the Supreme Court to fall within the purview of Congress' trust responsibility because the preference had the effect of furthering Indian self-government. The Court explained that the BIA only serves federally recognized tribes and that, because the employment

preference is only provided to members of federally recognized tribes, the hiring preference specifically serves the government interest of furthering Indian self-government. Had the classification been extended to Indians from non-recognized tribes who are not self-governed, the preference would have been overly broad and no longer *rationally* related to the goal of advancing Indian self-government. In other words, the classification would have been deemed racial rather than political in nature, and thus subject to strict scrutiny analysis. With this background, we can begin to examine one of the major Equal Protection cases challenging the scope of the federal peyote exemption.

Peyote Way Church of God v. Thornburgh

The most significant of the Equal Protection challenges invoking the peyote exemption was brought by a non-Indian peyotist church known as Peyote Way Church of God. The Peyote Way Church alleged that the federal regulation exempting use of peyote by the NAC was racially discriminatory, and asserted that their church's use of peyote should also be exempt. In *Peyote Way*, the 5th Circuit Court of Appeals looked to the Supreme Court's decision in *Morton v. Mancari* for guidance in determining whether the peyote exemption was premised upon a political or racial classification. The Fifth Circuit, however, seems to have misunderstood the ruling in *Morton*, believing the Supreme Court had "characterized the BIA employment preference as a political rather than racial classification because the BIA regulations implementing the preference limit eligibility to members of federally recognized tribes who have at least 25 % Native American blood" (*Peyote Way v. Thornburgh* 1991, p. 1215).

While the BIA policy in question specifically required that "an individual must be one-fourth or more degree Indian blood and be a member of a federally-recognized tribe" in order to be eligible for the employment preference, the Supreme Court never directly addressed the blood quantum requirement (*Morton* 1974, p. 554). In fact, the two times that blood quantum is mentioned by the Court are when the federal policy is quoted in footnotes to the Court's opinion. Consequently, the Supreme Court never established membership in a federally recognized tribe, or 25 % Indian blood quantum, as determinative factors in the second prong of their test; rather, the Court sought to determine whether these criteria satisfied the second prong of the test. To put it more plainly, tribal status and blood quantum were the parameters of the classification in *Morton* to be tested, not the test itself.

Nevertheless, the 5th Circuit reasoned that if the federal exemption could be read as limited to members of federally recognized tribes with a 25 % Indian blood quantum, then the classification would pass the 2nd prong of the *Morton* test. So, while the federal exemption refers to "members of the Native American Church," the court determined, at the urging of the Department of Justice, that it "must look to the evidence to determine whether NAC membership presupposes tribal

affiliation and Native American ancestry, and thus effects a political classification under *Morton*" (*Peyote Way* 1991, p. 1215).

The Court relied heavily on the testimony of Emerson Jackson, National Chairman of NACNA, who "repeatedly testified that tribal membership and 25 % Native American ancestry are prerequisites to NAC membership" (*Peyote Way* 1991, p. 1215).[7] The Court was largely dismissive of evidence introduced to dispute Jackson's testimony, including an excerpt from the Articles of Incorporation for the NAC of Navajoland (now *Azee' Bee Nahaghá of Diné Nation*) which stipulated "that any non-Indian spouse of a member is eligible for membership" (*Peyote Way* 1991, p. 1215), finding instead that the Articles of Incorporation generally corroborated Jackson's testimony. Additional testimony that the NAC had been multiethnic prior to federal prohibition of peyote was also dismissed because it did not speak to the make-up and membership practices of the NAC following prohibition and promulgation of the peyote exemption in 1965.

While the core of the Court's ruling was correct in finding that preservation of the "centuries-old tradition of peyote use" is "fundamental to the federal government's trust relationship with tribal Native Americans," thus satisfying the first prong of the *Morton* test, the Court's application of the second prong, premised upon a misunderstanding and misapplication of the Supreme Court's ruling, was seriously flawed (*Peyote Way* 1991, p. 1216). Because the 5th Circuit misinterpreted the second prong of the *Morton* test, it is necessary to re-examine whether the elements of the classification can reasonably be interpreted as rationally related to the government's goal of preserving Indian culture.

First is the requirement, asserted by the government, that to be eligible for the peyote exemption one must be a member of a federally recognized tribe. By limiting the exemption to members of federally recognized tribes, the exemption fails to recognize the pan-Indian nature of peyote religions such as the NAC, which are not tribally based or tribe-specific religions. Additionally, there are many tribes that never developed a government-to-government relationship with the United States, and so have never been federally recognized. Other tribes have had the misfortune to lose their federally recognized status due to the Allotment Act, passed in 1887, or to unilateral termination of federally recognized status by the federal government during the 1950s.[8] If members of federally recognized tribes were the only people who remained "cultural" Indians then such a limitation on eligibility might make sense. As it is, the limitation excludes many who remain "cultural" Indians, and who may have historical, cultural, or religious ties to the NAC.

[7] NACNA is known to be staunchly opposed to the participation of non-Indians, even to the extent of encouraging members to report non-Indian participants for potential prosecution (Maroukis 2010).

[8] Termination was implemented as a policy in the 1950s, with the goal of eliminating tribal self-government and of integrating Indians into the general population. During this period, a series of acts were passed by Congress eliminating the governmental status and federal recognition of approximately 109 different tribes.

Second is the additional limitation that NAC members be able to claim at least 25 % Indian heritage. While blood quantum has been used as a factor in identifying Indians for treaty purposes for several hundred years, the federal government did not commonly use this as a criterion until the early twentieth century. Prior to the use of blood quantum, it was customary to use more political and cultural criteria such as tracing someone's ancestry; either patrilineally or matrilineally, based on tribal kinship patterns. The introduction of "blood quantum" as a classificatory tool was foreign to Indian tribes, many of which were multi-ethnic and accepted outsiders into their ranks through marriage or adoption. The use of this measure tended to be subjective, and its application was often based on an evaluation of someone's physical appearance rather than on an examination of one's family tree or identifiable relations (Russell 2010; Spruhan 2006).

A true application of blood quantum would require DNA testing, a factor that makes it hard to argue that blood quantum is not a racial (biological) criterion that runs afoul of Equal Protection, but this is hardly the only problem with this criterion. First, it suggests that someone may be an enrolled member of a federally recognized tribe but might not actually be "culturally" Indian. If someone is raised within a tribal community, raised with tribal customs, values, and a tribal worldview, it is hard to see how they are not a true part of the culture based on the fact that they cannot claim a minimum blood quantum. This can only be true if culture and biology are inherently linked, a racist notion that has generally been discarded. Second, this requirement suggests that an "eligible" member of the NAC would not be allowed to share their faith and worship alongside a spouse if the spouse is non-Indian, or could not claim the requisite blood quantum. Lastly, the blood quantum requirement would also make it illegal for such a couple to raise their child within their faith if the child is unable to meet the 25 % blood standard. These are all problematic aspects of the government's position, and support the conclusion that this is a racial rather than political classification.

Unfortunately, the 5th Circuit case has been widely cited as affirming the legality of the DEA's position that the peyote exemption is limited to Indians with a 25 % blood quantum and membership in a federally recognized tribe. Shortly after the decision in *Peyote Way*, however, Congress passed a statutory version of the peyote exemption, one which explicitly included membership in a federally recognized tribe as criterion for eligibility but notably made no mention of blood quantum.

The New Exemption

In 1994, Congress moved to codify the peyote exemption through passage of the American Indian Religious Freedom Act Amendments (AIRFAA), in response to a Supreme Court case that ruled that religious use of peyote was not protected by the

First Amendment (*Employment Division v. Smith* 1990).[9] In passing this legislation, Congress acknowledged that "for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures" (AIRFAA 1994, [a][1]), and further recognized that "the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment" ([a][5]).

While the federal regulatory exemption specified that "members of the Native American Church" were exempt, under AIRFAA no specific reference is made regarding the Native American Church. Instead, the law protects the use of peyote "by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion" (AIRFAA 1994, [b][1]). Although a seemingly innocuous semantic modification, two significant changes result. First, the legislation recognizes that there may be other peyotist traditions among American Indians other than the NAC. Second, the law specifies that only an Indian who is a member of a federally recognized tribe is exempt, whereas the regulatory exemption merely indicates membership in the NAC. While the eligibility criteria under the federal regulation had been ambiguous, despite the government's insistence as to its limitations, AIRFAA sought to put these disputes to rest.

To appreciate the scope of this exemption, we must understand who is considered an "Indian" under AIRFAA, and we must also know what constitutes an "Indian Religion." Under the exemption, an Indian is defined as a member of a tribe "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (AIRFA 1994, [c][2]). This definition has two parts: (1) to qualify as an Indian under the exemption, one must be an enrolled member of a tribe, and (2) the tribe to which the individual belongs must be one that is recognized by the federal government (AIRFAA 1994). By choosing not to define the term "Indian" by blood quantum, the government left the extent of the protections offered by the new peyote exemption to be determined by individual tribes through tribal enrollment practices.

A tribe's right to define its own membership and enrollment criteria has been recognized by the Supreme Court as central to a tribe's "existence as an independent political community," and to the preservation of its traditions and culture (*Santa Clara Pueblo v. Martinez* 1978, p. 72). Some tribes choose to require a minimum blood quantum, while others will recognize multi-ethnic children of any blood quantum so long as they are a child of a tribal member. This criterion provides tribes flexibility in determining who may, or may not, participate in the religious practices of the NAC, and avoids the odd result produced by the blood quantum requirement where some tribal members are exempt while others are not. However, while chapters of the NAC are often associated with particular tribes, the

[9] See Brown, this volume, for a further discussion of the current statutory and constitutional bases for freedom of religion.

tribal leadership and church leadership are not equivalent, and each may espouse different membership requirements.

The second feature that necessitates comment is the limitation of the exemption to "traditional Indian religions." Under AIRFAA, an Indian religion is defined as a religion "practiced by Indians. . . the origin and interpretation of which is from within a traditional Indian culture or community" (AIRFAA 1994, [c][3]). This characterization provides several specific benefits over the federal regulation exempting "members of the Native American Church." In addition to recognizing that religious use of peyote among American Indians took multiple forms, the law also provides courts with a tool for making a factual determination as to whether a particular religious group qualifies for the exemption. While this particular issue has not been litigated, its significance is highlighted by the case of *State of Utah v. Mooney*, which will be examined shortly. Although no Equal Protection challenges have been brought that specifically invoke AIRFAA, language in the new statutory exemption played an important role in an Equal Protection challenge brought by the União do Vegetal (UDV).

O Centro Espírita Beneficente União Do Vegetal (UDV) v. Ashcroft

The União do Vegetal (UDV), a religion that arose out of the Brazilian Amazon in the mid-twentieth century, combines elements of folk Catholicism, Afro-Brazilian religions, European esotericism, and indigenous shamanism, including the use of ayahuasca (Labate and MacRae 2010). Ayahuasca, a hallucinogenic brew that has been used shamanically by indigenous groups in South America for hundreds if not thousands of years, is a sacrament that is central to the religious practices of the UDV. Despite its obscure origins, the UDV has developed a global presence, and has attracted the attention of legal authorities wherever it appears, including in the United States (Labate and Feeney 2012). After having several barrels of ayahuasca confiscated by United States Customs in 1999, the UDV brought suit against the United States government asserting violation of Equal Protection, among other asserted claims.

All previous parties who challenged the peyote exemption, asserting violations of Equal Protection based on racial discrimination, failed due to the unique status of Indian tribes as "domestic dependent nations." Cleverly, the UDV asserted that the Native American Church is a multi-ethnic church and that the exclusive peyote exemption, therefore, could not be justified under the trust responsibility. The UDV argued that if the classification used in the peyote exemption is not restricted to Indians, then it cannot be seen as a political classification justified by the trust responsibility; as a result, the classification must be seen as targeting religious groups for differential treatment.[10] Upon these grounds the UDV asserted that the

[10] It is important to note that the UDV's argument is premised upon an understanding of political classifications under the trust responsibility as inherently race-based.

UDV and NAC are similarly situated for purposes of Equal Protection analysis and that an exemption allowing one religion access to a controlled substance, but denying another, constituted discrimination on the basis of religious affiliation.

In making their argument, the UDV relied heavily on the case of *United States v. Boyll* (1991), where a non-Indian member of the NAC was deemed protected by the federal regulation exempting "members of the NAC."[11] In the *Boyll* case, a man by the name of Lawrence Robert Boyll was arrested after mailing himself a package of peyote from Mexico. Boyll sought dismissal of the charges, asserting that he was a member of the NAC and was therefore exempt under the original regulatory peyote exemption. The government countered that the exemption was limited to American Indians with at least 25 % Indian ancestry, and to the spouses of such individuals. In order to clarify this point, the *Boyll* court held an evidentiary hearing in order to determine what, if any, membership restrictions were recognized by the NAC.

The court heard testimony from both Indian and non-Indian members of the NAC, as well as from Omer Stewart, a distinguished anthropologist and authority on the peyote religion. Jimmy Reyna, a member of Taos Pueblo and lifelong member of the NAC, testified that "Robert Boyll is known to me personally as a member of the Native American Church," and declared "from my own experience as a church member and a roadman, and from the accounts told to me by my father, Telles Goodmorning, and others, I am aware of the participation and membership of non-Indian people in the Native American Church from the earliest days of the church in Oklahoma" (Reyna 1990). Additionally, Alden Naranjo, a member of the Southern Ute Indian Tribe and member of the NAC of Colorado testified as follows:

> The chapter of the Native American Church to which I belong has no restrictions on membership by non-Indians. Although there is controversy in some parts of the country about Indian blood requirements for membership in chapters of the Native American Church, the majority of church members with whom I am acquainted do not support any attempt to restrict membership to those of Indian descent. (Naranjo 1990)

The *Boyll* Court acknowledged that "one branch of the Native American Church, the Native American Church of North America, is known to restrict membership to Native Americans," but based upon the testimony presented the Court determined that "most other branches of the Native American Church do not" (*United States v. Boyll* 1991, p. 1336).

Further, the Court found the exemption to be "clear" and "unambiguous," declaring that "Nowhere is it even suggested that the exemption applies only to Indian members of the Native American Church. Had the intention been to exclude non-Indian members, as the United States argues, the language of the exemption would have so clearly provided" (*United States v. Boyll* 1991, p. 1338). As a result of this finding, the *Boyll* Court never had to address the question of Equal Protection, which had become a moot point.

The *Boyll* case was not the first time that membership requirements of the NAC were called into question. In 1984, John and Frances Warner were arrested and

[11] AIRFAA would not be passed for another 3 years (1994).

indicted for distribution of, and possession with intent to distribute, peyote (*United States v. Warner* 1984). The Warners, who claimed membership in the Tokio congregation of the NAC, brought an Equal Protection claim asserting that the peyote exemption, as interpreted by the federal government, was racially discriminatory. This claim was dismissed by the court, which cited the trust responsibility as giving the federal government the power to treat American Indians differently based upon a political classification. The outcome of the case, however, was ultimately decided upon two factual questions: First, whether the Warners used peyote in bona fide religious ceremonies; and second, whether they were members of the NAC. At trial, the jury found in favor of the Warners on both questions and charges were dismissed.

In a similar case, a non-Indian couple was charged with peyote possession for participating in an NAC ceremony in which their marriage was blessed (*State v. Whittingham* 1973). Despite extensive testimony at trial from NAC members attesting to the sincere participation of the Whittinghams, the couple was convicted. The couple later appealed and was exonerated under the First Amendment's protections for religious freedom (see footnote 9), a determination based largely on the extensive testimony at trial as to the sincerity of their participation. While Equal Protection was not specifically at issue, the case further suggested that participation and membership in the NAC, in practice, is not exclusively tied to Indian ancestry or tribal enrollment.

The UDV relied upon the above cases as evidence of non-Indian membership in the NAC in arguing that the peyote exemption could not be based upon a political classification under the trust responsibility. Based on this showing, the UDV argued that their use of a scheduled psychoactive substance was parallel to the use of peyote by the NAC, and that the federal government was discriminating based on religious affiliation.

In response to the UDV's assertion that the NAC is multi-ethnic in nature, and therefore not entitled to an exemption based on political classification, a coalition made up of the NAC of Oklahoma, the NAC of North America, and the NAC of the Kiowa Tribe of Oklahoma (hereinafter, the Coalition), sought to file an *amicus curiae* ("Friend of the Court") brief countering the Equal Protection claims of the UDV. The Coalition, claiming to represent 35 chapters of the NAC, took issue with the UDV's characterization of the NAC as a multi-ethnic church and countered that "the NAC is overwhelmingly comprised of tribal Native Americans," and that it "is indigenous in its origins and practices" (NAC 2002, p. 5).

The NAC Coalition appealed to the court, explaining "This is but the most recent in a long line of efforts by various individuals or religious groups to make such an Equal Protection challenge... [We] sincerely hope that this court will, as numerous courts have in the past, lay to rest the false notion that groups such as the UDV are similarly situated with the NAC for purposes of Equal Protection analysis" (NAC 2002, p. 2).

The NAC Coalition was careful throughout their brief to avoid making absolute claims about the ethnic make-up of the NAC, but suggested that courts had often failed to make factual distinctions between participants and members of the NAC.

The Coalition explained: “It is one thing for a non-Indian to claim ‘membership’ in the NAC; it is quite another to be regarded as a legitimate member by the community of Indian NAC members in a given locality” (NAC 2002, p. 12). The Coalition cited *Whittingham* as an example, explaining, “Whether the Indian roadman running the ceremony and other Indians present at the ceremony considered the Whittinghams members of that NAC chapter is a factual matter on which the court apparently had no record” (NAC 2002, p. 15).

While there appears to have been plenty of testimony at trial attesting to the “sincere participation” of the Whittinghams in NAC ceremonies, the Coalition stressed that participation in a religious ceremony and recognition as a member of a religious congregation are two distinctly different things, and pointed out that the Whittinghams are only ever mentioned as “participants.”

Because the regulatory exemption, which has been the basis of most of the Equal Protection challenges, specifically refers to “members of the Native American Church,” it becomes important to distinguish between participants and members. If NAC members are overwhelmingly members of federally-recognized tribes with a minimum 25 % Indian blood quantum, and if non-Indians are generally non-member participants, as is asserted by the Coalition, then the UDV’s argument that the NAC is multi-ethnic is seriously diminished.

The Coalition also criticized the UDV’s reliance on the *Boyll* decision, asserting that no factual record was developed as to Boyll’s NAC membership. Here, however, the Coalition appears to be mistaken. As cited previously, testimony by Jimmy Reyna (1990), a roadman and NAC member, attested that “Robert Boyll, is known to me personally as a member of the Native American Church.” Additional testimony was also offered that Boyll had “sponsored these [NAC] meetings or participated as a drummer, cedarman or fireman” (*Boyll* 1991, p. 1337), indicating a high level of participation in NAC ceremonies. Given this testimony, it is unclear on what basis the Coalition claims that no factual record as to Boyll’s membership was ever established.

While the Coalition smartly asserts the importance of distinguishing between membership and participation, the Coalition never goes so far as to claim that there are no non-Indian members of the church. Instead, the Coalition works around this issue by making two important arguments. First, the Coalition argues that despite the participation of some non-Indians, “most NAC members are members of federally recognized tribes” and, “as such, they have a unique legal and political relationship with the United States” as enshrined in the trust doctrine (NAC 2002, p. 6). Second, the Coalition argues that the ethnic make-up of the NAC does not diminish the obligations of the federal government to preserve Indian culture under the requirements of the trust doctrine. In supporting this position the Coalition looked to a failed Equal Protection challenge by a Rastafarian, where the court declared that:

> Regardless of the racial classification of its members, the NAC plays a central role in Native American culture. The state has chosen to protect that culture by allowing the NAC to use peyote in its religious ceremonies. The fact that non-Indians can become members does not

> change the *sui generis* and political status of the NAC. (NAC 2002, p. 6, citing *McBride v. Shawnee County* 1999, p. 1103)

Ultimately, the court in *UDV v. Ashcroft* refused the Coalition's motion seeking to submit an *amicus* brief due to lack of timeliness, and also sidestepped the factual question of NAC membership, stating that the Court was "reluctant to conduct the type of complex anthropological and theological inquiry that would be required to draw a definitive conclusion regarding whether non-Indians can truly be members of the NAC" (*UDV v. Ashcroft* 2002, p. 12).

The court recognized that different courts had come to different conclusions about the ethnic composition of the NAC, specifically citing the *Boyll* Court's finding that "the vast majority of Native American Church congregations . . . maintains an 'open door' policy and does not exclude persons on the basis of their race" (*UDV v. Ashcroft* 2002, p. 11, citing *Boyll* 1991, p. 1336), as well as the *Peyote Way* Court which found "that the record conclusively demonstrates that NAC membership is limited to Native American members of federally recognized tribes who have at least 25 % Native American ancestry" (*UDV v. Ashcroft* 2002, p. 11, citing *Peyote Way* 1991, p. 1216). The *UDV* Court noted, however, that both of these decisions came out before the passage of AIRFAA in 1994, which subsequently clarified that membership in the NAC is limited to members of federally recognized tribes. The Court additionally indicated that it had "been unable to locate any federal court opinions decided *after* the enactment of AIRFAA which have found the federal peyote exemption to extend to non-Indians" (*UDV v. Ashcroft* 2002, p. 20). The Court concluded that the exemption was limited to Indians from federally recognized tribes, as outlined in AIRFAA, and that the exemption was based upon a permissible political classification under the trust doctrine.[12]

The decision in *UDV v. Ashcroft* affirmed the power of the federal government to single out Indian tribes for differential treatment, and also suggested that the passage of AIRFAA had rectified any potential problems with racial classification inherent in previous interpretations of the regulatory exemption. Additionally, the court's review of prior Equal Protection cases, in addition to the Coalition's motion, reveals that there is clear disagreement among different branches of the NAC regarding membership and ethnicity. While AIRFAA does not include any blood quantum requirements, it does require enrollment in a federally recognized tribe. Since tribes often use racial criteria in determining their membership, the AIRFAA requirement that NAC members be enrolled in federally recognized tribes ensures that the conflict over "race" and NAC membership will continue.

Despite the passage of AIRFAA, however, the DEA regulatory exemption remains on the books, and was adopted by several states in implementing individual state drug laws. As a result, the ambiguity of "membership in the Native American

[12] While the UDV lost their Equal Protection argument, they would go on to win the right to use their religious sacrament, ayahuasca, under the Religious Freedom Restoration Act of 1993 (*Gonzales v. UDV* 2006).

Church" continues to be a point of legal contention in some states, and in at least one legal case a purely semantic reading of the law resulted in an outcome that did not align with the apparent facts.

State of Utah v. Mooney

In 2004, in a case further complicating an accurate understanding of the history, culture, and composition of the NAC, the Utah State Supreme Court found that the state's peyote exemption was based on the federal regulatory exemption and therefore applied to all members of the Native American Church regardless of race (*State of Utah v. Mooney* 2004). As a result of this decision, James "Flaming Eagle" Mooney[13] and Linda Mooney, a non-Indian couple who incorporated the Oklevueha Earthwalks Native American Church of Utah, were acquitted of possession of peyote with intent to distribute. While the Utah Supreme Court's decision was based upon a fair reading of the law, ultimately coming to the same conclusion as the *Boyll* Court, there are specific questions of fact in this case that remain ambiguous. Significantly, the regulatory exemption at issue refers broadly to the Native American Church, an entity that is never clearly defined. With no clear guidance as to what constitutes a "Native American Church," anyone could incorporate a church under this name and become eligible for the exemption. Such a situation seems to go beyond the intent of the regulation that was meant to help preserve Indian culture and religious practices. However, this exact scenario seems to have manifested with the Mooneys, who founded their own church in 1997.

The Oklevueha NAC is unique in that it was founded by a non-Indian couple with no apparent personal connection to any tribal communities recognized or unrecognized by the federal government. At its root, the church appears to be an outgrowth of the Mooneys' personal interest in traditional Indian cultures. While James Mooney has claimed Native American descent, he was not a member of a federally recognized tribe at the time of trial, although it was later contended during a federal detention hearing that he had submitted fraudulent paperwork to the Cherokee Nation in order to obtain tribal enrollment papers (*United States v. Mooney* 2005, 39), suggesting, perhaps, that the Mooneys were grasping for a legal footing to protect their activities.

This case poses specific difficulties. Because the Native American Church is a loose confederation of churches with no centralized authority, different NAC chapters may have minimal contact with each other, and may espouse differing views on how the NAC does, or should, operate: a reality that is aptly illustrated by the controversy over blood quantum and membership. Despite some differences, however, NAC chapters are generally formed within or among tribal communities

[13] Interestingly, James "Flaming Eagle" Mooney reports that he is a descendant of the ethnologist James Mooney, discussed earlier in this chapter.

by members of those communities, and use of peyote within these communities not only has an historical basis but also, arguably, plays a role in perpetuating Indian tribes and cultures. An NAC chapter founded outside of this cultural context seems dubious at best, and while non-Indians may from time to time be invited to participate in NAC ceremonies, or even become recognized members of an NAC congregation, this is quite different from someone outside of this cultural context founding their own church and labeling it "Native American."

This problem appears to be addressed by AIRFAA, which provides an exemption limited to Indian peyote religions originating from "within a traditional Indian culture or community" (AIRFAA 1994: [c][3]), which would seemingly exclude the Mooneys' church. However, Utah state law was based on the regulatory exemption that permits use by "members of the Native American Church," an entity that is never clearly defined, and not based on the parameters set out in AIRFAA. The state of Utah subsequently revised the exemption, at the urging of NACNA, to bring state law in line with federal law (Maroukis 2010; Utah Controlled Substances Act 2012).

While Utah's exemption for religious peyote use was based upon the DEA's regulatory exemption and not upon AIRFAA, it is nevertheless puzzling why no factual record was established to determine what constitutes a "Native American Church," and whether the Oklevueha NAC, despite its semantic claims, was in fact such a church. Had a record been established at trial, this case may have turned out differently. Characteristics that the court might have investigated include: where and how the church originated, the composition of its membership, the structure of its ceremonies, and the presence or absence of ties to tribal communities.

While the Mooneys were cleared under state law, the federal government was determined to pursue their own prosecution. Eventually, an agreement was made that the government would withdraw its charges so long as the Mooneys would discontinue their use of peyote until such time as they could prove membership in a federally recognized tribe. James Mooney later claimed Seminole ancestry, specifically claiming membership in the Oklevueha Band of Yamasee Seminoles; however, the tribe is not federally recognized and his membership was eventually revoked (Maroukis 2010). Regardless, the Oklevueha NAC has continued to conduct ceremonies and now offers, through its website, a Church membership card for $200 or an Independent Branch Church Packet, to help individuals set up their own branch of the Oklevueha NAC, for $2,495 (Oklevueha 2000–2012). The website proclaims that membership in the Oklevueha confers legal "protection to worship with any and all earth-based Sacraments 'especially Peyote'" (Oklevueha 2000–2012). The implication appears to be that one can purchase immunity from state and federal drug laws by becoming a member or starting a branch of the Oklevueha NAC; however, these claims are based on a misrepresentation of the Mooneys' victory in the Utah State Supreme Court, and also ignore subsequent changes to Utah state law.

Interestingly, the ambiguous reference to "all earth-based Sacraments" on the Oklevueha NAC website appears to stem from the apparent efforts by the church to expand their "exemption" to include all psychoactive plants, including marijuana,

as sacraments. Currently, litigation is underway involving the Oklevueha NAC of Hawaii, which is asserting a religious right to use marijuana as a traditional NAC sacrament (*Oklevueha NAC of Hawaii v. Holder* 2012). Of course, there is no historical or anthropological evidence that marijuana has ever been used sacramentally by American Indians, or that it has ever been incorporated into the practices of peyotism. This appears to be peculiar to the Oklevueha NAC, further suggesting an attempt to benefit from the NAC's unique legal status by appropriating the title "Native American Church." While the nature of the Oklevueha NAC may have been ambiguous at the time of their original legal proceedings in Utah, it should now be clear that the NAC and the Oklevueha NAC are completely unrelated entities, sharing only a semantic connection.

Proposed Regulatory Changes

Following the arrest of the Mooneys, the DEA contacted tribal leaders from around the country to inform them of a possible change to the language of the federal regulatory exemption. In a letter, the agency explained that "since DEA's regulation specifically mentions the Native American Church, there has been some confusion and misunderstanding about the scope of the regulatory provision," and that the proposed rule change would clarify that the exemption is limited to members of federally recognized tribes (Nagel 2001). While the proposed change was straightforward and would have brought the federal regulation in line with AIRFAA, the proposal created cause for concern among some NAC members.

At the 2001 Annual Conference for the NAC of the State of Oklahoma, the church members voted to oppose the proposed change and to submit a formal letter to the DEA advocating for the retention of explicit references to the Native American Church (Maroukis 2010). Others, including Teresa Murray, secretary of the NAC for the State of Oklahoma, submitted their own letters to the DEA opposing the proposed rule change. In an interview with the *Native American Times*, Murray explained that her husband, a member of the NAC, is non-Indian, and that the rule change would prohibit him from legally participating in their religion. Additionally, she expressed concern that future generations of her family may not be able to meet the blood quantum requirements for tribal enrollment and could therefore be prevented from participating in the peyote religion (Murg 2002). A decrease in blood quantum among peyotist families could lead to the disappearance of the peyote religion if the exemption limits participation to those with a sufficient blood quantum to meet tribal enrollment standards.

The DEA held hearings on the proposed rule change in 2002, but the change was never implemented. The proposal has been introduced regularly over the last 10 years as a "nonsignificant" priority item, and no action has been made to formally change the language of the regulatory exemption. It seems likely that the rule change has remained in limbo due to the opposition of NAC members like

Murray, who see the change as a threat to religious liberty and to the viability and vitality of the peyote religion.

Race, Membership, and the Future of the Native American Church

While the federal government appears to be backing away from their prior insistence that NAC members have a minimum 25 % Indian blood quantum, the maintenance of a tribal membership requirement continues to pose problems for peyotists. The parameters of any federal classification of Indians pursuant to the trust responsibility must be rationally related to the government's underlying goal; in this case, the preservation and protection of traditional Indian religions involving the use of peyote. Although rational basis review is not a difficult standard to satisfy, it is not a green light for arbitrary classifications (*Romer v. Evans* 1996). While it is reasonable for the government to seek to preserve the religious practices of Indians, there appears to be little rationale in excluding Indians who are not federally recognized when they share common religious and cultural traditions with members of recognized tribes. But this is hardly the only problem with the tribal enrollment restriction.

As mentioned previously, a tribe's right to define its own membership and enrollment criteria has been recognized by the Supreme Court as central to tribal autonomy and to the preservation of tribal traditions and culture (*Santa Clara Pueblo v. Martinez* 1978). However, one of the main membership criterion employed by tribes is the requirement of a minimum blood quantum. Of tribes that retain blood quantum eligibility rules, 25 % blood is the most commonly required quantum, although requirements may range from as little as one-sixteenth to as much as five-eighths. The quantum may be a general Indian blood quantum, or it may be tribe specific. With tribe specific blood quanta you could end up with an individual who can claim more than 50 % Indian blood from an amalgam of tribes, but who may not be able to claim a minimum 25 % blood quantum specific to a particular tribe. While there is controversy and debate within tribal governments over how best to determine tribal enrollment, the criteria are generally based on blood quantum, descent, or some combination of the two.

A demographic study for the Salish and Kootenai tribes of the Flathead Indian Reservation was produced in 2002 in order to determine the impacts of several different enrollment criteria on tribal population (Russell 2005, citing Walker 2002). The first category, based on current enrollment criteria, required 25 % of either Salish or Kootenai blood. Under this criterion, the study projected an 8 % decrease in population (from 6,953 to 6,400) over a 20 period. The second category sought to establish how expanding the blood quantum to include descendants with a minimum 25 % blood quantum from any recognized tribe would impact future tribal enrollment. Such a change would allow tribal members to marry members of

other tribes but maintain tribal membership rights for their offspring. It was shown that this criterion would lead to an immediate spike in the number of individuals eligible to claim tribal membership; however, following the spike a steady decline in population was predicted. Finally, the third category investigated sought to establish how tribal rolls would be affected if all descendants of current tribal members were permitted tribal membership regardless of blood quantum. Under this model, it was shown that the number of individuals eligible for tribal membership would grow exponentially (Russell 2005, citing Walker 2002).

While the study shows that determining tribal membership based on descent will potentially preserve the numbers of tribal peoples, it does not indicate how many will choose tribal membership, nor whether descendants who move out of their communities will maintain the cultural beliefs, values, and customs of the tribe. Russell (2005, p. 173) has made the argument that membership by descent maintains the racially problematic notion that "blood in any amount as an infallible proxy for culture." Can someone who has never lived in a tribal community, who has never maintained ties with, or participated in, traditional cultural activities, still be considered "culturally" Indian if they can claim an Indian ancestor five or six generations back? Under the descent criterion, such individuals would remain eligible to claim tribal membership and whatever accompanying benefits may arise from that status. Russell argues that this type of system fails to preserve tribal culture and he instead recommends that tribal membership be based on whether someone is a genuine member of the tribal culture. Determining one's "cultural" status need not be based on a specified blood quantum, but might include descent in combination with criteria such as: self-identification as an Indian, being recognized as Indian by an Indian community, roots in an Indian community, participation in customary and cultural activities, involvement in tribal governance, and other similar indicators.

A similar proposition might be employed to determine who is a member of the NAC, one that would allow the peyote exemption to extend to all sincere members of the church. Restricting membership by blood quantum will lead to the steady decline and eventual disappearance of the peyote religion. Restricting membership to those enrolled in federally recognized tribes may fair no better, particularly since enrollment requirements often include racial criteria. Additionally, this restriction excludes members of tribes who have never been recognized by the federal government, as well as members of tribes who had their official status discontinued during the Termination Era of the 1950s. In any case, neither of these criteria serves the purpose of preserving the peyote religion as a cultural institution; therefore, a rational argument limiting the peyote exemption by these criteria cannot be maintained. However, the AIRFAA exemption may hold the seeds for a successful solution tailored to cultural preservation.

A cultural institution or religion cannot be preserved if one does not know what one is preserving. AIRFAA, by recognizing peyotism as a religious practice with its foundations in traditional Indian culture and communities, provides a broad base for understanding what the NAC is: an inherently Indian religion. A cultural practice cannot be reinvented or synthesized outside of its original cultural context, as the

Mooneys may have attempted; it arises from that context. This does not mean that a culture or religion doesn't change or evolve, but suggests some parameters for determining whether an organization or particular religious practices are "Indian," and can therefore be singled out for special treatment under the trust responsibility. By recognizing the cultural roots of peyotism, as well as the nature and structure of the peyote religion, an exemption can be created that encompasses all participants and members of the Native American Church without excluding members based on antiquated notions of race or political restrictions, and that is also sufficiently tailored to prevent claims that attempt to fraudulently capitalize on the unique relationship between American Indians and the federal government.

While there continues to be problems with the scope of AIRFAA and the DEA's regulatory peyote exemption, there may be other avenues of protection for NAC members who fall outside of the exemptions as interpreted by the federal government. The Religious Freedom Restoration Act (RFRA), which was passed in 1993, provides statutory protection for the free exercise of religion (see footnote 9). The UDV, mentioned earlier, eventually succeeded in winning the right to use their sacrament, ayahuasca, by asserting religious rights under RFRA. Until racial criteria are fully eliminated from the peyote exemption, non-Indian spouses, multi-ethnic children, and other non-Indian members of the NAC might similarly rely upon RFRA to protect their religious practices.

Conclusion

The peyote exemption, in both its regulatory and statutory forms, was intended to help preserve and perpetuate Indian beliefs and customs. As applied, the exemption runs into the danger of eliminating rather than preserving peyotism by creating exempt classifications that are hampered by racial and political restrictions rather than being tailored to cultural preservation. While NAC members are predominantly Indian, some congregations allow non-Indians to participate, and others embrace non-Indian spouses and other close friends and relations. As demonstrated, there is disagreement within the NAC as to who may and who may not be a member of the church, however, due to the loose structure of the NAC, it seems sensible that these decisions would be determined by the customs and practices of individual chapters. While some congregations may be multi-ethnic, or become multi-ethnic, the purpose of the peyote exemption is to preserve the traditional practices of the Indian peyote religion, not to preserve the purity of a particular "racial" group. The federal exemption, however, remains imperfect, and still implicitly raises questions of race, identity, and cultural authenticity. Eventually these questions will have to be answered, not only by the federal government, who must ultimately decide what the goal behind the peyote exemption is, but also by the individual tribes, who remain central to the question of who is, and who isn't, an "Indian."

While culture ultimately cannot be tied to race or to a particular political status, carefully considered criteria can be developed that allows the full participation of

all members of the NAC, regardless of ethnicity or tribal affiliation, without opening the door to systematic abuses. Such criteria might include whether a particular congregation has roots in an Indian community, whether members of the church are regular participants in customary and cultural activities, whether the congregation is recognized by established epicenters of the church, and whether members recognize the core tenets of the peyote religion. The current parameters of the peyote exemption, however, are unlikely to change any time soon. Although the Justice Department has made a habit of prosecuting non-Indian members and/or participants of the NAC, there have been no cases where multi-ethnic American Indian families have been subjected to selective prosecution for participating in the peyote religion. While it seems unlikely that the government would prosecute under such circumstances, alternative legal remedies are fortunately available for NAC members who are members of non-recognized tribes, or who are non-Indian members that have been welcomed into a particular congregation. Although constitutional protections for freedom of religion have been reduced, robust protections for religious freedom have been passed by Congress in the form of the Religious Freedom Restoration Act, the statute under which the UDV successfully fought for their right to use their religious sacrament, ayahuasca. So, while not all NAC members may fall within the purview of the peyote exemption for racial or political reasons, legal recourse for sincere members of the NAC may still be available regardless of blood quantum or tribal affiliation.

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From the Sacrilegious to the Sacramental: A Global Review of Rastafari Cannabis Case Law

Melissa Bone

Introduction

"We refuse to be what you wanted us to be, we are what we are, that's the way it's going to be. For you can't educate I for no equal opportunity. . .talking about my freedom, people freedom and liberty" (Marley 1979).

The freedom to practice one's religion is widely regarded as one of the hallmarks of a free society (Ngcobo 2001, p. 25 as cited in Du Plessis 2009, p. 10). Yet, when religious practice is impeded by prohibitive drug laws, there is often an enormous potential for conflict between those executing the practice and the state. Rastafarians across the globe have experienced this conflict firsthand due to their sacramental use of cannabis, a prohibited substance under all three of the UN drug conventions. Rastafarians' use of cannabis forms an integral part of their religion and is believed to bring them closer to their god, who they call Jah (Barrett 1977). Rastafarians consume cannabis in a variety of ways for predominately religious purposes. This chapter will strive to acknowledge the absolute centrality of this practice for Rastafarians, as it is not only firmly intertwined with their religion, but also with their culture, their politics, and, as will be demonstrated, with their very identity. The reverence and wide usage afforded to this sacred, yet prohibited, herb has invited judicial proceedings to determine whether religious freedom or the interests of the state in maintaining an unqualified prohibition of cannabis should prevail.

This chapter will primarily focus on five legal jurisdictions which have considered this issue in varying degrees, as these legal judgments have been reported on the most extensively (see Taylor 1984, 1988; Frank 1990; Loveland 2001; O'Brien 2001; O'Brien and Carter 2002–2003; Edge 2006; Du Plessis 2009; Gibson 2010). The chapter will analyze case law deriving from the USA, England, the

M. Bone (✉)
School of Law, The University of Manchester, Room 4.43b, Williamson Building,
Manchester M13 9PL, UK
e-mail: melissa.bone@manchester.ac.uk

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Commonwealth Caribbean, South Africa, and Italy. Additionally, as Edge (2006) observed regarding the USA, England, and South Africa: All five of the above jurisdictions are pluralist democracies, all are concerned with maintaining drug prohibition, all seek to uphold and respect religious rights, and all five possess religious minorities who use prohibited drugs as a sacrament. Nevertheless, much of the relevant judicial discourse is believed to present a reductionist version of Rastafarianism,[1] in which its beliefs and values are undermined and are reflective of existing judicial preconceptions (O'Brien and Carter 2002–2003). Therefore, prior to comparing different judicial approaches on this issue, this chapter will first offer an overview of the origins of Rastafarianism, the realities of the movement, and its cannabis-related rituals. It will then trace the evolution of Rastafarianism's religious status through the courts before exploring how the respect afforded to Rastafarian cannabis claims has, in many instances, increased, alongside developments in the law relating to the manifestations of religious freedoms in general. When finally analyzing and comparing Rastafari cannabis case law from the five jurisdictions in question, the chapter will thematically consider: the various claims made by states when restricting Rastafari cannabis use; whether the balancing exercise undertaken by courts to resolve this conflict is truly genuine; the difference in treatment afforded to other religious drug use; the potential impact reductionist discourse and majoritarian and pluralist reasoning have on the outcome of these cases; the differing emphases placed upon religious freedom and the UN drug conventions; judicial discrepancies between Rastafari possession and possession with intent to supply cases; and whether the recent Italian decision could be a landmark case for change. By taking the reader through the history of Rastafarianism, and the relevant case law, as well as undertaking a substantial comparative analysis of the case law, it is hoped that this chapter will present a comprehensive review of how judicial interpretations of Rastafarian cannabis use could be changing. Indeed, the extent to which the courts are moving from the sacrilegious to the sacramental will be addressed.

The Roots and Realities of the Rastafarian Movement

The Rastafarian movement is a religious, racial, cultural, and political movement that emerged in the 1930s in Jamaica (Smith et al. 1960). It arose in what was a colonial and predominately Christian country where approximately 98 % of the population were Black descendants of slaves (Chevannes 1994). Thus, in response to a deeply felt displacement by the African Diaspora and to escape the political and cultural legacy of the colonial mindset, Rastafarianism, as it is presently practiced,

[1] To avoid confusion the author will use the term "Rastafarianism" when referring to the religion as an entity. However, it should be acknowledged that the followers of the Rastafari religion would not approve of this terminology, as they reject any form of "ism" (Glazier 2001).

materialized (O'Brien and Carter 2002–2003). Rastafarianism is a messianic movement with its tenets maintaining that Haile Selassie, the late emperor of Ethiopia, is another incarnation of the Judeo-Christian God known by them as Jah (Taylor 1984). In fact, the very term *Rastafari* is derived from Selassie's pre-regnal given name, Tafari, with Ras literally meaning "head" (Cashmore 1979). The deification of Emperor Selassie was taken from the teachings, guidance, and Pan-Africanism of Marcus Garvey, who, for the Rastafarians, foreshadowed the coming of a Black messiah (Taylor 1984). Garvey is widely regarded as the first prophet of the movement and was the founder of the United Negro Improvement Association (UNIA) (Taylor 1984). As perhaps expected, his teachings could be described as Afro-centric, as he abhorred slavery, ardently rejected the Western world, was a firm advocate of Black pride, and believed that repatriation to Ethiopia was the route to salvation (O'Brien and Carter 2002–2003).

The belief in repatriation and the deification of Selassie are possibly the only rigidly defined creeds that the Rastafari have (O'Brien and Carter 2002–2003). It is believed that Garvey prophesized the coming of the Black messiah; his teachings encouraged others to look for his coming and to view God through their own spectacles: "the spectacles of Ethiopia," as opposed to the "White spectacles" engendered through colonialism (Garvey 1967, p. 34). For Garvey, the entire African continent was Ethiopia before the Europeans carved it up (Cashmore 1979). As he famously summarized in the *New York Times* in 1920, "if Europe is for the Europeans, then Africa is for the Black peoples of the world," thus strongly advocating for their return (Garvey 1920, as cited by Cashmore 1979, p. 20). Interestingly, it is from these beliefs that strong Rastafari concepts such as "Zion," a utopian Africa and the true homeland for the Rastafari, and "Babylon," the rest of the world outside of Africa as dominated by the White peoples, first emerged (Ishmahil 2002). It appears that the report of Smith et al. (1960) was accurate in determining that the Rastafarian movement is racial and political, as well as religious. In fact, it has been posited that the movement transcends far beyond Garvey's initial teachings: Although he was an essential social precursor to the movement, his central concern was the relatively pragmatic one of repatriation. Instead, it was the Rastafari themselves who were able to transform their own social universe, supported by Garvey's initial teachings inviting Rastafari to form their own conceptions of reality (Cashmore 1979). As Dennis (1978, n.p. as cited in Cashmore 1979, p. 123) acutely surmised, "Rasta is not a *version* of reality as you say; Ras Tafari is the reality."

Accordingly, the movement has been able to embed and diversify, since its tenets are not restrictive in the way that those of more traditional religious creeds might be. Rastafari now have many differing perspectives on Selassie, on Jesus, and on many of the other various elements that together comprise their religion (O'Brien and Carter 2002–2003). For instance, Rastafarians believe both that Selassie is a deity and that Jah is simultaneously inherent in all men (Owens 1973). The religion has been described as an extremely subjective and spiritual one, as its tenets consist of positivity, being in harmony with nature, and the idea that any relationship with Jah does not need to be mediated through an official, but

is a wholly private and individual affair (O'Brien and Carter 2002–2003). As such, the religion has been deemed non-doctrinal, non-hierarchical, fiercely anti-authoritarian, extremely heterogeneous, and multi-faceted in nature (O'Brien and Carter 2002–2003). It is clear why many authorities studying the interplay between the law and Rastafarianism have concluded that the judiciary is often unable to categorize it according to their own narrow, and often socially indoctrinated, theistic conceptions of religion. In actuality, one could surmise that Rastafarianism's non-conformist nature has in some ways pre-determined the outcome of many Rastafarian cases, as the Rastafari ardently reject the moral, political, and social order that the judiciary embodies. A Rastafarian from the UK captures these conflicting realities by noting that:

> The courts speak another language that you don't know about… and you've unknowingly given away your rights just by communicating with them, you know? And we naturally can hear fallacy, like…we naturally can hear them trying to take away our rights, you have to give it up freely to conform within this system and they ask you if you understand…and Rastafari say no we don't understand. (Blessed Barak 2011)

The courts likewise have often failed to understand the reality of the Rastafari, since the case law is largely dominated by issues such as the wearing of dreadlocks and the celebration of cannabis as a sacramental herb (O'Brien and Carter 2002–2003). According to O'Brien and Carter (2002–2003), the judicial preoccupation with just these two issues has produced a reductionist version of Rastafarianism, with the courts historically being all too willing to dismiss the movement; a dismissal that may have been predestined in light of the non-conformist and anti-colonialist origins of the Rastafarian practices.

The ritualistic consumption of cannabis has received the most attention by the courts (Taylor 1984) due to the aforementioned conflict between the right to religious freedom and the perceived necessity of global drug prohibition. However, the Rastafari originally grew cannabis in the 1930s for economic purposes, not religious ones, in order to achieve Black economic self-sufficiency (Chevannes 1994). It was only later that Rastafari activists instructed their members to make "a virtue out of a necessity," as Rastafarians were targeted by the authorities for anti-colonialism under the pretext of their cannabis use (O'Brien and Carter 2002–2003, p. 226). It is therefore evident that even prior to contemplating the herb's religious significance, cannabis was deeply and historically intertwined with the race, politics, and culture of the Rastafari. This gives further credence to the notion that Rastafari cannabis use is more than a religious practice: It is a way of life, and is profoundly central and integral to the identity of Rastafarianism itself (Barratt 1977). Moreover, since Garvey advocated that the Bible should be used to liberate as opposed to domesticate (Gordon 1988), and is thus open to subjective interpretation, Rastafarians have cited several biblical passages as proof of the sanctity of the holy herb.[2] Cannabis is now smoked, eaten, and used as incense by Rastafarians wherever possible and is mandatory at all meetings, rituals, and services for the

[2] See Genesis 1:11, 1:29, 3.18; Psalms 104:14; Proverbs 15:17; Revelation 22.2.

Rastafari who accept this sacramental practice (Barratt 1977). It is thought that its presence enhances the spiritual nature of the movement, as cannabis use is perceived to be the key to understanding the self, the universe, and God (Barratt 1977). Yet, despite the reverence afforded to this herb, Rastafarians are not surprised that its use remains illegal, since its central role in freeing the mind to the truth and away from the "fuckery of colonialism" is something, they reason, that the Babylon system clearly does not want (Edmonds 2003, p. 61).

Furthermore, Edmonds (1998) states that the Rastafari contrast their cannabis use to alcohol and other drugs, which are widely enjoyed and accepted within more conventionalist cultures, as Rastafarians feel they destroy the mind. In fact, many adherents of the Rastafari faith have strict dietary regimes where tobacco in particular is prohibited (Taylor 1984). Interestingly though, much of the expert evidence relating to the dangers of cannabis use assumes that the cannabis consumed would have been mixed with tobacco (Nutt 2012). Such mistakes demonstrate how the courts could err substantially in their balancing exercise concerning the dangers of the drug and its significance to the Rastafari faith, failing to appreciate the wealth of medical, sociological, and religious material available (Walsh 2010). Indeed, I will demonstrate that there has been very little effort from the majority of jurisdictions to accommodate the roots and realities of the Rastafarian religion within their respective legal frameworks.

The Evolution of Rastafarianism's Religious Status

As O'Brien and Carter (2002–2003) observe, the distinction between religion, race, and politics for Rastafarians is largely meaningless, since the movement and its belief system intricately entwines all three. Regardless, it is its manifestation as a religious movement that has been the focal point for the judiciary (O'Brien and Carter 2002–2003). O'Brien and Carter (2002–2003) have argued that any claims here are brought on religious grounds since the courts are more likely to be sympathetic to the religious beliefs of Rastafarians, as opposed to their political or racial ideologies. Moreover, they have further postulated that the judicial recognition of Rastafarianism as a religion is beneficial, since it not only invites constitutional protection, but additionally requires the authorities to officially acknowledge its existence. While it is likely that O'Brien and Carter (2002–2003) are correct in their assertion that religious claims are more likely to elicit judicial sympathy, given the movement's historic targeting by the authorities (Edmonds 2003) and the increased protection afforded to minority religions in recent years (Equality and Human Rights Commission 2012), their second assertion is perhaps not entirely accurate. Despite the legal system's general acceptance of the movement's religious status, the political system in the jurisdiction where Rastafarianism actually originates has yet to afford the movement any official religious rights (Wignall 2012). For Wignall (2012), such recognition is long overdue, particularly since it has been 50 years since Jamaica has achieved political independence, and

since other religious minority groups, who have actually incorporated racist teachings, have been afforded official religious rights in Jamaica. However, although this political failure could serve to further reinforce the perceived conflict between Rastafarians and the Babylon system, other political systems, such as that of the UK, have officially recognized Rastafarianism as a religion, through the registration of Rastafari charities (Gibson 2010). Furthermore, as will be shown, the vast majority of legal jurisdictions now readily accept Rastafarianism as a religion, although this was not always the case.

The bulk of Rastafarian religious cases stem from the USA, possibly due to the nation's rich tradition in litigating religious liberties claims (Edge 2006). As such, some of the earliest cases concerning the Rastafari originate here. In a footnote in *United States v. Moore* (1978, para. 79, n2), the court dismissed the Rastafarian movement as a vegetarian sect where its members eat no eggs or milk and fail to cut or wash their hair. The hair reference not only perpetuates the myth that Rastafarians are dirty, but as Taylor (1984) deduces, such a shallow summary of the religion reveals an inherent bias by the courts. This is particularly evident since such references to the religion were only mentioned in testimony involving circumstantial evidence of the defendant's guilt (Taylor 1984). Additionally, in the very same year, a public prosecutor in *People v. Marchese* (1978) dismissed the Rastafarian movement as an "organization," and tried to imply that its members advocated the murder of police officials. In this instance, the appeal court found that there had been prosecutorial misconduct and reversed the defendant's conviction. Such a denial of a fair trial further indicates the clear prejudice to which the Rastafari were once subjected within the US legal system, although at least the appellant court in question acknowledged this. No such acknowledgement, however, was conferred upon the defendant in the Gayle saga, which involves perhaps the greatest amount of discrimination to date regarding the legal recognition of Rastafarianism as a religion. In *Gayle v. Le Fevre* (1980), during a prosecutorial inquiry, the trial judge questioned whether Rastafarians were in fact "animals." As a result, the defendant sought to have his conviction overturned on the grounds of the misconduct of the trial judge. In *Gayle v. Scully* (1985), it was held by a majority that, although the conduct here was offensive, it was not enough to render the entire trial fundamentally unfair. In a vote of dissent, Judge Oakes noted that the defendant could not have had a fair trial due to the "devastating effect" the animal question would have had on a jury, coming as it did from the trial judge (*Gayle v. Scully* 1985, para. 814). Indeed, as Taylor (1988) observed, if similar references to Catholics or Methodists had been made, then there would be little doubt that an appellate court would have found judicial misconduct. This further reveals how Rastafarians have not traditionally occupied a socially accepted plane, and, due to judicial unfamiliarity, they comprised a group that was very likely to be subjected to reflexive human prejudice (Taylor 1984). However, such open prejudice in judicial proceedings had decreased decidedly by the early 1990s. Because of increased judicial familiarity with Rastafarianism and its worldwide growth, its status as a religion was no longer an issue within the US (O'Brien and Carter 2002–2003).

The case of *United States v. Bauer* (1996, para. 1556) dispelled any residual doubts, since the court of appeal in the ninth circuit referred to Rastafariansim's inclusion in Melton's Encyclopedia of American Religions as "among the 1,558 religious groups sufficiently stable and distinctive to be identified as one of the existing religions in this country." However, the US has adopted a rather broad, functional approach when determining which beliefs qualify for religious status (Taylor 1984). As established in *United States v. Seeger* (1965), there is no requirement for a traditional belief in God, only a requirement that the belief should be sincere, meaningful, and occupy a place parallel to that filled by an orthodox belief in God. As such, there is no inquiry into the contents of an individual's beliefs; rather the focus is on the importance of those beliefs in an individual's life (Tribe 1978). This approach is therefore arguably better suited to the diverse, largely non-conformist and unorthodox beliefs shared by Rastafarians. Thus, in the absence of open prejudice, their religious status can be more easily established.

In contrast, the UK and the Caribbean Commonwealth had, until very recently, adopted a narrow, theistic approach to define a movement's religious status. In *Barralet v. Attorney General* (1980), it was held that religion concerns one's relations with God and that it is not sufficient to believe in the platonic concept of the ideal. Although this test was successfully applied in the Cayman Islands case of *Grant v. J. A. Cumber Primary* (1999), it is easy to surmise that the Rastafari religion did not sit well within it. The chief justice was able to conclude that Ras Tafari was the functional equivalent of a Judeo-Christian God and could find evidence of some ritualistic, albeit non-formal, practices of worship. Yet, although Rastafarianism can be made to satisfy the theistic test, such an approach is homogenizing, and is therefore possibly more subtly discriminatory than the apparent prejudice evident in the early US cases. Indeed, by requiring new religions to correspond with traditional Christian modes of worship, the courts were unwilling to accommodate the Rastafari reality, as Rastafarians ardently reject orthodox, colonialist models of worship. Thus, it is unlikely they would have wanted to have been judged by reference to them. Fortunately for the Rastafari though, this approach changed after the UK Human Rights Act 1998. Through incorporating the European Convention on Human Rights (ECHR) (1950) into domestic law, the UK legally recognized a general right to religious freedom (Gibson 2010). Additionally, in the English case of *Williamson* (2005), it was suggested that everyone is entitled to hold whatever beliefs they wish, since such respect runs simultaneously with the respect for human dignity.

Such a broad, encompassing approach accommodates the Rastafari. In fact, the vast majority of legal jurisdictions now readily accept Rastafarianism as a religion (O'Brien and Carter 2002–2003). Moreover, this matter has never been in dispute for all of the early and more recent cases to be analyzed later in this paper (Gibson 2010). It is clear, then, that the respect afforded to the legal status of Rastafarianism as a religion has increased and could coincide with general developments in laws relating to religious freedoms. Such developments are also evident as shown below, in the way the courts have addressed the religious manifestations of Rastafarianism, particularly in relation to Rastafarian cannabis use.

The Religious Manifestation of Rastafarianism

Although post-*Williamson* (2005) there can be no limitations in relation to holding a religious belief in the UK and the Commonwealth Caribbean, there remain certain limitations with regards to manifesting one's beliefs (Equality and Human Rights Commission 2012). This restriction is applicable in most legal jurisdictions, because unlike the mere holding of a belief, its actual manifestation requires an action, which thereby obliges states to carefully consider its significance to the religion in question and its potential impact upon society at large. Unfortunately for Rastafarians, the manifestation of their religious beliefs via the sacramental use of cannabis has posed problems, particularly in light of the wide adoption of cannabis by the global counter-culture (O'Brien and Carter 2002–2003). The World Drug Report (United Nations Office on Drugs and Crime 2012) stipulates that cannabis is the world's most widely used illegal drug, and is consumed by approximately 119–224 million users. Not only has this made it difficult for the judiciary to distinguish the true sacramental users from the recreational "charlatans," but the extremely wide usage of cannabis and its illicit status has led the courts to historically treat this issue with some hostility. (For more information on this subject see Brown and see Lander, this volume.) For instance, the government's attorneys in *Grant v. J. A. Cumber Primary* (1999, para. 327–331) argued that, because Rastafarian religious ceremonies involved the use of cannabis, such ceremonies should not be accounted for when determining whether or not the existence of worship had been established. While this reasoning was rejected, consider for a moment the copious distinction between the sacramental use of alcohol in Christian ceremonies and the use of cannabis in Rastafarian ones. It would no doubt be unheard of to ever bring forward this line of argument in the former example, which once again highlights the marginalization that Rastafarians have faced during legal proceedings, even at the elemental and mere definitional stages.

Yet, in order to accurately deduce whether Rastafari cannabis use is a bona fide manifestation of their religion, the US courts have, at least in theory, devised a useful judicial screen for filtering out false claims (O'Brien and Carter 2002–2003). The US judiciary initially tests the sincerity of a defendant's religious beliefs through questioning both their knowledge of the religion and the extent to which the manifestation of these beliefs is religious in nature (O'Brien and Carter 2002–2003). This test has been epistemologically challenging for Rastafarians, as their movement lacks any formal membership and is additionally racial, political, and cultural in nature. Thus, Rastafarians "may be sincere but not sincerely religious" with regards to their cannabis use (O'Brien and Carter 2002–2003, p. 235). Though some commentators advocate that the sincerity test should only be applicable in relation to a defendant's religion (Ahdar and Leigh 2005), Mhango (2008) has suggested that the test should protect Rastafarians irrespective of whether cultural, political or religious factors dominate their claims. While Mhango's broader test would demonstrate a greater level of understanding and respect for Rastafarianism (Gibson 2010), the Rastafari can nevertheless satisfy the

latter aspect of the sincerity test requirements, as their arguments for cannabis manifestation rest on biblical evidence.[3] Regardless, the former requirement to have sufficient knowledge of the religion has caused several cases to fail, since the US courts in both *Robinson v. Foti* (1981) and *Reed v. Faulkner* (1988) remained unconvinced of the defendants' knowledge of Rastafarianism.

The US additionally considers the centrality of the defendant's religious manifestation as a necessary screening device (Taylor 1984). This test has also posed difficulties for Rastafarians, since not all adherents of the faith use cannabis, given the diverse and subjective nature of the religion (Cashmore 1979). Hence, the courts could conclude that, in the absence of any doctrinal mandate to consume cannabis, the practice is not central to their religion. This situation did in fact occur in the case of *Reed v. Faulkner* (1988). The expert evidence in this case concluded that the wearing of dreadlocks was not mandatory, so the practice could not be deemed a central manifestation of Rastafarianism. However, other jurisdictions have managed to successfully address this issue. In *Prince v. The President of the Law Society of the Cape of Good Hope* (2002, para. 42), the Constitutional Court of South Africa held that "religion is a matter of faith and belief... believers should not be put to the proof of their faith and beliefs" since beliefs can be "bizarre, illogical or irrational." Through making this point, Justice Ngcobo respected the conceptual flexibility inherent within religious manifestations, and the notion that it is the individual's perception of the manifestation that should be the focal point. The English courts have similarly demonstrated an enhanced respect for minority religions, through asserting that any "threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the convention" (*Williamson* 2005, para. 23). Yet, although Article 9 (1) of the ECHR can be broadly construed to protect the manifestation of an individual's beliefs (Equality and Human Rights Commission 2012), the English courts have, to date, merely assumed centrality for Rastafarian cannabis claims, as opposed to really considering this issue in any detail (Gibson 2010). Therefore, while it is now less likely that certain legal jurisdictions will limit religious liberties claims at the definitional stage, it is arguable that this is largely extraneous to the Rastafari, as there are other ways to restrict Rastafarian claims to use cannabis. All of the legal jurisdictions to be analyzed below allow derogations from the right to manifest a belief if it is deemed to be in the public interest, etc. Walsh (2010, p. 433) acutely summarizes this situation as follows: "It seems that it is easy to be magnanimous when determining those activities that engage human rights' protection, if one is similarly 'generous' in finding that the same such conduct falls within the derogations." Accordingly, along with the other numerous issues for analysis as outlined in the introduction, justifications for restricting Rastafarian cannabis claims will be considered in detail below.

[3] See Genesis 1:11, 1:29, 3.18; Psalms 104:14; Proverbs 15:17; Revelation 22.2.

An Analysis of Rastafari Cannabis Claims and the Justification for Their Restriction

All of the legal jurisdictions to be discussed are able to restrict the manifestation of one's religious beliefs, if it is deemed to be necessary in a democratic society to protect the public order, societal health, morals, and safety, or to protect the rights or freedoms of others. Such consequentialist limitations are expressly articulated by Article 9(2) ECHR, and are often stressed substantially in Rastafarian cannabis case law, to justify the restrictions placed upon Rastafari religious freedom. The first US case to directly address whether a Rastafarian can claim a religious exemption from laws making it a crime to possess and distribute cannabis was *Whyte v. United States* (1984). While the court accepted Rastafarianism as a religion, and the sacramental use of cannabis as a bona fide religious manifestation, the judicial exercise the court undertook in balancing the state interest in regulating cannabis with the needs of a sincere Rastafarian to consume cannabis for religious purposes, was arguably contentious. The court refused to account for any evidence minimizing the dangers from cannabis use. They followed an earlier ruling and held that, "the harm of the particular drug in question is not relevant in determining the degree of protection afforded by the free exercise clause" (*Whyte* 1984, para. 1021). In light of this ruling against the religious rights of Rastafari, one must question the diligence of the court's balancing exercise. The absence of empirical evidence pertaining to the dangers of cannabis implies that the public protection arguments used to counter the defendant's religious claim were inadequately reasoned. In the unreported case of *Forsythe v. DPP* (1997), the Jamaican court adopted a similar, deficient analysis. In this case, the Supreme Court of Jamaica was called upon to consider whether Jamaica's drug laws infringed the defendant's rights under section 21(2) of the Jamaican Constitution (1962) to freely manifest one's religion. The court relied upon derogations contained within section 21(6) to uphold Jamaica's drug laws, as these laws were deemed to be reasonably required to the extent that they protect public health among other state interests. Yet, despite heavy reliance on the derogations, no attempt was made to demonstrate the harmful effects of cannabis and the dangers it posed to public health. The court was instead content to rely upon an earlier dictum that considered the possession of any illegal drug to be per se an offense against public health. Again, such superficial reasoning leads the author to suggest that this case reads as if the judiciary had predetermined its outcome in favor of upholding Jamaica's drug laws. O'Brien and Carter (2002–2003) could possibly concur with this deduction by recognizing that judges hold their own normative values, and that religious safeguards can be manipulated by the courts to serve majoritarian ends.

Furthermore, several commentators in articles unrelated to the Rastafari plight have acknowledged that the judicial balancing exercise can be artificial, particularly with regard to human rights issues. Alder (2006) uses Edmund Burke's philosophy of the "sublime and beautiful" to demonstrate the mutual exclusivity of legal consequentialist reasoning on the one hand, and the intrinsic value of an

individual's rights on the other. For Alder (2006), a consequentialist perspective dominates the judicial balancing exercise, as it lends itself more easily to a cost–benefit analysis at the expense of truly considering the "beautiful," i.e. the intrinsic, moral value of an individual's rights. Beck (2008, p. 240) goes even further in asserting that individual, moral considerations have little place in politically sensitive areas; rather, "in the absence of moral truths... judges make rights and their choices remain political." Unfortunately for the Rastafari, drug policy is one of the most politically sensitive areas there is. Therefore, any deference to the executive under the guise of neutral, seemingly objective language via the derogations is perhaps predictable, although such an approach remains inadequate. The leading UK Rastafari cannabis case of *R v. Taylor* (2001) provides no exception. Since this case will be analyzed in greater detail later, it is sufficient here to once more acknowledge the court's feigned balancing exercise. There was a judicial refusal in this case to look outside of the typical discourse and to carefully analyze the intrinsic value of the defendant's beliefs (i.e. to consider the wealth of medical, sociological, cultural, and historical material on Rastafarianism and on Rastafari cannabis use). Instead, the court relied heavily upon the three UN drug conventions in deciding against the defendant. As Edge (2006) keenly notes, these are international legal documents of general application and should not, therefore, have been accorded the great significance bestowed upon them throughout this judicial reasoning process. To counteract any insufficient judicial reasoning in *Taylor*, Loveland (2001) suggested that Rastafarians should persuade parliament to amend the drug laws of England and Wales in order to accommodate Rastafari religious beliefs. Yet, even Justice Scalia, a US judge who openly embodies majoritarianist principles, acknowledges that this argument is flawed, since legislative and executive branches of government are by their (elected) nature far more accommodating to popular and socially accepted religious practices than they would be to unconventional forms such as Rastafarianism (as cited by O'Brien 2001). The fact that Rastafarianism's country of origin still refuses to recognize its religious status further supports this contention.

Perhaps the solution is simpler. Tsakyrakis (2009) posits that the best way for the courts to adequately engage with the balancing exercise required when weighing a state's interests against an individual's is to really spell out and openly debate the moral considerations involved. For Tsakyrakis (2009), it is the moral arguments that are at the heart of human right disputes, and as shown above, these are often overlooked or masked by neutral language. The South African case of *Prince* (2002) is arguably the first Rastafari cannabis case to directly spell out these moral issues, as two judgments in particular thoroughly analyze the intrinsic value of the defendant's beliefs. This case involved a law graduate who was denied access to the bar in South Africa due to his religious use of cannabis as a practicing Rastafarian. The defendant claimed that this prohibition amounted to a disproportionate infringement on the religious freedom of the Rastafari, and he thus sought a religious exemption from the relevant drug laws. Four of the nine judges agreed with the defendant and the concurring dissenting judgments of Justice Sachs and Justice Ngcobo were particularly strong. Both justices emphasized the importance

of religious rights, with Justice Ngcobo noting that the prohibition of cannabis for the Rastafari religion constitutes "...a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is very profound indeed" (*Prince* 2002, para. 51).

By thoroughly analyzing the impact such laws have on the Rastafari religion, Justice Ngcobo clearly appreciated the intrinsic value of the defendant's beliefs, and recognized that the current law, lacking in any exemption, is unconstitutionally broad. In his dissent, Justice Sachs further highlighted the differences in Justice Ngcobo's reasoning and the reasoning of the majority judgments. He noted that the real difference in the judgments rests on how much trouble the state should be expected to go to accommodate the religious rights of Rastafarians. Through comprehensively detailing the significance of Rastafari religious practices, the dissenting judges' determined that "the Constitution obliges the state to walk the extra mile" (*Prince* 2002, para. 149, per Justice Sachs). It was thought that a carefully crafted exemption would satisfy all parties, as the state could still achieve its aims without totally restricting the religious rights of Rastafarians in the way that absolute prohibition does.

In contrast, the majority judgments were particularly preoccupied with the practical problems associated with administering a religious exemption, given the lack of any organizational structures or rigid doctrines within Rastafarianism. Regardless, all of the judgments demonstrated a keen knowledge of Rastafari life in a way that had not been exhibited previously. Furthermore, the Constitutional Court allowed expert evidence to be adduced which revealed the multitude of ways in which Rastafarians consume cannabis, and additionally acknowledged medical evidence that suggested that cannabis use does not necessarily cause harm (*Prince* 2002, para. 24). While such remarks are in line with current scientific findings (see Taylor et al. 2012), it remains rather unusual to observe any judicial discourse that does not solely accentuate the dangers associated with illicit substances. It is unfortunate, therefore, that this more open approach did not transfer across to the Human Rights Committee in *Prince v. South Africa* (2007). The committee failed to engage with the underlying moral considerations and completely sidestepped the detailed balancing exercise required as they predictably relied upon facially neutral derogations (*Prince* 2007, para. 7.3). Regrettably, in relation to the Rastafari, much of the case law below also follows a similar pattern.

The Difference in Treatment Afforded to Other Religious Drug Use

The predominant focus of this section will be on the USA, given their strong tradition of juridification of religious freedom claims (Edge 2006). Comparisons will be drawn between the judicial "treatment" accorded to peyote use by the Native

American Church (NAC), and that given to the use of cannabis by Rastafarians. In the early case of *Town v. State ex rel. Reno* (1979), the defendant questioned the constitutionality of the prohibition of cannabis as applied to the Ethiopian Zion Coptic Church (EZCC), a religion with "symbiotic ties to Rastafarianism" (Taylor 1984, p. 1620). In deciding against the defendant, the majority distinguished their decision from *People v. Woody* (1964, para. 817); a case where the Californian Supreme Court refused to prohibit the use of peyote in light of its positive force, and its ability to facilitate strong familial bonds for NAC members. Leaving aside this rather rare, constructive drug discourse for a moment, the justification given for the difference in treatment was that the peyote was consumed by adults, and was confined to certain ceremonies far away from the general population.

In contrast, the majority in *Town* were concerned that children as well as adults, members and non-members alike, consumed the cannabis freely and that it was continuously consumed independently of any particular EZCC rituals. However, in his dissent, Justice Boyd observed this distinction to be insufficient, since an exemption could be subject to certain restrictions, and as such, the majority's concerns could have been dealt with less intrusively. Judge Buckley also agreed that an absolute prohibition on the use of cannabis for EZCC members was excessive in the later case of *Olsen v. DEA* (1989). Olsen, a member and priest of the EZCC, repeatedly petitioned the Drug Enforcement Administration (DEA) for an exemption permitting his church's sacramental use of cannabis. The DEA rejected Olsen's petition along with the majority judgments in this case, citing the potential for abuse in relation to the unrestricted usage of cannabis, and the impracticalities of monitoring any proposed restrictions. While it may be difficult to ensure compliance, Judge Buckley maintained in his dissent that the majority had nevertheless failed to apply the standard of strict scrutiny in reviewing an absolute prohibition to be the least restrictive possible measure. There was no detailed judicial consideration of the needs of the EZCC members since Olsen's proposals to restrict the consumption of cannabis to adult members, once a week, during their Saturday evening prayer ritual were easily dismissed (Mazur 1991).

Although it remains questionable whether all of the above restrictions should even be imposed upon the sanctity of the herb for the EZCC and the Rastafari, the fact that members are willing to restrict their usage could somewhat undermine the judicial reasoning in these cases. Furthermore, the perceived unlimited use of cannabis by Rastafarians was one of the three justifications given in *State v. McBride* (1989) for the difference in treatment accorded to the Rastafari and the NAC. The court additionally considered that the abuse of peyote was far less common than the abuse of cannabis, and that the USA has a special duty to respect the integrity of Native Americans. However, because both substances reside in Schedule I of the Controlled Substances Act (CSA) (1970), there should be no reason why the judiciary should treat them any differently if reasoned from a purely legal sense. Hence, the latter two justifications not only expose the superficiality of the CSA; they also highlight the cultural favoritism behind such decisions. In truth, Judge Buckley was particularly concerned with any Establishment clause

implications in *Olsen* (1989, para. 1468), stating that the DEA had created “a clear-cut denominational preference.”

Interestingly, the majority judgments in *Employment Division v. Smith* (1990) attempted to eradicate any “denominational preferences” of the type established previously. *Smith* effectively banned religious peyote use for a short while, through employing the logic that as drug laws are facially neutral, they should be generally applicable to everybody without exception. Alongside other academics, McConnell (as cited in O’Brien 2001) was fiercely critical of this decision. He observed that, unlike with sex, gender or race issues, minority religions actually strive to be differentiated, and to not be accorded the same treatment as others.

Yet, although the majoritarian reasoning here was flawed, the more liberal, pluralist approach attempted by Judge Blackburn in *Smith* only served to castigate the Rastafarians further (O’Brien and Carter 2002–2003). In his dissent, Judge Blackburn seized upon the discourse utilized in *People v. Woody* (1964) to highlight the positive uses of peyote. In furtherance of these religious claims, he also unfavorably compared Rastafari cannabis use with peyotism, asserting that peyote use by the NAC in a confined ritual was “far removed from the irresponsible and unrestricted recreational use of unlawful drugs” (*Smith* 1990, para. 913).

In deep contrast, it is worth noting that peyotism was therefore not implicated as being unlawful, despite peyote’s Schedule I status, and its use was not deemed irresponsible or recreational, despite the fact that both groups consume their respective substances for predominately religious purposes. Furthermore, the implicated restrictions placed upon the use of peyote for the NAC remain questionable, since a legislative exemption means that their usage is legally effectively unlimited in the Uniform Controlled Substances Act (21 C.F.R. § 1307.31 [1990]). (For more information on the NAC, see Feeney, this volume.) The presence of this flawed discourse demonstrates that even a more pluralist approach has offered little benefit to Rastafarians. In *Smith*, Rastafarianism was viewed as marginal, and as offering no more than a helpful yardstick for evaluating the reasonableness of other religious freedom claims. However, it could be fair to assume that Western jurisdictions are becoming ever more pluralistic and, in religious terms, divided (Crammer 2010). For instance, the Equality and Human Rights Commission (2012) acknowledges that religious issues are increasingly coming to the forefront post the UK’s Human Rights Act (HRA) (1998). Nevertheless, as will be shown, some jurisdictions have responded more favorably than others to these developments.

The Differing Emphases Placed Upon Religious Freedom and the UN Drug Conventions

R v Taylor (2001) was one of the first cases after the HRA to explicitly address the tension between religious freedom and global drug prohibition in England. Taylor was searched by police when approaching a Rastafarian temple, and was found to

be in possession of approximately 90 g of cannabis. He indicated that he was a practicing Rastafarian, and during questioning he further explained that the cannabis had been prepared for an act of worship at the temple. At the trial he effectively argued that his actions should be interpreted as a manifestation of his religion under Article 9(1) ECHR, and henceforth any criminal proceedings against him ought to be justified under Article 9(2) ECHR. As noted previously, although the court agreed that Article 9(1) was implicated, they justified the criminal proceedings and the absolute prohibition of cannabis by reference to the derogations contained in article 9(2) ECHR; as aided by a reliance on the UN drug conventions to the exclusion of all other considerations specific to Rastafarianism.

Arguably, such a partisan approach has affected not just the reasonableness of the *Taylor* decision, but possibly all of the other relevant cases that have followed it. In truth, not only has a later Rastafari cannabis case endorsed *Taylor* (see *R v. Andrews* 2004), but so have cases which examine the broader tensions between individual human rights and global drug prohibition, such as *Hardison* (2005). (For further detail see Walsh, this volume.) Accordingly, in light of such questionable reasoning, *Taylor's* far-reaching effects could be deemed problematic. In any event, several authors throughout this book have suggested that excessive deference to the UN drug conventions in relation to certain human right concerns is largely unnecessary (see Metaal; Feeney and Labate; Feilding, this volume). In relation to *Taylor*, Walsh (2010) has further observed that an overreliance on the UN drug conventions should not be legally persuasive. Unlike the ECHR, the conventions have not been incorporated into UK domestic law, and thus they should not take precedence (Walsh 2010). Besides, the conventions are not as restrictive as the *Taylor* decision might lead one to believe. Article 36(1)(a) of the Single Convention on Narcotic Drugs 1961 specifies that its provisions are subject to a jurisdiction's "constitutional limitations." This provision is therefore presumably applicable to issues of domestic significance, such as religious freedom.

The USA in particular has historically placed more emphasis upon religious freedom than the conventions in matters relating to the NAC. More recently, in the case of *Gonzales v. O Centro Espiríta Beneficente União do Vegetal* (2006), a US court allowed a religious exemption for a New Mexican branch of a Brazilian church, so that its members could continue to consume ayahuasca tea, a sacramental brew containing the controlled substance DMT. Given the generally unfamiliar nature of the religion, this case could further emphasize Crammer's (2010) assertions that Western jurisdictions are becoming more pluralist. Moreover, in choosing to uphold religious freedom, this US decision, combined with those pertaining to the NAC, somewhat undermines the significance bestowed upon the UN conventions, and the perceived necessity of absolute prohibition in *Taylor*.

The South African *Prince* case also goes some way to undermine the reasoning in Taylor. Although the majority saw their conclusions as being in line with the conventions, far more attention was focused on the nature of Rastafarianism, particularly on the fact that Rastafarian cannabis use is typically unlimited and thus it would be difficult to regulate. This judicial focus on the amount and quantity of cannabis consumed is not unique and will be considered in more detail below.

Possession Versus Possession with Intent to Supply

With the possible exception of the US (see *Whyte* 1984, para. 1021), all of the other jurisdictions mentioned have placed emphasis on whether a Rastafarian defendant was merely possessing the cannabis for his or her own personal use, or whether they additionally intended to supply others. The English and Italian jurisdictions, in particular, have wholly engaged with this issue. In the English case of *R v. Williamson* (1979), a Rastafarian imported cannabis from Jamaica and was given a more lenient sentence in light of both his religion and his intention to distribute cannabis among Rastafarians only. Similar case facts can be found in *R v. Daudi and Daniels* (1982), as the two Rastafari defendants had no commercial motive, only an intention to supply cannabis to fellow Rastafarians.

While the English court recognized their good character, diverging from *Williamson*, they refused to mitigate the defendants' sentences, citing the seriousness of supplying and distributing cannabis to rationalize the lack of any differential treatment. The same outcome followed a year later in *R v. Dalloway* (1983), further highlighting the distinction between the increased judicial focus on s5(3) of the Misuse of Drugs Act (MDA) 1971 concerning supply, and s5(1) concerning possession. As observed by Gibson (2010), these cases not only reveal a lack of coherence in the degree of moral culpability attached to Rastafarian cannabis use, but the judicial preoccupation with possession versus supply also distances the law from any rights-based discourse; the presence of which could have highlighted arguments in favor of an exemption. Even after the HRA, Rose L. J. in *Taylor* continued to focus on the fact that the defendant was supplying cannabis to other Rastafarians in the temple. He additionally left open the possibility for a different outcome if the defendant was charged under s5(1) only, noting that such an occurrence "raises different considerations" (*Taylor* 2001, para. 17).

However, it is the author's contention that possession versus supply issues are largely superficial in the religious liberties field, serving only to detract attention away from the broader tension between religious human rights and global drug prohibition. Besides, judiciaries could ironically resolve their concerns through providing a carefully crafted religious exemption to both enable and potentially limit the confines of Rastafari cannabis use. Moreover, the US has highlighted that there are actually very few real concerns in practice, since their NAC exemption is effectively unlimited: The only requirement for an NAC member who manufactures or distributes peyote is registration (21 C.F.R. § 1307.31 [1990]). While this further supports the idea that possession or supply matters little to sincere adherents of the faith when considering true respect for religious rights, the only case at present to decide in favor of a Rastafarian was also preoccupied with such issues.

A Landmark Case for Change?

In 2002, the Italian Court of Terni convicted a Rastafarian defendant of unlawfully possessing cannabis with intent to supply. He was given a 16 month prison sentence and a €4000 fine, which was upheld by the Appeal Court of Perugia. This decision was later reversed by the Italian Supreme Court (Judgment No. 28720) in 2008, as the lower courts had not considered the defendant's conduct prior to his arrest or his religious beliefs. When confronted by the police, the defendant handed over approximately 97 g of loosely packed cannabis straight away. He also claimed to be a Rastafarian and that the cannabis was for his own personal and private use. In light of these additional factors, the Supreme Court referred the case to the Court of Appeal in Florence. This Court allowed two documents to be adduced by the defendant's solicitor, the first of which detailed his religious beliefs and the second made reference to his good character (Il mio diritto 2012).

In the former document, the solicitor impressed upon the court the affect an absolute cannabis prohibition has upon his client's religious beliefs. He additionally justified the large amount of cannabis found by reference to the fact that Rastafarians typically smoke around 10 g per day to bring them closer to Jah. Furthermore, since the cannabis was not divided, and the police found no tools to suggest that the defendant intended to supply it to others, the court was willing to conclude that the cannabis was solely for the defendant's own personal consumption. The public prosecutor appealed against this decision to the Italian Supreme Court, stating that it was unreasonable to assume the cannabis was for personal consumption simply because it was not divided. In 2012, the Supreme Court upheld the Florence decision, and in quashing the defendant's conviction, they ruled that the Florence decision was logically and coherently reasoned (Judgment no. 14876).

Yet, although this case is no doubt a landmark in Rastafari cannabis case law, it is perhaps unfortunate that such emphasis was placed upon possession versus supply issues in all of the judgments and case reports (Il mio diritto 2012). Some cynics may also attribute this decision to a higher court requirement to rectify legal technicalities, since the lower courts erred substantially in failing to appreciate the defendant's religion. Nevertheless, the higher courts did debate the tensions surrounding religious freedom and global drug prohibition, and, ultimately, they did decide in favor of upholding a Rastafarians religious right to consume cannabis.

Concluding Remarks

When surveying an overview of the Rastafari journey through the courts, it is evident that there has been some real progress. The courts have moved on from the blatantly discriminatory discourse present in the late 1970s and early 1980s, where even the definitional elements to establish Rastafarianism as a religion, and the associated cannabis use as a bona fide religious manifestation, could not be

easily satisfied. Both developments in the law relating to religious freedom and the growth of Rastafarianism worldwide have contributed to this progress. Nonetheless, subtle discrimination is arguably still rife amongst the US, English, and Commonwealth Caribbean judiciaries, since there is often manipulative and artificial reasoning employed when weighing a Rastafarian's religious right to use cannabis. In truth, almost 30 years ago, Taylor (1984) predicted that the courts would continue to defer to state interests, and cite enforcement problems to justify an absolute prohibition of the Rastafari herbal sacrament.

Yet, as Frank (1990) asserts, in free societies, people should be prevented from surrendering their constitutional freedoms, in the same way that governments should be prevented from undermining those freedoms through faulty legislation or judicial interpretations. To justify the restrictions placed upon the Rastafari, the aforementioned judiciaries have largely and superficially fixated on: potential enforcement and possession versus supply issues; differentiating between more socially acceptable religions; the UN drug conventions; and a perceived need to defer to constitutional derogations, at the expense of engaging in any genuine sense with the intrinsic value of Rastafarian cannabis use. Indeed, as previously established, this usage is integral to a Rastafarian's very identity, given the religion's non-conformist, anti-colonialist origins and its integrated racial, political, and cultural dimensions. Accordingly, the weight afforded to more orthodox judicial constructs detracts attention away from the real tension between religious human rights and global drug prohibition. As Crammer (2010) observes, in an era of heightened human rights and religious pluralism, legal systems are increasingly required to handle the problems of accommodating religious freedom, while simultaneously holding together society at large. It is therefore essential that all of the judiciaries concerned begin to thoroughly appreciate the significance of cannabis to the Rastafari in a way similar to that of the Italian and South African courts.

The dissenting judgments in *Prince*, and the higher court's analysis in the Italian decision, revealed a legitimate attempt to accommodate the Rastafari reality within their respective legal frameworks. Thus, it could be posited that sincere progress is being made to genuinely move the case law forward from the sacrilegious to the sacramental, despite there being considerable room for improvement; subtle discrimination still exists for the majority of jurisdictions discussed. Nevertheless, if progress can be made in spite of the prejudice, marginalization, and hostility that has historically surrounded Rastafarianism, then perhaps there is hope; not just for the future of this movement, but for an appreciation of human rights in this field more generally.

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The Expansion of Brazilian Ayahuasca Religions: Law, Culture and Locality

Kevin Feeney and Beatriz Caiuby Labate

In the spring of 2006, the United States Supreme Court issued a ruling in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* opening the door for the União do Vegetal (UDV), one of the Brazilian ayahuasca religions (Labate et al. 2009; Labate and MacRae 2010), to import ayahuasca for their religious ceremonies. Ayahuasca is a decoction of two Amazonian plants, *Psychotria viridis* and *Banisteriopsis caapi*, which has historically been used by indigenous and mestizo Amazonians in shamanic and healing rituals, among other contexts. In the twentieth century, the use of ayahuasca was adopted by several Christian religious groups which have since become well established in Brazil, and which currently have a presence throughout Europe, and North and South America (Labate and Jungaberle 2011). The expansion of these religious groups has drawn attention due to their use of ayahuasca, which contains dimethyltryptamine (DMT), an internationally controlled substance (Labate and Feeney 2012; Tupper and Labate 2012).

The response to the international expansion of the Brazilian ayahuasca religions has been one of unease among states where these groups have emerged. However, the suppressive responses to these groups, based on "illicit drug use and drug trafficking," raise complex questions about law, culture, and locality in a world that is increasingly marked by transnational cultural flows and mobile populations. So far, these responses have found support in international law like the United Nations Convention on Psychotropic Substances, which allows limited use of controlled substances by geographically bound "traditional" groups, but prohibits use that falls outside of these groups and their territories.

K. Feeney (✉)
Washington State University, College Hall #215, Pullman, WA 99164, USA
e-mail: kevinmfeeney@gmail.com

B.C. Labate
Center for Economic Research and Education - CIDE Región Centro, Circuito Tecnopolo Norte s/n, Col. Hacienda Nueva, 20313, Aguascalientes, Ags, Mexico
e-mail: blabate@bialabate.net

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While globalization is not a recent phenomenon, the rapid transmission of goods, ideas, and populations, as facilitated by modern technology, is unprecedented in the history of humankind. As populations and cultural forms become increasingly mobile, different values and traditions will eventually come into conflict, possibly leading to criminal sanctions against behaviors and practices of cultural and religious minorities. In order to describe and examine the expansion of ayahuasca traditions, and the resulting implications for international exchange and movement of peoples, this chapter will analyze the mechanisms of international drug control as well as their potential impact on transnational communities and cultural forms. Finally, we will suggest ways in which international law can be adapted in order to achieve its goal of preventing drug-related health problems while simultaneously maintaining international respect for human rights and cultural diversity.

International Drug Regulation

International regulation of "illicit" drugs is currently founded upon three United Nations Conventions: The Single Convention on Narcotic Drugs (1961 Convention), The Convention on Psychotropic Substances (1971 Convention), and The Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention). The purpose of these treaties is to employ international cooperation in order to "prevent and combat" the "evil" of drug addiction (1961 Convention, Preamble), though no definition of the term "addiction" is ever offered. As international treaties, each of these Conventions seeks to accommodate certain realities of signatory states, although such accommodations are limited.

The 1961 Convention allowed states with traditional uses of cannabis, coca, or opium to temporarily reserve the right for individuals within their territorial boundaries to continue traditional uses, with the caveat that use would be eliminated within 15–25 years of the Convention's ratification (Art. 49). The 1961 Convention also allows limited and regulated production of cannabis, coca, and opium for research and development of pharmaceutical medicines. This is in line with the Convention's recognition that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes" (1961 Convention, Preamble). In this sense, the Convention is seen as serving a dual purpose: first, combatting addiction; and second, ensuring continued access to effective pain medications.

The 1961 Convention pushes a strong "modernist" agenda, one supposedly aimed at eliminating "antiquated" (bad) practices and replacing them with modern (good) practices, as illustrated by the time-limited exemptions for use of cannabis, coca, and opium preparations (Art. 49, sec. 2). These conceptions grew out of a particular era where many in the West thought of the traditions and cultures of the developing world as "backwards," and sought to explain why Western civilization had "advanced" while the rest of the world remained stagnant. Edward Said (1978)

famously explored and analyzed narratives such as Orientalism that dichotomized the world and helped explain how some cultures were seen as simple and primitive while others were considered progressive; narratives that often helped justify political projects grown from imperial and colonial contexts. In addition to race and geography, "drug use" has also been a popular explanation for "degenerate" and "primitive" cultures. This is aptly illustrated by comments made in 1949 by Howard B. Fonda, head of the UN Commission of Inquiry on the Coca Leaf, tasked with investigating the practice of coca chewing and any potential health consequences associated with its use. Prior to the start of the investigation, Fonda gave an interview in Lima where he explained, "We believe that the daily, inveterate use of coca leaves by chewing . . . not only is thoroughly noxious and therefore detrimental, but also is the cause of racial degeneration" (Jelsma 2011, p. 2). In concluding his comments he stated additionally that, "Our studies will confirm the certainty of our assertions" (Jelsma 2011, p. 2; see also Metaal, this volume). It should be clear from Fonda's comments that he viewed the Andean cultures as inferior to his own, and we might further speculate that he believed that coca chewing contributed to the "failure" of these cultures to achieve "modern" or "developed" standards of living. Ultimately, the implication of the 1961 Convention—while allowing a brief period for "undesirable" drug use to be extinguished—is that the world should move towards a homogenous and uniform understanding of the use of psychoactive substances, and that modern biomedical attitudes should prevail over diverse cultural understandings of the complex and multifaceted relationships between humans and plants.

Similarly, the 1971 Convention permits signatories to make reservations for "plants growing wild which contain psychotropic substances. . .which are traditionally used by certain small, clearly determined groups in magical or religious rites" (Art. 32, sec. 4). This provision reflects a view that exemptions for psychoactive drug use are acceptable if they are confined to a specific locality, and to a determined cultural group. This notion is mirrored by language in the 1988 Convention which asserts that "The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use" (1988 Convention, Art. 14, sec.2). So, in addition to the geographical and cultural limitations of the 1971 Convention, the 1988 Convention adds the requirement that there be "historic evidence" in order to allow continued use of internationally controlled substances. Strangely, however, neither the 1971 nor the 1988 Conventions specifically prohibit any psychoactive plants.

When taken together, these treaties imply that use of psychoactive substances is only permissible where "traditionally used by certain small, clearly determined groups" (1971 Convention, Art. 32, sec. 4), and "where there is historic evidence of such use" (1988 Convention, Art. 14, sec. 2). While couching this international approach in terms of respect for "fundamental human rights," these conventions are premised on the notion that "traditional uses" will be phased out, either by the explicit timelines set forth in the 1961 Convention, or by the static and geographic notions of culture implicit in these treaties when viewed as a whole (see also Tupper

and Labate 2012). These, and other implications arising out of these treaties, require further examination in light of current global realities.

The first major implication of international drug law, as outlined by these three treaties, is the notion that only long-standing traditional substance use by a particular cultural group is permissible, an idea that suggests that practices with a lengthy history are somehow more authentic, or more "cultural" than more recent manifestations. Next is the notion that culture is a static and discrete coherent whole that is attached to a specific definable territory. Related to this is a presumption that these cultures are no longer capable of increasing the scope of their population and influence, and that the future of these groups is limited; a supposition which may have contributed to the argument for allowing limited exceptions in the first place. Finally, there is the presumption that pharmaceutical drug preparations are safer and more effective than traditional plant preparations. Each of these assumptions, which appear to be founded in ethnocentric perceptions of the virtues of modernity, will be explored below through an examination of the rapidly expanding Brazilian ayahuasca religions.

The Origin and Spread of Brazilian Ayahuasca Religions

The ayahuasca religions arose in the beginning of the twentieth century in Brazil when the rubber booms of the early 1900s and the 1940s brought working class Brazilians into contact with the various indigenous groups of the Amazon. Through this contact, the rubber tappers were introduced to the healing and visionary properties of ayahuasca, a brew used in shamanic rituals among a variety of different Amazonian peoples (Labate and MacRae 2010). When the rubber market in Brazil bottomed out, many of the rubber tappers who found themselves out of work returned to urban life. One of them, an Afro-Brazilian by the name of Raimundo Irineu Serra, brought ayahuasca with him when he returned to urban life in Rio Branco, the capital of the state of Acre (Cemin 2010).

Mestre Irineu is credited with founding the first of the Brazilian ayahuasca religions, Santo Daime, which emerged in the 1930s in Rio Branco. The Santo Daime church was formally established in 1945, and received government recognition in 1971, the same year that saw the passing of Mestre Irineu. Santo Daime, like the other ayahuasca religions, combines elements of folk Catholicism, Afro-Brazilian religions, European esotericism, and indigenous shamanism (Cemin 2010; Labate and MacRae 2010; MacRae 1992). Although Santo Daime has its origins in the Amazon Basin, its emergence was intimately connected to the international rubber market, which, at its height, brought rubber workers into contact with the indigenous population and, with its collapse, brought the rubber workers, along with their knowledge and use of ayahuasca, back to urban centers. As a result, Santo Daime can be seen as arising out of intercultural exchange and internal migrations influenced by international markets (Afonso n.d.); processes that transcend the purely local.

One of the other ayahuasca religions, União do Vegetal (UDV), arose independently from Santo Daime, although under similar conditions. José Gabriel de Costa, or Mestre Gabriel, who had been a rubber tapper in the Amazon in the 1940s, established the UDV in 1961. This religious movement was formed in Porto Velho, Rondônia, a state neighboring that of Acre, where both Santo Daime and Barquinha (another of the Brazilian ayahuasca religions) originally emerged. Mestre Gabriel continued to lead the UDV, the most institutionalized of the three religions, until his death in 1971 (Brissac 2010; Goulart 2010).

The death of both Mestre Irineu and Mestre Gabriel in 1971 resulted in a series of fissures in their respective religious groups. The process of segmentation and expansion that followed led to further diversification, resulting in the spread of both Santo Daime and the UDV throughout Brazil from their meager origins (Labate et al. 2009). In 1985, the Brazilian government began a process of investigation into the religious use of ayahuasca in order to determine how best to address the practices of these emerging religious groups. Since that time, a series of resolutions has been generated in consultation with the ayahuasca religious communities in order to recognize the practices of these groups and also to set regulatory parameters for the use and handling of ayahuasca (Labate 2011; Labate and Feeney 2012). Efforts are currently underway to have the religious use of ayahuasca recognized as part of Brazil's cultural heritage (Labate 2012), a designation successfully adopted by Peru in 2008 (National Directorial Resolution 2008).

ICEFLU, one of the branches of Santo Daime that emerged following the death of Mestre Irineu (also known formerly as Centro Eclético da Fluente Luz Universal Raimundo Irineu Serra [CEFLURIS]), espouses a strong expansionist ideology based on the idea of indoctrination (Groisman 2005; MacRae 1992). According to Groisman (2005, p. 91), the notion of indoctrination among the Santo Daime membership is connected with the idea of spirits, and the actual "expansion of Santo Daime is considered. . .a 'spontaneous' process. . .directed by a spiritual force." Although members of Santo Daime outwardly frown upon proselytism and generally do not invite others to participate in their ceremonies, the religion has expanded rapidly and can now count congregations in over 30 different countries (Labate and Feeney 2012). Much of this expansion can be attributed to the interests of the Western New Age movement, and the missionary propensities of some Santo Daime leaders. Beginning in the 1960s and 1970s, tourists and spiritual seekers from northern countries began to visit congregations of the Santo Daime and other ayahuasca religions in order to participate in their ceremonies (Groisman 2009). Many of these visitors generated interest within their home communities upon their return; some performing private rituals for friends and family while others continued to habitually visit Amazonian and urban congregations in Brazil (Feeney and Labate 2013; Groisman 2009; Labate and Jungaberle 2011).

By the late-1980s, enough interest had been generated that traveling *comitivas* (delegations of musicians and singers) from Santo Daime began to be invited to foreign countries in order to "conduct spiritual works and teach the ritual performances to the locals" (Labate et al. 2010, p. 15). The first official visit of a Santo Daime group in Europe occurred in 1989, when a delegation of CEFLURIS arrived

in Spain for the Easter Holy Week (Groisman 2005). Soon, local congregations began to develop. By 1992, a branch of the Santo Daime appeared in The Hague, Netherlands (Rohde and Sander 2011). An early Santo Daime/New Age hybrid developed in Germany in 1993, and was soon followed by more traditional Santo Daime congregations (Balzer 2005; Rohde and Sander 2011). Informal groups arose in Spain in the early 1990s, and by the mid-1990s, branches of Santo Daime had emerged in a number of countries, including Canada, France, Italy, and the United States (Labate and Jungaberle 2011). Likewise, the UDV also experienced an expansion during this time, with congregations developing in the United States and several European countries (Bernardino-Costa 2011; Labate and Jungaberle 2011). Interestingly, though Brazilian *comitivas* frequently visit and are highly regarded as sources of sacred knowledge by these foreign groups, Brazilian nationals make up only a small portion of the membership of these international congregations. That the majority of the membership in international congregations is non-Brazilian raises questions about the transnational nature of these religious traditions. It also suggests that these new religious movements have tremendous vitality and appeal outside of their humble roots in the Brazilian Amazon.

Historical Evidence of Ayahuasca Use

Under the conventions that guide international drug control, exceptions may be made for "traditional licit" uses of controlled substances, so long as there is evidence of historical use. However, determining whether a particular use is "historical" or "traditional" is a complex endeavour. How far back must evidence of particular "traditional licit" uses go? And must the use be continuous within a particular culture or territory? These are just some of many broad and important questions that remain unanswered by the UN drug conventions. We will attempt to elucidate some of these below.

The use of ayahuasca was first documented in the 1850s. Manuel Villavicencio described the effects of the brew in 1858, use of which had been observed among the *Angatero*, *Mazán*, and *Záparo* Indians of Ecuador (Ott 1993). Richard Spruce, a British botanist, had also reported upon the use of ayahuasca among several South American groups, including the *Tukano*, *Guahibo*, and *Záparo* (Schultes and Hofmann 1992). Some authors have pointed to archaeological data that suggests the use of ayahuasca in South America dates back several millennia (Ott 1993, citing Naranjo 1986), while others challenge this notion (Beyer 2012; Brabec de Mori 2011). In any case, there are reports that 72 different indigenous groups currently use ayahuasca, with over 42 documented terms for the brew (Luna 1986). While there is significant anthropological and historical evidence as to the widespread use of ayahuasca among various South American indigenous groups, the Brazilian ayahuasca religions have their origins in the twentieth century.

In order to be in accordance with the letter of the drug conventions, states must determine how far back a tradition must go before evidence of its practice becomes

"historical." One option would be to begin with the emergence of Santo Daime and the UDV in the twentieth century. Alternatively, the Brazilian ayahuasca religions might be framed as a modern permutation of older historical cultural uses. Such an assertion would be similar to the tack taken by some American Indians regarding religious peyote use in the United States. Although the peyote religion among most American Indian tribes dates back only to the mid-nineteenth century (see Feeney, this volume), evidence for historical ceremonial use of peyote in North America dates back several thousand years. In fighting for legal recognition for their religious practices in the USA, advocates for the peyote religion have cited not only the ancient roots of the religious use of peyote, but also the unique American character of this religious practice.

If the drug conventions cannot be interpreted as recognizing traditions with origins in the twentieth century as sufficiently historic, perhaps the Brazilian ayahuasca religions can make a similar argument to the one made by American Indians, and assert the very ancient roots of the cultural and spiritual use of this sacred brew. This very position was recently taken by a group of experts in a public statement defending the legal right to use ayahuasca (Anderson et al. 2012). Nevertheless, the comparison between American Indian peyote religions and the Brazilian ayahuasca religions is limited by the fact that the latter are not ethnic movements and, as seen before, the letter of the conventions imply some sort of purist or traditionalist view of certain minority groups (for a discussion of the concept of race/ethnicity in connection with traditional American Indian use of peyote, see Feeney 2014).

While strong arguments can be made for the historical basis of the Brazilian ayahuasca religions, the meaning of the term "historical" remains indefinite in the drug conventions. Perhaps more problematic is the equally ambiguous use of the terms "traditional" and "licit." The pairing of the words "traditional" and "licit" in the 1988 Convention suggests two important functions. On the one hand, there is an indication that for substance use to be considered licit, it must somehow be traditional, though no definition of "tradition" is provided. On the other hand, the combination of these terms also implies that some traditional uses may be "illicit," although this term is also left undefined. So, what criteria determine whether a "traditional" use is "licit" or "illicit"? Ultimately, it appears that the determination of "traditional licit" use is up to the signatory state seeking an exemption for such use; that is, assuming that "historic evidence" somehow supports an exemption. In this sense, the definition of these categories is exceedingly circuitous.

Interestingly, the confusing provision in the 1988 Convention containing these terms (Art. 14, para. 2) was negotiated by Peru and Bolivia, neither of which was satisfied with the requirement to phase out local customs of coca chewing, as required by the 1961 Convention. This particular provision has remained a point of international contention (see Metaal, this volume), and there remain questions about how drug control should be balanced against human rights, particularly in light of the 2007 adoption of the United Nations Declaration on the Rights of Indigenous Peoples (see Boiteux et al., this volume). While the language of Article 14 arose because of concerns regarding customary use of coca, this is not explicit in

the text and the text can be read as applying to all plants bearing psychoactive substances. Significantly, as mentioned before, the only psychoactive plants that are explicitly prohibited by the drug conventions are cannabis, coca, and the opium poppy; whereas, the legality of plants containing controlled psychoactive substances, such as *P. viridis*, which contains DMT, remains ambiguous (Labate and Feeney 2012; Tupper and Labate 2012).

The use of ambiguity in international treaties, however, arguably serves a very practical purpose. In order for a treaty to be effective, there must be broad international support, and acquiring such support often requires allowing flexibility among signatory states in how a treaty is implemented and interpreted. However, only states can be parties to international treaties, meaning that individual cultural groups have no recourse under international law if the state in which they reside fails to recognize certain practices involving "controlled" psychoactive substances. To illustrate this point, despite ethnographic evidence of the continued use of psychoactive plants among traditional peoples around the globe, only five countries requested exemptions for traditional use under the 1971 Convention: Bangladesh (unspecified), Canada (peyote), Mexico (unspecified), Peru (San Pedro cactus and ayahuasca), and the USA (peyote). The fact that only a few countries made such reservations does not automatically mean that other states are harassing indigenous groups who traditionally use psychoactive plants, but it does highlight the fact that such traditional groups have no human rights recourse under the drug conventions should they be targeted for involvement in a "criminal enterprise." Another consideration is the political power of states in the international community, and whether countries from the global south, for example, have the political capital to advocate for measures that are protective of their citizenry.

Conspicuously absent from the list of countries with exemptions under the 1971 Convention is Brazil, the home of Santo Daime and the UDV. Interestingly, under the 1971 Convention, a state may only reserve an exemption at the time of ratifying the treaty; meaning that "small, clearly determined groups" with traditional uses of psychoactive plants have no opportunity to advocate for their own interests after the fact. Despite not reserving an exemption for use of ayahuasca under the 1971 Convention, however, Brazil currently allows religious uses of ayahuasca (Labate 2011; Labate and Feeney 2012).

In 1985, an on-going regulatory process began, examining cultural and religious uses of ayahuasca from a multi-disciplinary approach. Anthropologists, lawmakers, scientists, and representatives from different ayahuasca-drinking groups participated in meetings and discussions regarding the safety of ayahuasca and parameters surrounding its "traditional" use (Labate 2011; Labate and Feeney 2012; MacRae 2010). So, while Brazil did not reserve an exemption under the international drug conventions, it has taken a progressive, human rights oriented approach to the regulation of ayahuasca. Such an approach could serve as a model for the international community in balancing the interests of drug control with respect for human rights and cultural diversity (Labate and Feeney 2012).

The Dynamics of Culture and Place

The end of the Thirty Years' War in 1648, marked specifically by the treaties of Westphalia, is widely considered to mark the beginning of an era of state sovereignty, sometimes referred to as Westphalian sovereignty, which established the territorial independence of the nation-state. The alignment of state jurisdiction with geographic boundaries contributed to understandings of culture and "nationhood" as being territorially bound, although state territories frequently encompassed multiple cultural groups. Despite the realities of globalization, which clearly threaten such territorial notions of culture, a common perception that human culture and sociality is "naturally localized and even locality-bound" persists (Appadurai 2003, p. 344). Modern states continue to equate cultural groups with particular territorial boundaries, and proceeding from this premise have made legal and cultural exceptions for groups that were seen as specifically situated in space. This view is illustrated perfectly by the previously mentioned provision of the 1971 Convention, permitting signatories to make reservations for traditionally used psychoactive plants within certain parts of their territory (Art. 32, sec. 4). This provision reflects a view that exemptions for psychoactive drug use are acceptable only if they are confined to a specific locality and to a specific culture group.

The equation of culture with locality, as exemplified by the drug conventions, is especially questionable when modern transportation technology allows one to cross entire continents in a matter of hours, and when "other" cultures are frequently accessible through various forms of media (books, film, music) and communication technologies (telephone, email, Skype, etc.). These forms of media have made cultural practices and experiences, such as those of the ayahuasca religions that originated in the Amazon Basin, progressively more accessible to wider national and international audiences. This is significant since foreign interest in these religious practices have largely contributed to their expansion.

The spread and flow of culture in a world that is decreasingly defined by locality and geographic boundaries presents a clear need to re-conceptualize, or "re-imagine" if you will, established notions of culture, tradition, civic rights, and citizenship. Traditional notions of culture are often based on the idea that culture is static, being fixed in time or place, or otherwise bound by biological characteristics of "race." However, the history of humankind is marked by cultural flows. Culture is dynamic and intangible, with cultural forms and practices having spread historically both through conquest and peaceful contact, and occurring through economic as well as other systems of exchange. The prominence of tea in British culture is a good example of how culture evolves, adopts, and incorporates components of other cultures despite geographic and political boundaries. The ayahuasca religions themselves have their origins in a series of exchanges that brought many disparate cultures together, and can count influences from among African, European, and American Indigenous cultural groups.

An examination of the growth in transnationalism is essential to any efforts to rethink stagnant notions of culture and citizenship. Transnationalism is a term

generally applied to migrant communities who work, or who have otherwise established themselves, in a foreign country, but who retain strong ties to their home country. There are many ways in which migrant communities remain connected to their home countries, perhaps most significantly is a sense of cultural identity connected with their place of birth, but continuing connections with family, including financial obligations, also remain strong. Such transnational communities might be called "transnations," which Appadurai (1993, p. 424) defines as a diasporic collective "which retains a special ideological link to a putative place of origin."

Although migration largely accounts for the growth in transnational communities, the development and growth of such communities is not limited by the global flow of populations. Appadurai's (1993, p. 424) notion of the "transnation" encompasses this idea well. Appadurai suggests that a "transnation" may be comprised of different categories, including individuals connected through religion, philanthropy or military service, among other possible transnational associations. The ayahuasca religions, which are not diasporic in the traditional sense, fit into Appadurai's use of the term transnation if they are viewed as communities; groups that are tied together internationally by religion rather than by ethnicity or national origin.

Despite the fact that many international adherents of the ayahuasca religions do not have ethnic or family ties to the Amazon Basin, the religious connections to the birthplace of these religious traditions are strong. First, Portuguese is a central reference in the rituals, as the religious hymns are sung primarily in Portuguese (even if they also appear in other languages; see Labate and Pacheco 2010). There is also a prominent native discourse within these groups that emphasizes the wisdom and importance of both the Amazon and the Brazilian leadership. Further, ayahuasca, as the religious sacrament, has its origins in the Amazon and can only be produced from plants found growing in tropical areas, such as the Brazilian rainforests. Even though these plants can be cultivated elsewhere, their native habitat retains spiritual significance. Additionally, there are particular ceremonial obligations that apply to the gathering and preparation of ayahuasca that can only be fulfilled at the site of production.

Because of the difficulties associated with growing ayahuasca plants in most northern countries, internationally based congregations of the Santo Daime and UDV generally rely upon importation of ayahuasca that has been ritually prepared in Brazil (Labate and Feeney 2012). As an example of the transnational connections at play, we can look to a 2009 court case from the Netherlands where a Dutch member of the Santo Daime was charged with importation of a controlled substance after he brought containers of ayahuasca into the Netherlands. In his defense, the man argued that ayahuasca "can only be ritually prepared in Brazil," and that importation was therefore necessary in order to practice his religion (van den Plas 2011, p. 336, citing Rechtbank Haarlem 2009).[1]

[1] This is ironic in the sense that the Dutch Santo Daime group, in order to legally defend itself, seemed to foreclose the possibility of developing a local ritual to brew the sacrament in the future.

Problematically, the view that culture is geographically situated remains pervasive among nation-states, political systems whose form of governance often relies on notions of national identity. The perpetuation of national identity is to the benefit of the nation-state, as it creates cohesion among the populace and a sense of national pride as well as population-wide investment into the project of the nation-state. The nation-state has a variety of means at its disposal to enhance perceptions of national identity and to suppress subversive groups. With the ayahuasca religions, whose sacrament contains the controlled substance DMT, a mechanism is already in place for nation-states who see the activities of these religious groups as subversive or undesirable, despite the desire of some of these groups to integrate into the status quo, as is the case with the UDV.

In France, the congregation of a Santo Daime church was prosecuted for possession of a controlled substance, although charges were eventually dismissed after a court determined that the plant components (*B. caapi* and *P. viridis*) of ayahuasca were not specifically prohibited under the 1971 Convention or French law (Bourgogne 2011). Interestingly, following the dismissal, the French government moved quickly to schedule both plants as illicit "sectoidal" products, a move that not only prohibited ayahuasca's component plants, but also suggested that use of these plants is connected with cult-like groups (Feeney and Labate 2013). This is a good example of how a state can shape public discourse to demonize and constrain groups that are undesirable or seen as challenging the status quo.

Another example that merits mention is the experience of the Santo Daime in Germany. Congregations of Santo Daime began to appear in Germany during the 1990s, and in 1999, systematic raids were carried out against different churches, including raids on the private homes of church leaders. Publicity following the raids depicted the group as a "drug sect," and church members soon became the victims of vandalism and threats from individuals in their local community. The local police refused to investigate or prosecute the reported crimes, and eventually one of the congregations decided to go into exile in the Netherlands, due to fears for their safety (Rohde and Sander 2011).

The decision to migrate helps illustrate Appadurai's (1996, p. 191) idea of the "perpetual motion machine," where a cultural group is forced out of one state and must seek refuge in another, before causing new social unrest and being kicked out again. Conflicts that result in exiled and refugee populations often stem from social unrest caused by clashes over identity. Sometimes these conflicts center on ethnicity, language or religion, and sometimes they encompass whole packages of cultural identifiers. While these conflicts occasionally occur between rival groups vying for power, often the conflicts are directly related to the project of national identity.

This defensive position, in effect, prevents the group's rituals from transforming and evolving, and serves as a good example of how external legal impositions can establish a stagnating circularity (or mutual enforcement) between certain cultural manifestations and a specific place.

The ayahuasca religions are currently being reviewed for recognition as part of Brazil's cultural heritage, potentially establishing these traditions as part of Brazil's "national identity" (Labate 2012). Nevertheless, these religions are unquestionably foreign in each of the new countries within which they emerge. Wherever these religions appear, they remain intrinsically tied to Brazil and the Amazon, and the allegiance of these religious adherents is inherently transnational. The development of allegiance to particular states is also unlikely due to the persistent threat of persecution in Western industrialized nations that view consumption of ayahuasca as illegal, or questionable at the very best. The Santo Daime group that fled Germany is a good example of a group that chose allegiance to their religious faith over allegiance to a political state. We have also witnessed examples of North American and European Santo Daime members who have chosen to migrate permanently to the Amazon in order to best practice their faith.

The modern emergence of new national forms, forms that do not align with particular geographic boundaries, are expressed in myriad ways, and are by no means confined to the experiences of the ayahuasca religions. In any case, these religious groups provide a foundation for exploring the conflicts between the regulatory mechanisms of nation-states and the changing realities posed by the continuing growth of transnational cultural forms. They also bring into question the validity of the UN Conventions in dealing with contemporary global religiosities, particularly when human rights are one of the supposed pillars of the United Nations.

"Legitimate" Medicine

Another implication that arises from the drug conventions is the notion that pharmaceutical preparations of psychoactive drugs within Western medicine are preferable to use of traditional plant psychoactives, and can be better controlled to limit the perils and consequences of addiction. This idea of the primacy of pharmaceuticals is steeped in ethnocentric beliefs about the superiority of Western biomedicine; a belief that not only ignores different cultural understandings of health, wellness, and illness, but which also ignores the realities of global wealth disparities, and the impact that an attack on various ethnomedicines will have on impoverished and developing communities. One could write a whole book on the fallacy of the above supposition, but we shall limit ourselves to several brief remarks.

Notably, the 1961 Convention allows the medical use of cannabis, coca, and opium to continue to some degree, although all other traditional and "quasi-medical" uses were required to have been "abolished" after twenty-five years (Art. 49[2]). The language of the 1961 Convention's Preamble specifically recognizes that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes." Despite this exception,

the convention effectively stripped many local communities, communities with lengthy histories of applying these plants safely and effectively, of their medical sovereignty. Under the convention, each country producing one of these three drug plants would have to account for every hectare of land used to cultivate the plant, and would have to establish a government agency to designate such land and to take possession of any medical material produced (Arts. 19, 23, 26, 28). The subsequent trade and handling of these substances requires state licensing and, ultimately, a medical prescription (Art. 30).

At first glance, the removal of some of these substances from common usage may appear quite reasonable. For example, the negative impacts caused by certain uses of opium have been well reported for a long time; its problematic use is known to have reached epidemic proportions in China during the nineteenth century, to which Britain, in no small part, contributed (Beeching 1975). However, the proscription of these drug-plants is indicative of a broader imperialist trajectory of medical "modernization." By reducing access to these effective medicinal resources, some used for thousands of years, a new foundation of medical care is created that relies upon the exclusive production, distribution, and regulation of "approved" medicines. Production by itself, including extraction of resources, isolation of compounds, testing for effectiveness, and marketing, inevitably leads to substantial increases in costs for medical care. Add on top of this the expenses of distributing these medicines around the world, and the regulation of their production and distribution, and the costs of medicines that were once grown and harvested, or collected in the wild, rises precipitously. According to the World Health Organization (2013), the global trade in pharmaceuticals tops US$300 billion annually, and yet many of these drugs remain unavailable to millions of people in the developing world (Melrose 1982; see also Feilding, this volume).

The current disparities in access to medicine illustrate the fact that "modernization" of medicine has nothing to do with ensuring access to effective medications, as supposedly guaranteed by the drug conventions. Imposing restrictions on undeveloped communities with traditional uses of psychoactive plants significantly reduces the ability of these communities to address their own medical needs in an effective and culturally appropriate manner. If one cannot use traditional plant-based medicines and also cannot access expensive pharmaceutical preparations, then medical issues in these communities will, and do, go unresolved.

This system of restricting drug-plants also implicitly equates plant preparations with their isolated compounds, a comparison that has no basis in reality. The coca leaf, as consumed throughout much of South America, is a mild stimulant packed with nutrients (Duke et al. 1975). It is only when cocaine is extracted and used in isolation that it has been shown, in certain circumstances, to have addictive and detrimental properties. While opium, as traditionally prepared, is a powerful narcotic with addictive properties, it is mild in comparison to its pharmaceutical counterparts: morphine, codeine, and heroin (Weil 2004). In the case of cannabis, the U.S. government tried to halt a public groundswell of support for medical marijuana in the mid-1980s by approving pharmaceutical preparations of THC (delta-9-tetrahydrocannabinol) for therapeutic use. However, THC is only one

component of a complex array of cannabinoids contained in cannabis, and the intense psychoactive effects produced by pure THC made it an unpopular therapy among both patients and physicians (Randall and O'Leary 1998; Zimmer and Morgan 1997). In each of these instances, the equation of the plant to one or two of its chemical constituents has resulted in erroneous understandings of the therapeutic and cultural applications of these plants. Plant preparations like ayahuasca, which contains the prohibited substance DMT, are used therapeutically in specific cultural contexts to treat both physical and spiritual illnesses. Such remedies have value and application within particular cultural settings, but are not recognized as legitimate by "modern" medicine, with its reductionist and mechanistic approach to medicine and its Cartesian understanding of health and well-being.

As shown by some chapters of this book, the drug conventions have helped to root out some of the most effective and culturally significant medical plants used by, and available to, developing communities. They have rubber-stamped pharmaceutical drugs as "effective" and "scientific," removed and reduced access to plant-based alternatives, and laid the foundation for a global system of medicine without effective competitors. Looking beyond the drug conventions, the power of "modern" biomedicine to crush the competition continues to manifest in ongoing efforts to sideline natural and alternative therapies (Griggs 1997). The takeover and monopolization of the human body and the field of medicine by a cultural model promoted by industrialized nations has had substantial impacts on global health, and not all for good.

Navigating the Drug Conventions into the Future

As discussed previously, the conventions are replete with ambiguous and undefined terms, such as: "licit," "historic," and "traditional," all used in relation to potential exemptions or reservations that a state may claim prior to joining the individual drug conventions. The precise meaning of these terms appears to be left to the interpretation of individual states, meaning that the state should determine whether particular psychoactive plant use within its territory qualifies as "traditional" and "historic." While the only plants that are clearly prohibited by the conventions are cannabis, coca, and opium poppy, the 1971 Convention allows a procedure for states to make reservations for psychoactive plants growing within their territories that have traditional uses. Although plants that contain psychoactive substances (other than cannabis, coca, and opium) are not technically illegal under the conventions, such an explicit reservation may allow states greater legal latitude, and may help to emphasize the traditional and historic value of such substances.

Unfortunately, under the conventions, reservations may only be submitted upon a state's entry to the treaty, meaning that all states that have already ratified the drug conventions have no apparent recourse. Here is where a recent political move by Bolivia becomes instructive. Coca leaf is a very important part of Bolivia's cultural patrimony (see Boiteux et al., this volume; Metaal, this volume) and, while the state

ratified the 1961 Convention in 1976 without taking a position against the convention's mandate that coca use be eliminated, it soon became clear that this was a mandate that Bolivia could not adhere to. In protest, Bolivia withdrew from the 1961 Convention in 2012 and was able to submit a reservation upon its re-admittance to the convention. Not surprisingly, Bolivia's re-admittance did not go unopposed (Flores 2013). Nonetheless, this move stands as an example of how the drug conventions can continue to be revised and softened, even though such strategies do not challenge the main problematic foundations of prohibition.

Notably, Brazil did not make a reservation for traditional use of ayahuasca upon its entry to the 1971 Convention, even though the state is now considering plans to recognize ayahuasca as part of its cultural heritage. Only Peru has made a reservation for ayahuasca, despite the fact that traditional use of the brew occurs in many South American countries. Even if the religious use of ayahuasca is regulated in Brazil, the spread of the Brazilian ayahuasca religions outside of South America has been viewed to some degree, as we have seen here, as a drug menace; a view that has led to a number of prosecutions internationally. If one considers the Brazilian ayahuasca religions as transnational in character, as we have also argued above, then the position of Brazil towards this cultural export becomes paramount.

Although Brazil has taken progressive steps to protect and respect traditional and religious uses of ayahuasca within its geographical boundaries, it has not demanded international respect for these traditions, nor has it done much to advocate for international branches of the ayahuasca religions presently under persecution. A prime example concerns a Canadian branch of the Santo Daime, which received tentative approval in 2006 from Health Canada (a federal department of the Canadian Government) for use and importation of ayahuasca. Approval, however, was contingent upon documentation from the Brazilian government allowing its exportation (Labate and Feeney 2012; Office of Controlled Substances 2008; Tupper 2011). Brazil never responded to Canada's request for documentation, and the tentative approval of the Santo Daime to import and use ayahuasca was subsequently withdrawn by the Minister of Health (Aglukkaq 2012).

Brazil's reluctance to address issues of exportation may have to do with either its membership in the 1971 Convention, a general lack of consensus as to the legality of ayahuasca under the convention, or perhaps international pressure from countries where ayahuasca use has expanded. Alongside the Canadian government, other states, such as Spain, have recognized UDV and Santo Daime as legitimate religions, but remain inflexible regarding the importation of ayahuasca. This issue could partially be solved, however, if Brazil simply provided export permits. Local state actions such as these may be necessary given the improbability that the drug conventions will be revisited any time soon. Even though providing export permits would not address the limitations of the drug conventions directly, such a move could send a strong message internationally that Brazil considers these traditions to be legitimate and protected cultural practices, and could also signal a willingness to work with other countries to accommodate these religious practices.

A more radical move would be for Brazil to follow in the footsteps of Bolivia by withdrawing from the 1971 Convention and rejoining with reservations. Such a

move would allow Brazil to demonstrate, in the international arena, that the ayahuasca religions are important Brazilian cultural and religious manifestations. Additionally, Brazil could enter a statement into the record declaring an understanding of the convention as prohibiting DMT in its pure form only, and not pertaining to natural products and plant preparations. In this way, Brazil could establish a clear political position that the exportation and importation of ayahuasca is not a violation of the drug conventions, and thus open the door for reluctant states, such as Canada and Spain, to fully recognize and allow the religious use of ayahuasca. Significantly, unlike coca and its derivative, cocaine, there is no international market in ayahuasca, and as a result, Brazil's move would likely be less controversial than Bolivia's. While not perfect solutions, steps such as these would help create awareness about the traditional cultural practices of minority groups, and may lead to political shifts towards accommodation rather than persecution.

Conclusion

Since the passage of the 1961 Convention over 50 years ago, the drug conventions have become entrenched components of international law. It is unlikely that a new convention will be convened anytime soon; nevertheless, there are mechanisms available to individual states that could potentially weaken some of the detrimental components of the conventions. Unfortunately, the potential fixes, proposed herein, will not change the narrow understandings of culture nor the biomedical bias upon which the conventions are built. As globalization progresses and populations become increasingly transnational in nature, with ties of ethnicity, language, religion, family, and occupations expanding to encompass multiple countries, the limitations of the worldview enshrined in the drug conventions, including its attempt to confine "bad" cultural practices within particular geographic boundaries, have become increasingly problematic.

The conventional wisdom that predicted that modernity would lead to increased secularization, and globalization to cultural homogenization, has proven to be questionable. Further, it no longer seems that globalization will lead to the inevitable triumph of the developed world over the developing one, or that "quaint" and "antiquated" beliefs, values, and practices will be replaced by the supposedly superior ones of industrialized nations. Quite the opposite, in fact, appears to be true. This is particularly exemplified by the ayahuasca religions, which have demonstrated a broad appeal in portions of the Western industrialized world and which continue to attract new international adherents.

As nation-states continue to grapple with growing multicultural populations, the myths of "national identity" that once helped legitimize and empower the state as a representative of a particular cultural group are growing weaker. State laws that once encoded "cultural values," are now more frequently seen as discriminatory and oppressive, as exemplified by the use of secularist laws to curb the expression

of unpopular religious groups, restrictions on access to the institution of marriage, and the historical use of controlled substances laws to target minorities.[2]

There are also significant questions that need to be asked about the choice to push the world towards one cultural understanding of health and wellness, as well as the restrictions and regulations that accompany a uniform model. Interestingly, this one-model system of medicine, propounded as "modern" and "scientific," stands in contradiction to other "modern" values, such as individual choice and a free market. More nefarious, however, are the potential impacts that a singular medical model may have in developing parts of the world. Despite the promise of the drug conventions that communities which give up traditional therapeutic uses of psychoactive plants will have access to "real" medicine, many of these communities must choose either to continue their use of traditional medicines in the face of global prohibition and become criminals, or forego these practices and rely upon what little "modern" medicine and medical care is available.

It is important not to lose sight of the fact that the world is inherently multicultural, and that we must be steadfast in preventing the ethnocentrism of world powers in codifying their own cultural beliefs and values into international law. If culture is dimensional and not tied to particular localities, and if multicultural communities cannot be represented by a single "national identity," then traditional notions of social organization will need to be re-examined. Further studies on the expansion of the ayahuasca religions may provide insight into the rapidly changing dynamics of culture and locality, as well as the emergence and rise of unique forms of transnationalism. How these changing dynamics will affect global economic and cultural flows remains to be seen. Nevertheless, these rapidly changing realities, as exemplified by the emergence of transnational religious movements like Santo Daime and UDV, must inform the future of drug regulation, and will ultimately require the international community to re-evaluate the narrow views of culture, locality, and health at the heart of the drug conventions.

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[2] Some good examples include the Opium Exclusion Act passed by the U.S. Congress in 1909 that specifically banned opium prepared for smoking, the preferred method of use among Chinese immigrants. A more recent example is the infamous crack/cocaine disparity, where users of crack, predominantly Black, are punished more severely for possession and sale than powdered cocaine users, who are predominantly White (for more information see: Angeli 1997; Helmer 1975).

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Framing the Chew: Narratives of Development, Drugs and Danger with Regard to Khat (*Catha edulis*)

Axel Klein

Known as the "flower of paradise," *qat* (in Arabic), *miraa* (its Kenyan name), or *chat* (in Ethiopia), is an evergreen shrub of the *Celastraceae*, which grows between altitudes of 1,500–2,500 m. In the wild, khat trees can grow as high as 80 ft in an equatorial climate, but the farmed variety is kept at around 20 ft with constant pruning (Kennedy 1987; Goldsmith 1999; Lemessa 2001). The leaves are picked and rolled into bundles of around 250–300 g in weight. Known as "bundles," or *madruf*, they are sold from roadside stalls, shops, and special cafes (*mafrishes*) across the khat belt. Khat users, known as *khateurs* in French, pick the leaves off the branches and stuff them into the corner of their mouths, where they are slowly chewed. The taste varies depending on freshness and the tannic acid content, which can be up to 10 % in dried material. The taste is astringent, though younger shoots are slightly sweet. In a typical sitting, one to three bundles may be chewed. Environmental and climactic conditions determine the chemical profile of the leaves, and there is significant variation between different types. In Yemen alone, 44 different types of khat are known (Al-Motarreb et al. 2002; Geisshusler and Brenneisen 1987). Fresh khat leaves may contain some 60 different cathedulins (Kite et al. 2003), but the most important psychoactives are cathine and cathinone. For both the economics and the culture of consumption of khat, it is significant that cathine is highly unstable and will degrade after 48 h, leaving a short window of opportunity for traders and users.

Khat is often listed as a stimulant, but this is an unsatisfactory description. The typical dose of a bundle of 200–300 g of young shoots and leaves, consumed in a sitting lasting to 4 h, takes the user through a variety of mental states with different physical effects. A first effect kicks in after 15 min, with a rise of the heartbeat, and a burst of energy that finds expression in animated conversation. A tingling excites the body; shivers ripple from the crown of the head to the bottom of the spine, all sense of fatigue and hunger is slewed off. After a couple of hours a more quiet,

A. Klein (✉)
C1 Darwin College, University of Kent, Canterbury, Kent CT27PD, UK
e-mail: a.klein@kent.ac.uk

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reflective state sets in, with an expanded sense of being, during which seasoned khateurs will be given to grandiose planning and flights of fancy. Conversation takes on sharper contours, and a sense of bonhomie unites chewing companions. Interestingly, the phenomenology of khat remains poorly explored in the English language literature, in spite of the recent rise in academic interest.

From the 1990s onwards, the question of what to do about khat has occupied a growing number of researchers, immigrant community activists, policy makers, and social policy functionaries. Every so often, the subject attracts the attention of politicians or journalists before dipping once again below the radar. Within the small pool of khat specialists, the question of how to proceed, how to regulate—or not—the importation, distribution, and consumption of khat excites a lot of passion. The debate is highly polarized, pitting innocent advocates, who praise khat as a pinnacle of cultural achievement, against crusading prohibitionists, who hold the leaf responsible for the moral decadence of migrant communities and the violent collapse of the Somali state. There are many shades of green between these two positions but, as with all emotionally charged discussions, opinions will vary according to context and circumstance. In order to secure the support of policy makers, the different factions have devised particular methods of presentation. The argument is then compacted so as to fit into particular generic forms that are recognized, read, and respected by the audience. It is of little use, for instance, when arguing for a ban on khat in the UK or Sweden, to refer to the Fiqh, the body of laws deduced from laws found in the Koran and Sunna, because Sharia law does not directly cover them. European policy makers deliberating on questions of public health do not consider the holy book of Islam a religious, legal or moral authority.[1]

In this chapter, I divide the literature into three distinct genres, each located in a different field of inquiry and action. In the first instance, I therefore want to present a meta-narrative, or a story about the way that khat stories are told. This is not intended to be exhaustive, but rather is an interpretive scheme, introduced to spell out how the presentation of information is linked to action. I will argue that the way in which information is framed and presented is accompanied by an awareness of consequences. The authors present their material according to conventions, knowledge of the audience, and familiarity with the discourse to which it contributes, and call implicitly or explicitly for action: typically for more funds to carry on the research.[2]

In the UK, the authors and activists in the khat community, chewers or not, are concerned with a phenomenon that is itself a consequence of a process which is clumsily captured by the term "globalization." In referring to the sudden availability of exotic products effecting significant changes to the patterns of consumption, it forms part of the unfolding story of modernity itself. Historians have identified the epochal changes that began with the European maritime expedition as a search for spices (Courtwright 1982). Substances that were treasured not for nutritious value,

[1] This has not stopped the Swedish anti-khat campaigner Renee Besseling from citing the Koran in her arguments to sway Islamic immigrants against chewing khat (Omar and Besseling 2008).

[2] Or rather, financial support for a lifestyle that includes the production of research.

but their transporting effects. In the Medieval imaginary, paradise is often depicted as a place where spices abound (Schivelbusch 1992). At a time when European food culture was simple and the choice of staples narrow, spices like pepper, nutmeg or vanilla could open new dimensions of sensual experience and pleasure, and were often worth their weight in gold. Lifting the consumer out of the ordinary was a sensation both uplifting and mind altering.

It has also been argued that in societies haunted by famine, food played a very different role than in the contemporary post-scarcity society. Mass hallucinations, for example, have been attributed to the infestation of wheat with hallucinogenic fungi.

As Shivelbusch and others have demonstrated so convincingly, the quest for spices coincided with, or even precipitated, a change in consumer preferences; a consequence, perhaps, of the cultural and political changes associated with the rise of the European bourgeoisie. By the seventeenth century, stimulant beverages (tea, coffee, cocoa), nicotine, and sugar were transforming the European palate (and nervous system). With no nutritious value, oddly habit forming and mind altering, they have been classified as "soft drugs" (Goodman 2007), but are more fittingly described as *Genussmittel*: substances of pleasure.

If khat is only one more in the range of substances procured from exotic cultures, it differs in important respects. It came to Europe via people from East Africa and Yemen, and it has not been repackaged and adapted to European styles and tastes.[3] Though in the early period of contact Europeans were apt to copy indigenous forms of consumption—hence the popularity of smoking, chewing, and sniffing tobacco, all modes of administration found in different parts of the Americas (Goodman 2002)—they would very quickly be transformed as they were integrated into European social customs, be these coffee houses or the sweetening of cocoa. References to the exotic origins were relegated to packaging (Sheller 2004). None of these processes have occurred with khat, which has come to Europe with the reversal of population flows from the mid twentieth century onwards. While there were always risks attached to imported novelties—one remembers that one of Christopher Columbus's companions was arrested by the Spanish Inquisition for smoking—the twist now is that the initiative is no longer in the hands of returning conquerors, but incoming migrants.

Accompanied by a cultural package of beliefs and customs that must find accommodation in the dominant culture of the host country, these migrants change, in due course, the country they make their home, and are also changed by it. Furthermore, they introduce political complexities interwoven with identities that may appear indistinguishable to external observers. In the process, aspects of

[3] Arguably, with the exception of Hagigat, a pill form containing synthetic methcathinone, popular as a legal high in Israel—and of course mephedrone,4-methylmethcathinone. In 2010, this synthetic stimulant became the symbolic legal high in the UK and other European countries. Though brought under control in 2010, it continues to enjoy popularity as an MDMA substitute particularly in the nightclub and party scene. The active ingredients are the cathinone derivatives methcathinone and methylone.

cultural heritage, including the use of traditional *Genussmittel*, are also affected. Adapting to their cultural surroundings, migrants are reviewing their relationship with khat and adopting new narratives.

Khat Narratives

In many European countries where the status of khat has become a matter of political debate, members of the Somali community who advocate restrictions have risen to prominence. Some are former users, even self-declared "addicts," who claim to present an insider, or cultural, account, and also claim to represent the community. Because they are providing at least the appearance of authority and authenticity, these activists are welcomed by prohibitionist politicians, even if their overall political objectives are quite different.[4] In one London neighborhood, for instance, khat provided a common cause for conservative Muslims and groups opposed to immigration (Klein 2007). To underline the respective positions, natives tend to emphasize their ignorance about khat, cast metonymically as a foreign menace, while community members present themselves as insiders steeped in cultural knowledge and technical knowhow. In the welter of community studies that have been authored by UK Somalis over the past 10 years, one of the stated aims has been to introduce the khat phenomenon to a non-Somali audience.

The media has not missed the opportunity to shock and awe with stories about a new drug. Article headings such as "a legal form of crack cocaine," and another "khatastrophe," or "let the quat out of the bag" have provided newspapers with an opportunity to entertain and inform. Unusually for a legally permitted substance, khat has been presented time and again as a novel phenomenon, and the investigative journalists as heroic pioneers. The shrill tone has been echoed in the Spanish media (Klein et al. 2009), while in Sweden the reporting has been described as "one-sided and stable over time. It focuses exclusively on the direct negative effects khat use has on social relationships, mental and physical health, and employment" (Nordgren 2012). The words are often attributed to an affected family member or some authority figure from the migrant group (Omar and Besseling 2008).

[4] In the UK, one of the most vociferous proponents of khat control in 2011 was the Member of Parliament for Milton Keynes, Frank Lancaster. As a loyal member of the Conservative Party, he also supported strict reductions in immigration.

Travelers Tales

The role of the community spokesman shedding light onto a dark corner of urban Britain reflects the directional changes in the flow of goods and people occurring under globalization. But, in essence, these stories continue a long tradition in European literature of travelers' tales written up from expeditions by seamen, missionaries, and military men, all describing foreign lands and outlandish customs, mixing observation, science, and anecdote in an early example of infotainment. Naturally, the balance varies enormously, and particularly in relation to khat, where the first mention in the European literature includes sober descriptions of leaf size, stems, and growing conditions. Pehr Forsskål, the great Swedish/Finnish botanist, provides the first detailed account in his mapping of the vegetation of Yemen (Forsskål 1776).

Forsskål is not untypical of several generations of Europeans, including the last of the great explorers, Wilfred Thesiger, in not taking to khat. All we read about are complaints about the bitter taste, but no account of the effect. Considering that it was established scientific practice, from John Humphrey to Sigmund Freud, to closely observe and record the effects different substances were having on the user, this failure is surprising (Jay 2001). In part, this may be explained in what MacAndrew and Edgerton (1969), writing about alcohol, described as the importance of social learning when processing alcohol. Far from reducing drug effect to the pharmacology of drug and user, effect and behavior were revealed to be a social construct, and "drunken comportment" the product of cultural learning. Travelers in the eighteenth and nineteenth centuries did not have the opportunity to acquire that cultural knowledge and learn to become khateurs; unlike, for instance, the process by which marijuana users of 1960s California learned to integrate their substance use into their lives (Becker 1963). If the effect of drugs is the convergence of pharmacological factors, the expectations of the user, and the setting (Zinberg 1984), then khat failed to stimulate the early European experimenters because they simply did not know what to expect. Arguably, few travelers knew what to expect from ayahuasca, ibogaine or kava, yet all of these have impacted users. But the reason for this lack of appreciation is perhaps best articulated by the inveterate Victorian traveler Richard Burton in his detailed description of khat consumption and a balanced assessment of psychoactive risk:

> Europeans perceive but little effect from it, the Arabs however, unaccustomed to stimulants and narcotics, declare that they cannot live without the excitement. It seems to produce in them a manner of dreamy enjoyment...The people of Harar (Ethiopia) eat it every day from 9 a.m. till near noon, when they dine and afterwards in something stronger—millet beer and mead. (Burton 1856)

This view was supported by the US consul to Aden, who wrote about khat for the National Geographic Magazine in 1917 (Moser 1917). He was unable to perceive any effects after chewing "a huge amount," but found that he had trouble going to sleep at night. Khat is a mild stimulant, comparable to coffee, which originates in the same region, and receives favorable comment in the Arabic and Turkish

literature introduced by Krikorian (1984), including a mention by the famous Moroccan geographer Ibn Battuta from 1332. While these sources have yet to be made accessible to English-speaking audiences, they share with the European accounts an objective distance between the observer and the observed. There is no intention of interfering with the phenomenon of khat use itself, whatever its merits. At the time, the popularity of khat in Yemen and Eastern Ethiopia is compared to the prohibition in Saudi Arabia or in Ethiopia's highlands, and in each case is justified on religious grounds. But both license and sanction are part of the phenomenon described.

It has been noted that the tone changes in the early twentieth century as the role of the European observer morphs from visitor to colonial official (Gezon 2012). Where travelers write up and celebrate difference, officialdom sees only difficulties. This shift may well reflect a qualitative transformation in the pattern of consumption occasioned by contextual changes, including cultural dislocation of colonized populations and physical processes such as urbanization, internal migration, and the sedentarization of formerly nomadic populations. In British Somaliland, the governor, Sir Gerald Reece (1948–1954), lamented the lethargy and dissipation that was setting in among vigorous and healthy nomads once they had settled down. He worked hard to curtail the use of khat, which was one of the new-found vices, until he realized that all along his driver had been transporting khat in the boot of the Governor's car (Klein and Metaal 2010).

At the same time, one should be aware of the subjective concerns of the writer troubled by the prickly issue of maintaining control over restive subjects. Khat chewing is identified with idleness, a waste of resources, and resistance to European authority, as "natives become difficult to handle and antagonistic to all forms of authority" (Peters 1952). Condemnation of native consumption cultures has been a continuous feature of imperialism, from the persecution of coca chewing by the Catholic Church in Latin America to the restrictions on alcohol in colonial Africa (Ambler 1990; Pan 1975).

Empires have vanished, the exotic substances and people have arrived in the neighborhood, but tales of travel to khat countries still succeed in drawing an audience. One of the most accomplished recent accounts is perhaps Kevin Rushby's book "Eating the Flowers of Paradise" (1998), which is both a wonderful travelogue through Ethiopia and Yemen and a vivid evocation of the complicated relationship between the user and his chew. The book contains lively descriptions of "scoring" khat, of the rooms in private houses where it is chewed, but also of the anxieties of the user, the sense of urgency of having to obtain a bundle, the anticipation, the sociability, the excitement, and then the effect as the khat kicks in and reality looses its moorings.

Many of the anthropological contributions retain a detached objectivity (Beckerleg 2010; Carrier and Gezon 2012; Goldsmith 1999; Kennedy 1987; Klein 2007; Varisco 1986; Weir 1985) even when crossing boundaries to engage in technical discussion in other disciplines; still, their work remains grounded in the primacy of the social and the cultural. Combining the "thick description" of local experience with contextual information on politics and economic reality, these

anthropological accounts provide a holistic counterweight to the material reductionism prevailing in other fields. Gezon, using a critical medical anthropology framework, argues that one cannot explain how people behave when using khat simply by reductive biochemical descriptions, but must consider questions of context and culture.

The rising number of studies conducted in the East African diaspora, particularly in the UK, are also partly in this tradition (Griffiths 1998; Warfa et al. 2007; Klein 2007; Patel et al. 2005). Funded, as they often are, by government agencies, they have a different orientation, and view the issue through a prism of social problems. In as far as they are groping for answers, these studies share a feature with the products of the second large corpus of work, which falls into the development discourse.

Khat as a Development Issue

This discussion stretches back to the science of political economy emerging in the eighteenth century with wealth creation as its central theme. For the colonial administrations of the different Imperial nations, but particularly the British Empire, economic development or progress becomes the dominant theme. First of all, revenue had to be generated to fund the administration itself. Secondly, promoting the welfare of colonial subjects, people deemed to be unable to govern themselves, had become the legitimating notion of high imperialism.[5] These paternalistic concerns mark a significant shift away from the more rapacious character of empire in preceding periods, where overseas territories served purely for economic benefit, and effected a colossal transfer of wealth from, say, the Americas or India to Europe. But they also entailed the systematic subordination of indigenous populations, followed by the structural relegation of their cultures along a social evolutionary scale that had assumed both the concepts and the authority of modern science. It was adamant in its superiority and increasingly immutable, particularly to representations of "native" interests.

As the lofty ambitions of the imperial mission could not be realized with the tight-fisted allocations made available by the foreign and commonwealth office, colonial administrators in many colonies turned to raising revenue with taxes on the various "vices" to raise capital. In West Africa, British administrators funded their benevolent government from duties on alcohol and tobacco imports (Heap 2002), and in the Far East from taxes on opium parlors (Brook and Wakabayashi 2000; Trocki 1999). In East Africa, the trade in khat was encouraged by the authorities

[5] Value for the imperial power at first: The perversity in the colonial discourse is that colonial officials are promoting policies designed to improve the material well being of a people who they have no mandate for, a people who never asked to be governed by the officials and their class, and whose interests are often in conflict with those of the administrators and of the imperial power.

who gained a fiscal benefit, for example, the Italian administration in Ethiopia, and discouraged by those who worried about the outflow of currency. The attempts by British and French colonial administrations to control the khat trade in Djibouti (1956/1957), Somaliland (1921–1957), Aden (1957/1958), and Kenya (1945–1956), were motivated, at least in part, by political and financial calculations. As bans invariably proved unenforceable and counterproductive, they were, in the best tradition of administrative pragmatism, speedily revoked.

In the 1960s, the creation of wealth, now termed development, modernization and growth, became both purpose and raison d'etre of the independent state right across Africa. But economic progress was often intermeshed with other goals, including nationalist expansion and religious idealism. When economic decline occasioned by the fall in commodity prices and deteriorating terms of trade during the 1970s diminished the capacity of African governments to determine domestic policies, their claim to the role of development agent was challenged by the international financial institutions. From the 1980s onwards, the World Bank and the International Monetary Fund (IMF) imposed policy packages known as structural adjustment programs (SAPs) upon African governments that were characterized by a reduction in government spending and the fostering of exports, mainly minerals and agricultural commodities. Working with abstract notions of aggregate growth, the technocratic proponents could justify the deleterious social consequences of SAP in terms of ultimate good. In time, the tenets of neoliberal ideology were modified by the humanitarian concerns of a social development discourse that found expression in the Millennium goals, opening a space for considerations other than economic, and significant for the question of khat.

In the development discourse proper, dogma and social propriety are of marginal importance to the cost/benefit analysis. Core issues are the allocation of resources, yield, and return. In Yemen, for instance, where the khat industry employs 14 % of the labor force and accounts for at least 6 % of GDP (Lauermann 2012), the critical question is resource allocation. Khat is an important cash crop, particularly for poor farmers, and organizing the sale and occasions for chewing, from elaborately decorated cafes to the renting out of benches in urban areas, secures formal and informal sector livelihoods. Contested, however, is the use of water resources. This is not unique, as an imbalance between increasing water demand and existing limited water resources is being experienced in all countries of the Arabian Peninsula. But in Yemen, the largest proportion of irrigated water is used for cultivating khat (Almas and Scholz 2006). Water is pumped up from the aquifer on which the capital Sanaa is built at an unsustainable rate. Moreover, the ministry for agriculture subsidizes the diesel used by farmers for pumping the water. The question arises whether encouraging the depletion of scarce water resources for cash crop production is a sensible economic strategy (Gatter 2009).

In Kenya, one discussion focuses on land use by khat farmers. There is concern that farmers are pushing into areas that are ecologically fragile. Against a backdrop of rising demand for khat, farmers in many parts of the country are trying to cash in by planting small plots of khat on hillsides that have traditionally been left uncultivated. There are risks of exhausting poor soils and accelerating deforestation

(Gessesse 2009). It has also been argued that it is precisely the use of marginal lands that underlines the boon that khat has been for East African farmers. These are mainly small holders who cultivate khat as part of a diversification and income generating strategy. Production is in the hands of independent farmers, with no commercial enterprises or plantations involved. It is grown in addition to food crops, often replacing other cash crops like coffee that have failed to live up to promises and, in many cases, ended with farmers accruing debt (Feyisa and Aune 2003; Gebissa 2004). Khat can be planted in different soils, provides up to three harvests a year, and requires relatively little labor input. As the crop is hardy, there is little need for pesticides and other expensive inputs (Anderson et al. 2007; Gebissa 2004).

Across East Africa, khat farmers supply local and regional markets in Djibouti, Somaliland, and Sudan with a small, but important, flow to Europe and the Middle East. Strong underlying demand has secured price stability. There is no chance of dislocation from events beyond control and outside the risk calculus of African farmers; say, a bumper harvest in South America.

Furthermore, the distribution of khat creates income opportunities for traders and retailers, many of whom in Nairobi, Addis Ababa, Madagascar or Somaliland are women. According to Lisa Gezon's recent study of khat in Madagascar, "Khat has provided expanded economic and relationship opportunities for many women" (Gezon 2012). The preparation of khat for export or for long distance trade has also engendered a processing industry employing thousands in urban centers like Nairobi and Addis (Anderson et al. 2007). Here, people sort out the khat stems trucked in from the country, weigh them, and roll them into banana leafs.

The transportation of khat from the field to produce markets, and from there to consumption centers, engages legions of transporters and long-distance trucking companies (Carrier 2005). This trade, from Ethiopia and Kenya to Somalia, Sudan, and Tanzania, has created horizontal linkages in economies that are otherwise vertical (Klein et al. 2009). It has stimulated regional, economic integration that is a precondition for development. The story of khat illustrates once again how African farmers can respond once market opportunities and infrastructural facilities are in place.[6]

While khat exports and expansion were contingent upon infrastructural developments, governments in Ethiopia and Kenya have never provided direct assistance to the sector. Indeed, in both countries, khat farmers have been at best neglected by rural extension services. In Madagascar, senior government officers maintain a position of disapproval, while in Uganda, there is much ambiguity at official and street bureaucracy level, including confusion with cannabis prompting unwarranted arrests and confiscations (Beckerleg 2010a, b; Gezon 2012) In Somalia, the ban issued by the regime of Siad Barre led to khat farms being ploughed under in the north of the country, adding fuel to the fires of civil war.

[6] As was demonstrated by the expansion of cocoa farming in West Africa in response to opportunities during the late colonial era.

Government attitudes may merely echo the diffidence of international donors. Saudi Arabia has campaigned for decades against khat, eradicating crops in the region bordering Yemen and funding efforts by international agencies to impose controls. Interestingly, patterns of use persist in spite of these sustained efforts (Ageely 2009). Bilateral development assistance agencies, like GIZ, DfID, USAID or CIDA[7] have not only refused to support the activities of khat farmers, but have even invested in crop substitution programs. Concerned with a holistic interpretation of development, aid agencies consider khat, with its euphoriant and potentially habit-forming effects, unsuitable for assistance.

Overall, consideration about rural livelihoods and the urban informal sector, foreign exchange earnings for developing countries, and the benefits of crop diversification receive little attention in khat-related policy discussions. Neither the World Health Organization (WHO), nor the International Narcotics Control Board (INCB), nor the discussions held in North America and Europe take such issues into account. This is not surprising; the African poor, be they rural or urban, are on the margins of global decision making and find it difficult to make their voice heard; secondly, as noted above, the khat economy has been driven by local demand and supply, with minimal external support and no technical assistance by the development community. It is a veritable proof of the ineffectiveness of development assistance. Thirdly, khat is one of very few African exports that is controlled down the entire commodity chain by African producers and traders. At no point do multinational companies take over. Hence, there are no loud voices clamoring in support of the trade.

The history of coca provides a disturbing parallel, not only because of similarities in pharmacological effect and mode of administration, but also the history of control. When coca leaves were added to the schedule of controlled drugs it was co-classified with cocaine, a substance of exponentially higher potency. Though coca has a long history and its use is widespread, neither farmers nor chewers were consulted in the decision to impose an international ban (Metaal, this volume).

Drugs Discourse

Indifference to African poverty may be justified as lying outside the terms of reference of expert panels deliberating on the classification of khat in a European country. When deciding to ban khat in the Netherlands, for instance, the ostensible reason provided by the Dutch government was that it gave cause to public nuisance (Klein 2012; De Jonge and Clary Van der Veen 2010). The terms of reference given to the working group of the UK Advisory Council on the Misuse of Drugs were to

[7] GIZ: Gesellschaft für International Zusammenarbeit; DfID: Department for International Development; USAID: United States Agency for International Development; CIDA: Canadian International Development Agency.

look at the medical and social harm caused by khat to khat-chewing populations in the UK who are mainly of Somali, Ethiopian, and Yemeni descent.

In effect, the migrants and refugees who have escaped warzones and camps have far more political clout than the farmers and traders left behind. The wellbeing of diaspora communities, whose livelihood is guaranteed by social security provisions, trumps the survival strategies of indigent rural communities in Ethiopia or Meru. Sahan, for example, is a network of Somali women who meet on the premises of a community center in West London. Their leaflets and presentations to local councilors lament the availability of khat, which they say keeps the men away from their homes. Some of the campaigners do not shy from drastic measures. Abdi, a former user turned veteran campaigner for khat control, argues for criminalization of use, even if it leads to the incarceration of Somali men. "Better we lose them for a few years to prison than for a lifetime of use" (Middlesex University 2011).

The fortunate minority of émigrés then assumes the role of a victimized majority, who are suffering at the hands of khat trading profiteers. But they draw support from the third, and most dominant, discourse, with its assumption of all the privileges bestowed by contemporary science. It draws on medical research, chemistry, pharmacology, and social science to make up a discrete discursive field. It is what I suggest is the drugs discourse, with its particular narrative structure, consisting of several segments. It is centered on a notion of a problem, which has to be identified, analyzed, guarded against, and reversed. The authors seek to push the narrative along one of the different segments by providing research or practice based information. The show of modesty expressed by preceding qualifications, and the self-confessed limitation of the claims, are balanced out by the certitude with which the findings are presented.

Since the creation of the drugs field by political fiat in the 1920s, there has been a process: A substance is identified by one of the dedicated drug control bureaucracies, subjected to a series of scientific analyses, and the results with recommendations are passed on for policy makers to decide upon. In some countries, a similar process is conducted at the national level, even though disconnects may occur between analysis and policy.[8]

They are scientific in the sense that they follow established protocols on what constitutes evidence, the establishing of facts, and the presentation of the information along genre-specific conventions. But built into the discourse is a mechanism to problematize the substance. Hence, we find few publications here on, say, the protective properties of khat use in sustaining communities through stressful situations, such as exile, war or social deprivation. Or how khat use in a socially sanctioned environment predicts abstinence from alcohol and other drugs. Nor do

[8] In the UK in 2008, the unpopular Gordon Brown government changed the status of cannabis against the advice of the ACMD experts. In Jamaica, the findings of the 2000 Ganja commission were discarded after warnings by the US ambassador about the consequences (Klein 2001).

we read about much about the positive attributes of khat as an appetite suppressant, for pain management, or for controlling fatigue.

In part this may be because journals like *Addiction*, *Drug and Alcohol Review*; *Drugs: Education*, *Prevention*, *Policy*; *the International Journal of Mental Health Systems*; *European Addiction Research*; *Social Science and Medicine* and so on, are targeted at practitioners, whose interest is in the effect and impact on their practice. It is primarily the problematic consequences of drug use that establish relevance for medical and paramedical professionals, and the efficacy of their interventions that creates interest. Once a substance has entered into the field, the discussion develops its own momentum. The key mechanism is analogy, made in the case of khat with amphetamine (Kalix 1987). After cathine and cathinone had been identified as the two active alkaloids with stimulant properties similar in chemical composition, a case could be made to treat it like amphetamine, which, in itself, had been brought under control because of its similarity to cocaine.

The authors of these papers participate in a social process that sets the frame for the discourse. Objectives for publication reach beyond the presentation of findings, including the desire to advance their careers and reputations as protagonists within a given domain of academic practice. But they also validate the pretensions of the discourse to which their contribution adds vigor. The considerable numbers of papers discussing the harmful properties of khat or its contribution to mental health conditions belong to, and are only publishable because, there is such a thing as a drugs discourse.

This discourse on drugs is not simply a response to the mind-altering, habit-forming quality of certain substances. It is because these qualities have been, first of all, defined as problematic, and secondly, because, having been found to be problematic, they become subject to state sponsored intervention. At issue, then, are not so much the risks and dangers presented by khat and its consumption, but the work of the scholars. What the discourse records instead is the diligence of researchers, the keen observation of health professionals, and the careful orchestration of macro measures by policy makers. It is, in short, a testimony of professional practice in relation to a particular set of problematized human behavior.

There are indeed suggestions that excessive khat use can be a contributing factor to mental health conditions, but such problems have been qualified by the confounding variables, principally PTSD, among affected populations (Kassim and Croucher 2006; Kroll et al. 2010; Odenwald et al. 2009, 2010). Questions about the relationship between uncertain residential status of asylum seekers, or sleep deprivation of people without permanent homes who are chronic stimulant users, remain unexplored. Such lines of inquiry fall strictly outside the professional interests of the discourse participants and are therefore abandoned.

Similar professional interests are paralleled in the discussion of somatic risks, where research suggests that khat use can be damaging to liver, kidney, and heart. There are contributing factors, including vulnerability, excessive use, and poor diet. The latter is particularly significant, as poor diet prevents the production of enzymes to metabolize the khat, leading to the accumulation of khat in the liver,

causing toxicity. These findings should prompt intervention that target risk groups with health information, screening for vulnerability, and the provision of services.

But the framing of khat as a drug, and the launch of a discourse within this discursive field, precludes such soft options. There are no service-related beneficiaries to lobby for health awareness campaigns, but there are drug treatment services reporting the "need" for khat support services. The policy process itself follows its own instrumental logic. The British Crime Survey, for instance, is a bi-annual household survey designed to establish levels of crime victimization but also of drug use prevalence. Amidst a range of controlled substances, researchers have included khat, even though it is as legal and as free of controls as a soft drink. In 2012, the Advisory Council on the Misuse of Drugs was assessing khat for the third time in 6 years, having twice before pronounced the risks of misuse not to warrant control.

It is also found in everyday discourses, particularly among immigrant communities. Some informants of Somali origin, for example, would insist that khat was not a drug and compared it to the pub. They did not mean its psychoactive effect, but that, like alcohol, khat was a culturally integrated, harmless form of leisure. Other informants, by contrast, emphasized that khat was a drug, and because it is a drug, it needs to be controlled.

Policy Decisions on the Status of Khat

That drift towards control, or rather the legal repression of people consuming and selling khat, is a logical conclusion, and built into the drugs discourse. By framing khat as a drug, the outcome is almost pre-determined. In the UK, where for decades a commonsense, laissez faire approach prevailed, authoritarianism is set to triumph. As so often with repressive policies, it is brought about by a bizarre coalition of unlike-minded partners. Prominent is the voice of Somali women suffering the depredations of their partners. It is alleged that their husbands, fathers, and sons waste funds from tight family budgets on khat, come home in a drug-fueled rage to beat spouse and children, and are too inchoate or unmotivated to find work. This presentation of self-inflicted, undeserving poverty dovetails with populist caricatures of asylum seekers. At a deeper level, it echoes a common disparagement of African masculinity.

It is not only figures from the conservative political establishment who are calling for controls on khat. They are joining common cause with the Islamic fundamentalists who reject the accommodation struck by Islamic teachers in Yemen and Ethiopia centuries ago and declare it to be haram (forbidden) to Moslems. One observer wryly remarked that campaigners for banning khat in the UK share both the appearance of long beards and hardened attitudes with the followers of Al Shabaab, the Al Quaida-linked faction of Islamic extremists who brutalize khat chewers and murder khat traders in Somalia (Ghelleh 2012).

A ban on khat would present Jihadist groups with the biggest political success in Britain for over a decade. Ironically, it has been facilitated by the bustling activism of conservative politicians, and a rightwing instinct to be tough on drugs. Moreover, the destruction of a lucrative export trade further undermines the fragile economy of East Africa and gives another distal spur to immigration. The question of trade-offs has to be recognized; a UK ban on khat imports will, by destroying economic opportunities, become another push factor to the population outflow from the region.

Control Regimes

In 15 EU countries, then, khat is a controlled substance. In the cases of Sweden and Norway, where controls were introduced in 1989, the reasoning derives from the scheduling cathinone and cathine on the recommendation of the WHO Expert Committee in 1985. A subsequent review (2002) concluded, however, that at the current state of knowledge the risks of harm from khat use did not merit further controls. Classifications and penalties vary, though it is not a police priority anywhere. Possession alone is an offense for quantities of 5 kg in Norway and 1 kg in Denmark. In Sweden, prison sentences have been imposed on khat "traffickers" importing quantities in excess of 200 kg. In the spring of 2011, the recreational use of khat was prohibited in the Netherlands. The UK followed two years later; up until then, it was imported as a vegetable and subject to a Value Added Tax. It could be purchased from corner shops, green grocers, and small supermarkets in the UK. Most notable, perhaps, were the vibrant khat cafes or mafrishes where khat could be purchased and consumed on the premises. Against the advice of the Advisory Council on the Misuse of Drugs, the government decided to impose a ban. The impact on the Somali community, as well as on Kenyan exporters, is likely to be severe.

The Complexity of Drug Terminology

The complex causal chains of policy decisions made within a simple control paradigm reveal that the term "drug" is not a scientific category, but a construct, and that it triggers a chain of political actions that invariably lead to control. The term "control," as it is used in English, is, however, a misnomer. Experience with other substances shows that the opposite happens, as long as there are both market demand and willing supply chains.

It could be argued that the consequences of legal restrictions are more injurious to public health than non-intervention. Extrapolating from the experience with other controlled drugs, the following can be anticipated: (1) deterioration in the

quality of the product and adulteration, (2) the replacement of softer with harder drugs, and (3) criminalization of supply chains.

It is also fairly well established that the impact of criminalizing the culturally-entrenched customs of minorities leads to conflict with the law and aggressive policing. It furthermore fuels racism and alienation and sets up structural disadvantages for stigmatized communities. Some of these trends can be seen in countries that have banned khat, such as Canada. In Scandinavia, early prohibitions (Finland in 1981, Sweden and Norway in 1989; Denmark in 1993) have not led to a marked improvement in the social conditions of the Somali migrants. It appears that far from attracting Somalis from khat-ravaged countries, the migration flows the other way: towards the UK.

In response to the impending calamity, it is therefore suggested to consider alternative ways of framing the issue. Instead of describing khat as a drug, a term that neither its psychoactive effect nor any potential complications justify, a different category could be used, such as the German term *Genussmittel*. It should be acknowledged that consumption of khat, like the consumption of many other substances, entails risks to wellbeing. Chewing too much khat will affect one's sleeping pattern because it keeps the user awake. So will drinking too much coffee. These are not harms for which the police should be called out.

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Salvia divinorum, Hallucinogens, and the Determination of Medical Utility

O. Hayden Griffin III

Federal Drug Regulation

During the eighteenth and nineteenths centuries, the United States Federal Government did not have any legislation that affected domestic drug use. During this time period, the regulation of drugs was delegated to state and local governments (Courtwright 2004; Friedman 1994; Musto 1999; Spillane 2000, 2004). In such an environment, drug use was common and widely unregulated. Brecher and the Editors of Consumer Reports (1972) referred to nineteenth-century America as a "dope fiend's paradise" (p. 3). Drugs such as opiates, cocaine, and marijuana were widely available through a variety of sources. Furthermore, a prescription from a licensed physician was not necessary to obtain drugs (Brecher and the Editors of Consumer Reports 1972; Courtwright 1982, 2001; Gahlinger 2004; Goode 2011; Musto 1999; Spillane 2000, 2004). Perhaps the most notorious example of the lack of regulation of drugs and the wide availability of them was the patent medicine industry. Pharmaceutical companies marketed and sold "patent" medicines: drugs that promised to cure virtually any and all ailments a person might be afflicted with (Courtwright 1982, 2001; Friedman 1994; Gahlinger 2004; Goode 2011; Hawthorne 2005; Musto 1999; Spillane 2000, 2004). These "medications" were referred to as "patent" medicines so that the manufacturers of these products did not have to disclose the formulas (Fischelis 1938).

In 1906, the Pure Food and Drug Act was passed. The law did not ban or control any drugs; it only required that makers of food products and drugs list the ingredients of their products (Friedman 1994; Gahlinger 2004; Goode 2011; Musto 1999; Spillane 2000, 2004). Passage of the legislation was the culmination of many years of intense lobbying efforts. As Sutherland (1940) noted, 140 pure food and drug bills were introduced in Congress over a 30-year period before the Pure Food and

O.H. Griffin III (✉)
University of Alabama, 1201 University Blvd - 210, Birmingham, AL 35294, USA
e-mail: hgriffin@uab.edu

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Drug Act was finally passed. Sutherland attributed the delay in the passage of the legislation to the strenuous lobbying efforts of the pharmaceutical industry. Only 8 years later, in 1914, Congress passed the Harrison Narcotic Act. The act was largely intended as a record-keeping law to track sales of opiates and cocaine, but it also required a prescription by a physician before these drugs could be dispensed (Acker 2002; Courtwright 1982; Gahlinger 2004; Musto 1999; Spillane 2000, 2004). Not only did the Harrison Narcotic Act limit who could dispense drugs, but the act also limited who could be considered legitimate patients. Prior to passage of the Harrison Narcotic Act, many physicians would prescribe controlled dosages of opiates to addicts, a practice referred to as "addiction maintenance." This was considered an acceptable practice of medicine. However, the Harrison Narcotic Act required that all drugs be "prescribed in good faith." The United States Supreme Court interpreted this clause as a prohibition against the dispensation of drugs to addicts. Thus, a sizable population of "patients" became "criminals" if they decided to continue taking drugs because they could no longer legally obtain them from a physician (Acker 2002; Courtwright 2001; Goode 2011; Musto 1999; Spillane 2000, 2004). The Harrison Narcotic Act and the subsequent Supreme Court decisions that disallowed addiction maintenance firmly established medical utility as one of the deciding criteria to determine if a drug should be available to the public. Additionally, final authority to determine if a drug has medical utility would be vested within the government.

Although marijuana was not included in the Harrison Narcotic Act, marijuana would later be controlled through separate legislation (Bonnie and Whitebread 1999; Gahlinger 2004; Goode 2011; Himmelstein 1983; Musto 1999). The first marijuana prohibitions began at the state level when Massachusetts prohibited the sale of marijuana without a prescription in 1914. Several other states passed similar legislation and by 1933, 29 states prohibited the non-medical use of marijuana (Bonnie and Whitebread 1999). In 1937, the United States federal government passed the Marihuana Tax Act. The legislation required people registered with the federal government to pay a $1.00 per ounce tax every time marijuana was transferred between people. If a person was not registered with the federal government, the tax was $100.00 per ounce (Bonnie and Whitebread 1999; Gahlinger 2004; Goode 2011; Musto 1999). According to Bonnie and Whitebread (1999), federal lawmakers did not want to add marijuana to the Harrison Narcotic Act because they feared that inclusion within the act would indicate that marijuana had recognized medicinal properties. Thus, federal lawmakers decided to develop a prohibitive regulatory tax based upon the National Firearms Act, which required a $200 tax on every machine gun that was sold. (For more information about case law concerning marijuana, please consult the chapter by Brown in this book.)

Although the Harrison Narcotic Act controlled the medical use of opiates and cocaine and the Marihuana Tax Act effectively made marijuana illegal (unless someone could afford to pay the prohibitive tax), it quickly became clear that the United States federal government needed a new strategy to effectively regulate drugs. New drugs were rapidly emerging, many of which were not opiates. Thus, the Harrison Narcotic Act would have to be continually amended or, perhaps, a new

regulatory process was needed. Two categories of drugs would be the driving force behind the next federal legislative attempt at more efficient regulation: amphetamines and barbiturates (Rasmussen 2008; Spillane 2004). In 1965, the United States passed the Drug Abuse Control Amendments (DACA). DACA regulated and required physician's prescriptions for three categories of drugs: barbiturates, amphetamines, and central nervous system (CNS) stimulants. The legislation also added in another catchall category of drugs with a "potential for abuse" due to any depressant, stimulant, or hallucinatory effect. This last catchall category was developed for two purposes. The first purpose was that federal drug regulators recognized the need to plan ahead for the regulation of future drugs. The second purpose was the negative reputation lysergic acid diethylamide (LSD) was gaining (Spillane 2004). LSD was first synthesized in 1938 by chemist Alfred Hoffman while working for the Sandoz pharmaceutical company. Hoffman did not realize the psychoactive properties of LSD until he accidentally spilled a small amount of the drug on his hand in 1943. Four years later, Sandoz introduced LSD to the pharmaceutical market under the trade name Delysid. Psychiatrists and the United States military were among the first to research the possible applications of LSD (Gahlinger 2004; Lee and Shlain 1994). By the mid-1960s, 2,000 scientific articles had been published discussing the drug (Gahlinger 2004). However, primarily due to the actions of Harvard psychology professors Timothy Leary and Richard Alpert, who began as researchers studying the potential therapeutic benefits of the drug but primarily became known as advocates of the recreational use of LSD, the drug gained a notorious reputation and was thoroughly demonized (Gahlinger 2004; Griffiths and Grob 2010; Hofmann 2005; Johnson et al. 2008; Lee and Shlain 1994). Although DACA represented a step in the direction towards developing a more efficient regulatory framework for the regulation of drugs, it had several shortcomings. The most prominent of these shortcomings was that the legislation did not differentiate between regulated drugs. As Spillane (2004) notes, "Pharmaceutical manufacturers who may have been willing to accept some measure of additional regulatory control over their products resisted being lumped together with other drugs they regarded as obviously more dangerous" (p. 21). DACA was short-lived and would only last for 5 years until the current regulatory framework was enacted.

In 1970, the United States federal government enacted the CSA as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The CSA replaced all existing federal legislation that regulated drugs. Although the CSA is multi-faceted and regulates several other aspects of drug use, the most important part of the CSA is the classification system for drugs it established, or as it is known within the act, the scheduling process. Five categories or "schedules" of drugs are established based upon eight criteria, three of which seem to be the most important: medical utility, safety of the drug, and potential for abuse. Schedule I, the most restrictive classification within the CSA, is reserved for drugs with no recognized medical utility, a very high likelihood of abuse, and some degree of danger (Courtwright 2004; Gahlinger 2004; Goode 2011; Griffin et al. 2008; Spillane 2004). Examples of Schedule I drugs are: gamma hydroxybutyrate acid (GHB),

diacetylmorphine (heroin), LSD, marijuana, and methylene-dioxy-methamphetamine (MDMA). As Jaffe (1985) notes, the process of scheduling has greatly affected the practice of medicine and biomedical research. The consequences of the process have proven both beneficial and costly. Although the system provides a mechanism through which the abuse liability of drugs can be more comprehensively considered, restrictive scheduling can effectively remove drugs from a physician's available options for the treatment of patients and place rigid restrictions on researchers that can effectively prevent research. For instance, during her testimony before the United States House Commerce Committee, Engel (1999) of Orphan Medical recounted the hurdles her company would face if GHB was placed into Schedule I. To comply with security protocols required for research utilizing a Schedule I drug, she speculated her company would have to build a $20 million dollar facility.

Perhaps more controversial than the fiscal hurdles required to conduct research using Schedule I drugs is who has the power to decide if a drug has medical utility. Although the FDA provides recommendations for the proposed schedule a drug should be classified within, ultimate scheduling authority resides in the Drug Enforcement Administration (DEA), unless overridden by congressional legislation. On July 27, 1984, the DEA announced the agency intended to classify MDMA as a Schedule I drug. Several drug researchers and medical practitioners protested the decision and, as a result, hearings were scheduled to review the decision. After the DEA conducted hearings in Washington, DC, Kansas City, and Los Angeles, the DEA determined that Schedule I was an appropriate classification for MDMA. Supporters of MDMA were not deterred by the decision and eventually the matter was litigated in court. Both an administrative law judge and the First District Court of Appeals disagreed with the DEA and ruled that MDMA should be placed into Schedule III. However, the DEA was only required to reconsider their decision administratively. On March 23, 1988, MDMA was once again classified as a Schedule I substance, where it has remained since (Eisner 1994).

Debates concerning the medical utility of drugs such as marijuana, MDMA, GHB, and others that have been classified as Schedule I, usually concern some amalgamation of the utility and the socially constructed reputation of the substance itself. However, the class of drugs known as the hallucinogens presents a much deeper debate. As many have noted, hallucinogens are often niche drugs with essentially no potential for abuse, addiction or overdose. Many people find the psychoactive properties and altered states of consciousness caused by hallucinogens unpleasant. Some people will even describe these experiences as terrifying. Furthermore, this reputation alone may deter many from even trying hallucinogens. Indeed, the fact that so many hallucinogens are listed in Schedule I is more a testament to the negative reputation these drugs have been labeled with, primarily as a result of their constant association with the American counterculture movement of the 1960s (Gahlinger 2004; Goode 2011). Aside from these issues is a deeper comprehensive controversy that has existed since the Columbian Exchange: What should be considered an acceptable practice of medicine? *Salvia divinorum*, a plant with psychoactive properties that has recently gained attention within the popular

media, and the scrutiny of lawmakers in many countries, including the United States, is another example of the complexities involved when considering hallucinogens.

Salvia divinorum

S. divinorum is a member of the mint family. The active chemical within the plant, which is responsible for the psychoactive properties, is salvinorin A. This chemical has a unique effect on Kappa-opioid receptors, and the selective activation of the receptors typically results in an intense, but brief, dissociative state which typically lasts approximately 15 min or less (Grundmann et al. 2007; Prisinzano 2005; Roth et al. 2002; Siebert 1994). *S. divinorum* is native to the Oaxaca region of southern Mexico, a region inhabited by a group of indigenous people known as the Mazatecs (Wasson 1962). Gordon Wasson, a wealthy banker, was fascinated by psychoactive mushrooms and hallucinogens (Gahlinger 2004; Hofmann 2005). He financed many expeditions throughout the world to document different psychoactive mushrooms and plants, and was often accompanied by Harvard botanist Richard Schultes (Gahlinger 2004). Wasson embarked upon his first journey to Oaxaca in 1953 (Hofmann 2005; Wasson 1962).

Wasson (1962) noted "At an early date, we learned of a psychotropic plant that the Mazatecs consume when mushrooms are not available" (p. 77). Since Wasson was preoccupied with studying and documenting mushrooms, it was not until later that he investigated the plant he referred to as "a less desirable substitute" (p. 77). Eventually, Wasson obtained samples of the plant and submitted them to the Botanical Institute at Harvard University (Hofmann 2005). Due to the samples decaying in transit to the laboratory, it took several attempts before the plant could be identified (Wasson 1962). Eventually, botanists Carl Epling and Carlos Jativa identified the plant as a previously undiscovered (to the scientific community) species of salvia (Hofmann 2005). Wasson (1962) recounted that despite his friendly relations with the Mazatecs, and that they would freely discuss *S. divinorum*, the Mazatecs were unwilling to show Wasson either the seeds of the plant or where the plants were cultivated. Wasson noted that "virtually all" Mazatecs were aware of *S. divinorum* and he speculated that most had their own supply of plants. He believed the plants were located in remote ravines, but Wasson and his companions never personally observed any places where *S. divinorum* was cultivated. This secretive practice surrounding the cultivation of hallucinogens dates back to the arrival of Spanish conquistadors to the Americas, who believed the use of hallucinogens were akin to pagan rites and the work of the devil. The Spanish attempted to prevent indigenous people from continuing these practices, but only succeeded in driving them underground (Schultes et al. 2001).

Perhaps the biggest reason why hallucinogens are not more widely accepted by Western medicine is the continuing divide between European and Ameridian views of healing. As Schultes et al. (2001) note, many people who have belief systems

based upon ancient traditions (not just in the Americas) have believed that hallucinogens are useful to contact the spirit world and, in some cases, leave this plane of existence. Hallucinogens gain their medicinal value for people of traditional populations due to their understanding of what causes illnesses. For traditional Amerindian populations, illness is often believed to be caused by some disconnect between a person and the spirit world. Therefore, to ascertain what is ailing the person, a shaman (or *curandero* in mestizo cultures), will utilize hallucinogens to contact the spirit world and obtain a diagnosis for the afflicted person. For Mazatecan rituals, this is how *S. divinorum* is utilized. According to Wasson (1962), the Mazatec people would refer to *S. divinorum* as *hojas de la Pastora*, which means "leaves of the Shepherdess." In some instances the plant would be referred to as *hojas de Maria Pastora*, which means "leaves of Mary the Shepherdess." Wasson believed this was a strange name for *S. divinorum* because he was unaware of any tradition within Christianity that referred to the Virgin Mary as a shepherdess. Wasson speculated that this might be an attempt by the Mazatecs to "sanctify" a ritual that is rooted in paganism. Wasson could not determine how long *S. divinorum* rituals had been taking place. He speculated that the practice most likely predated the arrival of the Spanish to the Americas, but noted only cryptic references existed among early Spanish writers of a plant which *possibly* could have been *S. divinorum*. Emboden (1979) states, that in addition to *S. divinorum*, the mint family has several psychoactive species. *S. divinorum* does not grow from seeds, but the reclining branches of the plant fall to the ground and eventually root. Emboden noted that the plant needed to be cultivated to grow and did not appear to be present in the wild. *S. divinorum* does not flower until it reaches seven or more feet in length. Emboden describes the leaves of the plant as "almost an iridescent green."

Based upon observations during his expeditions, Wasson (1962) described one detailed example of a Mazatecan shamanistic ritual that involved *S. divinorum*. If a person was suffering from an illness and the source of the affliction could not be ascertained, *S. divinorum* would be used in a ceremony to determine the cause of the illness. A curandero would obtain 50 leaves of the plant if a patient "does not take alcohol," and one hundred leaves "when he takes alcohol." The leaves of *S. divinorum* are "rubbed" in water and "the potion" is given to a patient in a quiet isolated place at midnight. After a patient has ingested *S. divinorum*, the curandero will wait 15 min for the drug to take effect. The patient will enter into a dissociative state and will speak "in a trance." The curandero will listen to the patient and presumably obtain a diagnosis for the illness. Eventually, the patient will shake their clothes to rid themselves of the evil spirits that are causing the illness. When day breaks, the curandero will prepare a bath for the patient using the water in which *S. divinorum* has been "rubbed" and bathe the patient. The Mazatecs believe that the bath will end the patient's dissociative state. Wasson also recounted that a *S. divinorum* ritual could be used to investigate claims of theft or when something is lost.

In addition to the route of administration Wasson (1962) described, Siebert (1994) notes that *S. divinorum* leaves can be chewed as well. He states that the leaves must be chewed thoroughly so that the salvinorin A can be absorbed by

the oral mucosa. Furthermore, the longer a person chews *S. divinorum* leaves, the greater the intensity of the dissociative state. If the leaves are swallowed too quickly, salvinorin A cannot produce intoxication because the body's digestive system will deactivate the chemical. Lastly, *S. divinorum* may be smoked. Leaves of the plant can be crushed and smoked or the leaves can be impregnated with tinctures of salvinorin A extract. Salvinorin A extract can be purchased in different levels of potency and is more powerful than smoking the unadulterated leaves (Gonzalez et al. 2006; Bucheler et al. 2005; Siebert 1994). Smoking *S. divinorum* appears to be the most common route of administration among recreational users (Khey et al. 2008; Miller et al. 2009; Stogner et al. 2012).

Siebert (1994) lists many different effects people have reported while under the influence of *S. divinorum*. In some cases, people perceived that they were inanimate objects. This is a phenomenon Kelly (2011) observed when he conducted qualitative interviews with 25 *S. divinorum* users. One of the survey participants recounted that on one occasion, when he was under the influence of the drug, "I thought I was made out of Legos" (p. 48). Another user reported that he felt as if he had been turned "into a piece of art on the wall and people were looking at me" (p. 48). Some people have reported a sense of déjà vu (Siebert 1994). Singh (2007) reported a case study of a 15-year old boy who, in addition to experiencing déjà vu, appeared paranoid, could not articulate his thoughts, and had slow speech for a three-day period of time after using *Salvia*. Siebert (1994) stated that some people lost the sense of their body and, in some cases, believed there were some unknown forces physically affecting their body. The use of *S. divinorum* has been known to cause uncontrollable laughter in many users. Lastly, Siebert noted that, while under the influence of the drug, some people reported overlapping realities or a sense that they were in different places at the same time. Kelly (2011) recounts one user, while under the influence of *S. divinorum*, felt as if he was transported to the "Spanish coast." One user reported that time seemed to stand still, while another reported his trip seemed much longer than it had actually been. One consistent finding among researchers, which Siebert (1994) recounts, is while some users of *S. divinorum* reported similar effects to other hallucinogens, such as ketamine or dimethyltryptamine (DMT), many have noted that *S. divinorum* provided a "quite unique" experience (Siebert 1994). One example of this type of experience was described in a television news report when a person who had used *S. divinorum* stated "In my personal opinion, it's like taking acid and mushrooms and ecstasy and slamming a 40 and huffing a nitrous balloon all at the same time" (Blake 2006). Some researchers have recognized *S. divinorum* as one of the most potent naturally occurring hallucinogens (Bucheler et al. 2005; Valdes 1994).

Exactly when recreational use of *S. divinorum* began is unknown. Halpern and Pope (2001) conducted an Internet search on December 10, 1998 by entering the word "hallucinogens" into the yahoo.com search engine. At that time, yahoo.com was the most commonly used Internet search engine. The researchers identified 81 websites from their search. Among the search results was a now-defunct website with the URL http://ethnobotany.com. Leaves of *S. divinorum* were available for purchase from this website. When describing the plant, Halpern and Pope referred

to it as "a plant containing the little-known hallucinogen salvinorin A" (p. 482). In February of 2004, Dennehy et al. (2005) conducted an Internet search using the search engines from google.com, yahoo.com, aol.com, and msn.com. The authors used two search terms: "buy herbal high" and "buy legal high." Ephedra alkaloids were the most commonly mentioned substance, mentioned in 27 % of the websites that were identified. However, as the researchers noted, these substances were removed from the market by order of the FDA on April 12, 2004. The second most commonly mentioned substance was *S. divinorum*, mentioned in 17 % of the websites that were identified. Although it could be argued whether this amount of information indicated *S. divinorum* was popular or could be considered a commonly available substance, as Griffin et al. (2008) noted, "one could surmise that *S. divinorum* products have taken the place of ephedra as the most common substance available via the Internet" (p. 184). They further note that the first "major" article to appear in the United States was published in *The New York Times* on July 9, 2001. Thus, it appears recreational use began at some point during this time period.

As Griffin et al. (2008) have noted, *S. divinorum* has received considerable attention in the media. Most of the attention has been based upon stories that a hallucinogenic drug is (or was) legally available. Among media accounts, three events seemed to have garnered the most attention. In January of 2006, a teenager in Delaware, Brett Chidester, committed suicide. After the suicide, police officers found *S. divinorum* in Brett's vehicle. No other drugs were found nor were any drugs detected in his system during autopsy. Brett's mother, Kathleen Chidester, believed *S. divinorum* use "reshaped" the mind of her son (Moran and Culhane 2007). After conducting an initial autopsy, the medical examiner later revised the cause of death to include *S. divinorum* as a contributing factor to the suicide. This action was partially based upon a reading of Brett's journal entries, which discussed the revelations he discovered after using *S. divinorum*. Brett stated that smoking the plant led him to the belief that there were "different dimensions of reality that left him with an empty feeling about this world" (Griffin et al. 2008, p. 188). Three months after his death, Delaware passed "Brett's Law," which classified *S. divinorum* as a Schedule I drug within the Delaware state controlled substances act (Griffin et al. 2008). In December of 2010, videos appeared on the website youtube.com of the musician and actress Miley Cyrus smoking *S. divinorum*. As Murphy et al. (2011) document, postings on twitter.com and Google searches spiked considerably after these videos were posted. Postings of videos of people smoking *S. divinorum* are not limited to Miley Cyrus, though; several researchers have documented the phenomenon of *S. divinorum* users posting videos of themselves while under the influence of the drug on youtube.com (Casselman and Heinrich 2011; Lange et al. 2010). In January of 2011, Jared Loughner shot Arizona Congresswoman Gabrielle Giffords (D-AZ) at a Tucson campaign event. After the shooting, the television program *Nightline* explored Loughner's use of *S. divinorum* as part of an investigation into the possible motives that led to the shooting. The report specifically mentioned his discussion of existential realities (Stogner et al. 2012).

Despite the considerable media attention on *S. divinorum*, so far, the United States federal government has declined to list the plant as a scheduled substance. In 2002, U.S. Representative Joe Baca introduced H.R. 5607, the Hallucinogen Control Act of 2002. If the law had passed, both *S. divinorum* and salvinorin A would have been classified as Schedule I drugs. However, the bill died in committee and new legislation has not been introduced. As Griffin et al. (2008) note, the federal inaction regarding *S. divinorum* is a relatively unique occurrence after the passage of the CSA. In the face of federal inaction, individual states have stepped in and taken a variety of approaches to regulate *S. divinorum*. According to Stogner et al. (2012), individual states that have chosen to regulate *S. divinorum* have chosen one of three strategies: classifying *S. divinorum* and/or salvinorin A as a Schedule I substance within state controlled substances acts, passing a separate law from state controlled substances acts which regulates *S. divinorum* and/or salvinorin A, or establishing an age limit for people who are allowed to purchase or possess *S. divinorum* and/or salvinorin A. In August of 2005, Louisiana was the first state to take action; enacting legislation that prohibited the production, manufacture, and distribution of several hallucinogenic plants, one of which was *S. divinorum*. Other states that have passed separate legislation regulating the plant are: Tennessee, North Carolina, West Virginia, and Wisconsin. Also in August of 2005, Missouri classified *S. divinorum* as a Schedule I substance. Since then, Delaware, Oklahoma, North Dakota, Florida, Illinois, Kansas, Mississippi, Virginia, Hawaii, Nebraska, Ohio, South Dakota, Alabama, Georgia, Kentucky, Michigan, Minnesota, Connecticut, Indiana, Pennsylvania, Wyoming, and Colorado have added *S. divinorum* to Schedule I of their state controlled substances acts as well. In 2007, Maine passed a law that prohibited people under the age of 18 from possession of *S. divinorum*. California restricts the sale of *S. divinorum* and salvinorin A to minors. Maryland prohibits the possession of *S. divinorum* and salvinorin A to people under the age of 21.

As Griffin et al. (2008) state, regulation of *S. divinorum* seems to be simply focused on the fact that a legal hallucinogen was available. There is no real evidence that the use of *S. divinorum* is either dangerous or widespread. The first published prevalence study of *S. divinorum* was conducted by Lange et al. (2008). The researchers surveyed 1,571 university students at a large public university in the southwestern United States during the fall semester of 2006 and the spring semester of 2007. They reported *S. divinorum* had been used by 4.4 % of the students within the past year. They further identified the most likely users to be White males, fraternity members, and heavy episodic drinkers; people they identified as most likely to engage in substance use generally. In that same year, Khey et al. (2008) published the results of a survey of 825 university students at a large public university in the state of Florida, collected during the fall semester of 2006 and the spring semester of 2007. Only 22.6 % of students had even heard of *S. divinorum*. Of the total sample of students, 6.7 % had reported lifetime use of *S. divinorum* and 3 % reported use within the last year. Similar to Lange et al. (2008), Khey et al. (2008) found that White males were the most likely students to report that they had used *S. divinorum*. Additionally, Khey et al. found

most people who had used *S. divinorum* reported they would not use the drug a second time. In a follow-up study utilizing the same data, Miller et al. (2009) found that university students who reported heavy use of marijuana were among the most likely users of *S. divinorum*. *S. divinorum* appeared to be used as a legal substitute for marijuana, but users did not generally report that *S. divinorum* use was pleasurable or an adequate substitute.

On the website www.erowid.org, Baggott et al. (2010) added a hyperlink that stated "survey for people who have used *Salvia divinorum*" and collected responses from 520 people from July 24, 2003 to August 20, 2003 who chose to complete a 20 min survey; 500 were included in the results of their study (92.6 % were male). The survey found that the median number of times a respondent had used *S. divinorum* during their lifetime was six occasions. Among the motivations respondents cited for using *S. divinorum* (in order of rank) were: to explore altered consciousness, curiosity, spiritual or mystical reasons, personal growth or self-understanding, contemplation or meditation, relaxation or enjoyment, to get high, to increase enjoyment of other activities, and to help a mainly psychological problem. One hundred and twenty-nine participants reported positive mood effects that lasted more than 24 h; 60 of these participants reported *S. divinorum* had "antidepressant-like effects." Participants who reported positive effects were most likely to want to use *S. divinorum* again. Only three people of the total participants who were surveyed believed they were addicted or dependent upon *S. divinorum*, while six people reported strong cravings.

Wu et al. (2011) utilized data files from the 2006–2008 National Surveys on Drug Use and Health (NSDUH), a federally sponsored ongoing study that surveyed 166,453 people aged twelve and older concerning issues related to health and substance use. The researchers noted that questions about *S. divinorum* use are included in a section of the survey called "special drugs." They noted 0.7 % of respondents reported lifetime use of *S. divinorum* in 2006. That percentage increased to 1.3 % in 2008. They found that use of *S. divinorum* was primarily associated with young adult White males who lived in large metropolitan areas. Among the reported users, many reported they had been arrested and many users reported they also suffered from depression. Additionally, respondents who reported *S. divinorum* use were commonly polydrug users. In a similar study utilizing the same data source, Perron et al. (2012) noted "salvia use is part of a broader constellation of psychosocial and behavioral problems among youth and young adults" (p. 1).

According to the literature that has investigated *S. divinorum*, it seems recreational use of the drug does not appear to be widespread and does not approach a level one could really even say is common. Much like other hallucinogens, *S. divinorum* appears to be a niche drug. Most of the people who have used *S. divinorum* do not use it again, and those who do seem to be people for whom drug use is relatively common and the use of *S. divinorum* is just one of the many drugs they might try. Additionally, there does not appear to be any real danger when *S. divinorum* is used. As Vohra et al. (2011) note, "A literature search in the PubMED database in December 2008 revealed no clinical case reports or case

series on the acute toxic effects of *S. divinorum*" (p. 643). They note over a 10-year period, from January 1998 to May 2008, 133 reports that mentioned salvia were reported to the California Poison Control System. Of these reports, 96 referred to various species of salvia plants that are not psychoactive and only 37 actually referred to *S. divinorum*. Additionally, only 18 reports referred to *S. divinorum* alone, the other 19 involved polydrug use. The only study that has indicated *S. divinorum* has any real abuse potential is Baggott et al. (2010). In that study, among 500 people who had used *S. divinorum*, only three users (0.6 %) reported they believed they were addicted and only six users (1.2 %) reported strong cravings for the drug. This is certainly underwhelming evidence of any real abuse liability.

The federal drug prohibitions of the recreational use of heroin and cocaine have existed for almost 100 years, but use still persists, despite what many consider draconian threats of punishments. Yet, the results of one study seem to indicate that the use of *S. divinorum* is more elastic. Stogner et al. (2012) surveyed 534 university students at the same university in Florida as Khey et al. (2008) after the State of Florida had classified *S. divinorum* as a Schedule I substance. Stogner et al. (2012) found that not one single student reported using *S. divinorum* in the previous year. Thus, it appeared that simply scheduling *S. divinorum* essentially eliminated use. This would tend to indicate that *S. divinorum* was not especially popular or desirable among drug users, making one wonder why the media seemed to fixate upon the little-used plant. Stogner et al. (2012) speculate that *S. divinorum* may very well have been just one of many recent drugs that the media will focus on before they get bored and move on to a new drug. Others have documented similar phenomena, such as Akers (1992) concept of the "scary drug of the year" and Jenkins (1999) concept of "synthetic panic." Stogner et al. (2012) noted that synthetic marijuana and methylenedioxypyrovalerone (MDPV, more commonly known as "bath salts") quite possibly could be garnering the media attention once held by *S. divinorum*.

Medical Utility of Hallucinogens

The placement of *S. divinorum* into Schedule I in so many state-controlled substances acts raises a persistent question that has been debated about hallucinogens since the enactment of the CSA: Do hallucinogens have any medical utility? With *S. divinorum*, this question is not exactly clear. According to Wasson (1962) and Schultes et al. (2001), *S. divinorum* is used medicinally under the auspices of shamanism; a belief system Western and European views of medicine largely do not recognize. Siebert (2006), an advocate of *S. divinorum*, argues the plant should not be used simply for recreational purposes, and should only be used by people seeking enlightenment. Again, such use does not seem to satisfy Western or European views of medicine. Although it seems that *S. divinorum* will not be prescribed to patients, salvinorin A and the research applications of the active

chemical do seem promising. Prisinzano (2005) argued that studies of salvinorin A might help develop non-addictive painkillers or aid science in developing a more complete picture of how the brain works. This could potentially contribute to research on Alzheimer's disease and other mental illnesses. Roth et al. (2002) specifically noted that salvinorin A could help researchers understand perceptual disorders caused by such conditions as schizophrenia, dementia, and bipolar disorder. Vortherms and Roth (2006) have stated that salvinorin A might potentially be used to treat depression, chronic pain, and kidney ailments.

That so many individual states have rushed to premature judgment and placed *S. divinorum* into Schedule I of their state-controlled substances act seems to be just the next chapter in the continuing story of hallucinogens. That the United States federal government has failed to take action on *S. divinorum* is probably much more of a testament to the belief that the plant does not pose a danger than evidence of a progressive view that might allow research on a hallucinogenic substance to commence without undue restrictions. The excesses of people such as Timothy Leary and Richard Alpert, combined with the placement of seemingly every hallucinogen into Schedule I of the CSA, essentially seemed to end research into hallucinogenic drugs. Recently, however, there has been a revitalization of hallucinogenic drug research, beginning with the research of DMT by Rick Strassman (Johnson et al. 2008). Strassman (1996) argues that clinical studies of hallucinogens are necessary "to provide insights into many basic brain-mind relationships" (p. 121). Studies of ayahuasca have noted that the responsible use of this drink, which contains DMT, can improve a person's mental health (Grob et al. 1996; Callaway et al. 1999; Santos et al. 2007) and could possibly be used for the treatment of alcoholism and substance abuse (McKenna 2004). As Labate et al. (2012) note, two psychotherapeutic centers for the treatment of substance dependence currently operate in Brazil and Peru which utilize ayahuasca as a part of the rehabilitation process. Labate et al. note that, while the centers claim their programs are effective in treating substance dependence, independent researchers have not yet been verified these findings using a rigorous scientific method. Sheppard (1994) suggests that ibogaine could potentially be used for the treatment of opiate addicts. Research on psilocybin may lead to a deeper understanding of mystical experiences and deeper insights into pharmacological and brain mechanisms (Griffiths et al. 2006, 2011). Researchers hope that by studying psilocybin they can also arrive at a greater understanding of attitudes, mood, behavior (Griffiths et al. 2011), and personality (MacLean et al. 2011).

Perhaps the biggest irony surrounding medical utility, hallucinogens, and research is that what once discredited them, might help preserve them. In 1990, the United States Supreme Court ruled in the case *Employment Division v. Smith* that individual states were allowed to prohibit the sacramental use of peyote by Amerindians; no such exception to this type of use existed in the CSA. As Bullis (2008) notes, this led to the passage of the Religious Freedom Act of 1993. Written into the act was an exception that allowed members of the Native American Church to use peyote during sacramental rituals. This exception was later applied to members of the União do Vegetal (UDV) religion, who engage in the sacramental

use of ayahuasca. Members of the UDV have been allowed to consume the drink in the United States, as well as in other countries that recognize this as a legitimate religious practice (Bullis 2008; Labate and Feeney 2012). (For more information about the UDV case, please consult the chapter by Feeney and Labate 2014.) Thus, two different hallucinogens that have been used as part of shamanistic rituals, but shunned by Western and European thought and religious practice, are once again officially permitted. Perhaps this bodes well for the revitalization of hallucinogenic research and indicates that the overreaction to the excesses of previous generations will not continue to haunt researchers who want to investigate hallucinogens in a responsible manner.

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"Legalize Spiritual Discovery": The Trials of Dr. Timothy Leary

Devin R. Lander

Mexican Retreat

On December 20, 1965, Dr. Timothy Leary,[1] his girlfriend Rosemary Woodruff, daughter Susan, 18, son Jack, 16, and an acquaintance of Woodruff's named Charles Jaeger left Leary's rented estate in Millbrook, New York, on a road trip to Yucatan, Mexico. Leary and his family had closed up the 64-room mansion on 2,500 acres of rolling Dutchess county landscape for a much longed for Christmas vacation at the seaside Mexican villa of close Leary confidant—and Millbrook estate co-owner—Billy Hitchcock. The plan was for the children to enjoy

[1] Timothy Francis Leary, 1920–1996, was a psychologist, author, and lecturer who became one of the most famous advocates for the use of psychedelic substances during the 1960s. An icon of the 1960s counterculture in the United States, Leary waged a very public battle in the courts and in the media against law enforcement representatives and the government whom he believed were suppressing the use of culturally beneficial psychedelic substances, most specifically LSD-25, which Leary believed could change human behavior in positive ways. Arrested several times in the 1960s for possession of marijuana, Leary was eventually sent to prison in California in 1970 for violating parole. With the help of the Weather Underground, Leary escaped from prison and fled the country, living for a time with the Black Panther Party in Algeria, before settling in Switzerland. He was eventually tracked down by U.S. authorities and sent to Federal prison where he cooperated with FBI agents in order to receive a lighter sentence. Released from prison in 1976, Leary spent the rest of the decade as a lecturer and author of several books. In the 1980s, he became one of the earliest advocates for computer "alternative reality" and other technological advances, including the Internet. He died in Beverley Hills, California from cancer in 1996, documenting his demise through constant video upload to his website. In 1997, Leary's ashes, along with the *Star Trek* television show creator Gene Roddenberry's, were placed in a capsule and launched into space where they orbit the planet to this day.

D.R. Lander (✉)
3 Mayfair Road, Wynantskill, NY 12198, USA
e-mail: landerdevin@yahoo.com

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themselves in the tropics while Leary worked on a book he was writing about his life and experiments with psychedelic[2] substances (Greenfield 2006; Leary 1990, 1995).

At the time of this road trip, Leary was already infamous for his experiments with the psychedelic substances psilocybin and LSD-25 and the trouble it had caused him during his time as a lecturer in the Department of Social Relations at Harvard University. Leary's journey from fast-rising academic psychologist to psychedelic proselytizer and eventual criminal had begun, ironically enough, on a different trip to Mexico in the summer of 1960. Enjoying a vacation in a Mexican villa rented with some colleagues, Leary had been celebrating his newly acquired position at Harvard with his two children. One evening, while hosting a poolside cocktail party, Leary became enraptured by the description of psychedelic mushroom use by local native tribes told to him by anthropologist Lothar Knauth. Knauth mentioned that he knew that these mushrooms (most likely *Psilocybe mexicana*) still grew locally and Leary suggested that they attempt to find some. Within a week, the two academics had made contact with Juana Sanchez, a native Mexican curandera,[3] who supplied them with several dozen psychedelic mushrooms which Leary shared with a small group of friends at his villa, each ingesting approximately eight small mushrooms, or enough for a full-blown psychedelic episode (Greenfield 2006; Leary 1990, 1995).

Leary's mushroom experience was life-changing. "Like almost everyone who has had the veil drawn," he later wrote, "I came back a changed man" (1990, p. 32). The "new" Timothy Leary returned to Harvard and set about designing a series of experiments utilizing psilocybin, a synthetic derivative of the psychedelic compound found in various *Psilocybe* species of mushrooms. This compound had been recently isolated by Swiss chemist Dr. Albert Hoffman, the man who had first discovered LSD-25. Leary and a small group of colleagues and graduate students in the Department of Social Relations used psilocybin—which was legal at the time—in experiments related to prison recidivism, spirituality, and other humanistic psychological pursuits. The Harvard Psilocybin Project soon began to run into problems with the administration and other faculty members, however. Leary and

[2] Psychedelic, meaning "mind-manifesting," is currently a contentious term. It was coined by psychiatrist Dr. Humphry Osmond in a letter to author Aldous Huxley in 1956, and has become the most prevalent terminology in popular culture when categorizing the type of natural substances (such as the peyote cactus and certain species of mushrooms) and synthetic substances (such as LSD, synthetic psilocybin, and mescaline) that produce a remarkable array of "consciousness altering" and potently psychoactive effects when ingested. "Psychedelic" as a term has been questioned by those who feel it has become too much entwined with the 1960s "counterculture." Currently, among the most common alternative terms is "entheogen" (generating the divine within), which has gained favor among advocates of the therapeutic and spiritual use of these substances. However, since this chapter deals with the 1960s, and the term psychedelic is so heavily associated with that time period, I have chosen to use it over alternatives that are equally limited and potentially confusing.

[3] A curandero (feminine: curandera) is a traditional folk healer in Latin American aboriginal groups. A curandero is often known as a shaman.

his Psilocybin Project colleague Dr. Richard Alpert[4] came under attack for what appeared to be a loose adherence to the scientific method in their experiments and overall theories that, to the more staid members of the Harvard faculty, crossed over from the realm of science into the realm of mysticism. Rather than fully acquiesce to the demands of the Harvard administration to be more scientific, Leary and Alpert instead took a confrontational stance and continued to administer psilocybin, and later the much more powerful LSD-25, to test subjects both on and off campus. It was this casual approach to utilizing psychedelic substances that led to both men being terminated from the Harvard faculty in early 1963 (Lattin 2010).

Even before they left Harvard, members of the Psilocybin Project had formed their own non-profit research entity named the International Foundation for Internal Freedom (IFIF). Board members of the IFIF included Leary, Alpert, several former students including recent PhD Ralph Metzner, as well as luminaries such as author Aldous Huxley, MIT professor Huston Smith, and Andover-Newton Theological Seminary's Walter Houston Clark. After leaving Harvard, it was under the auspices of the IFIF that Leary and Alpert attempted to establish a psychedelic retreat in Zihuatanejo, Mexico, in which paying customers would spend a week at a time experimenting with psychedelic substances and attending lectures and presentations at a tropical beach-side hotel rented by the IFIF (Downing 1964). It was at this time that Huxley, Smith, and Clark chose to remain in the United States at their various teaching positions and distanced themselves from the activities of the IFIF (Lattin 2010; Smith 2003).

Press coverage of the Psilocybin Project and the subsequent firing of Leary and Alpert from Harvard helped to garner the IFIF and their Mexican retreat extensive interest. They were inundated with applications to spend time at what Leary described as their "Hotel Nirvana" (Leary 1990). Within weeks, however, the Mexican government found the press coverage too negative and the type of people the IFIF hotel was attracting too undesirable. The local police arrived after just six

[4] Richard Alpert, 1931–, is an author, psychologist, lecturer, and spiritual teacher who is also known as Baba Ram Dass. After receiving his PhD in clinical psychology from Stanford University in 1957, Alpert joined the faculty of Harvard University in 1958 as an associate professor. While at Harvard, Alpert became close friends with Timothy Leary and the two set about designing various experiments with the psychedelic substances psilocybin and LSD-25 under the name of the Harvard Psilocybin Project. Alpert was dismissed from Harvard in 1963 for giving psychedelic substances to undergraduate students in a non-clinical setting. Working with Leary closely until 1965, Alpert became an advocate of psychedelic substance use. After a falling out with Leary in 1965, Alpert returned to Stanford where he taught while lecturing throughout the country on the benefits of psychedelics. In 1967, Alpert traveled to India where he met and became a disciple of Hindu guru Neem Karoli Baba, who gave Alpert the name Baba Ram Dass. Alpert returned to the United States in 1969 and began traveling the country as a New Age spiritual teacher. In 1971 he wrote the bestselling book on his life and philosophy titled *Be Here Now*. In 1974, Alpert founded the educational Hanuman Foundation and followed in 1978 by founding the Seva Foundation, a health organization. He continues to teach and write despite suffering a stroke on 1997. The award-winning film, *Ram Dass: Fierce Grace*, about Alpert's life and work, was released in 2001.

weeks with agents from the Mexican government who told Leary and the rest of the IFIF that they were no longer welcome in Mexico (Leary 1990).

After a brief attempt to establish a retreat in the Caribbean, Leary and what remained of the IFIF returned to Newton Center, Massachusetts. Forlorn and with no base from which to operate, and unable to legally procure psychedelics since they were no longer considered academically affiliated researchers, Leary and Alpert were at an impasse by the fall of 1963. As luck would have it, one of the IFIF retreat attendees had been a young woman named Peggy Hitchcock, an heiress to the Mellon fortune who had remained friends with Leary and Alpert after they returned to the United States. She mentioned to them that her younger twin brothers—William Mellon (Billy) and Thomas (Tommy) Hitchcock III—had recently purchased a 2,500 acre estate in Millbrook, Dutchess County, a 2-h drive north of New York City. The estate included a 64-room gothic mansion that the brothers were not using and Peggy suggested that Leary and Alpert take a look at it and ask if they could rent it.

Alpert, a licensed pilot, flew from Boston to Poughkeepsie, New York with Peggy Hitchcock to tour the mansion. There was no electricity turned on when they arrived and the two spent the night walking around the rambling, run-down house with candelabras lit. Alpert was immediately smitten by the Gothic appearance of the house and estate and asked Peggy if she thought her brother's would rent it to the IFIF at an affordable price. She replied that it would be a good idea for Leary and Alpert to give her brothers LSD when they did ask. Leary and Alpert met with the Hitchcock twins shortly after and the brothers took LSD for the first time. They agreed to rent the mansion to the IFIF for a nominal fee and the group moved into the house in November 1963 (Ram Dass/Richard Alpert, personal interview, June 26, 2007).

In the 2 years that followed, Leary and his group, now called the Castalia[5] Foundation, fought a progressively more intense running battle with local authorities over their activities on the Millbrook estate. As they had in Mexico, the group opened their doors to visitors of all kinds, and the estate became a kind of psychedelic fun camp. The full-time residents, including Leary and his two children, Richard Alpert, and Ralph Metzner and his wife, continued to perform experiments using LSD. In a meditative and scholarly attempt to "map consciousness," Leary, Alpert, and Metzner re-interpreted the Tibetan Book of the Dead into a guide for the psychedelic experience titled *The Psychedelic Experience: A Manual Based on the Tibetan Book of the Dead*. The Castalia Foundation also edited and published a scholarly journal on all things psychedelic called *The Psychedelic Review* (Dass et al. 2009; Stevens 1987).

[5] The Castalia Foundation was named after Hermann Hesse's novel *The Glass Bead Game* (1943) in which a group of elite intellectuals run a boarding school for boys in the fictional European province of Castalia. Besides running the boarding school, the intellectuals play the Glass Bead Game, which is so difficult that it takes a lifetime of knowledge to play.

The cost of living, even essentially rent free, on the estate at Millbrook was daunting, and no one living there, save the Hitchcocks, had any steady income. As a result, the Castalia Foundation decided to open the mansion and grounds to paying visitors, as they had envisioned doing in Mexico. Unable to legally acquire psychedelics and fearing backlash if they distributed them to the visitors, the group instead attempted to simulate the psychedelic experience without drugs. Various types of meditation, yoga, breathing exercises, and other modes of psychological stimulation were used, including music, film, and light shows, as well as artificial coloring of food in an attempt to break the visitor's of their associative concepts (Hollingshead 1973; Dass et al. 2009).

These weekend retreats were popular with denizens of Boston and New York City, but less so with the local law enforcement community. Alarmed by the press attention the new residents of the Millbrook estate received and fearful that the Castalia Foundation was attracting undesirables to the bucolic village, the local sheriff and district attorney began to pay very close attention to the activities on the estate. It was under this cloud of pressure that Leary and his small group sought to escape for a time to Mexico to enjoy not only the warm weather, but also the lack of police presence. However, relaxation was not to be had.

Christmas Eve in a Texas Jail

Leary and his car full of expectant vacationers arrived at the Laredo, Texas border crossing on December 23rd. They had spent the past three days driving non-stop from Millbrook on their way to Billy Hitchcock's Mexican villa. Along the way, the group smoked marijuana that they had brought with them from New York, remnants of which they did not bother to hide as they neared the Mexican border, thinking that no one would be looking for people bringing drugs *into* Mexico. Leary even made sure to stop and purchase the proper auto insurance on their rented car in order to enter Mexico with all of the correct paperwork (Greenfield 2006; Leary 1990).

On the Nuevo Laredo side of the Laredo International Bridge, Leary left his passengers and entered the Mexican immigration building with the required papers. There he was met by Mexican police officer Jorge Garcia, one of the same officers who had deported Leary and the IFIF from Zihuatanejo in 1963. This serendipitous fact struck Leary and it dawned on him that perhaps something was wrong. Garcia informed Leary that he was not allowed into Mexico due to his 1963 deportation and Leary replied that he had express written permission to visit the country as a tourist. After conferring with immigration officials, Garcia responded that Leary and his group would have to return to the U.S. side of the border and try to cross again the following morning after he had time to speak to officials in Mexico City (Leary 1990).

For Leary, this was a bad sign, and when he returned to the car he told his passengers that there may "be some problem here" and "if there's any grass in the

car, we should flush it down the toilet." His son Jack and Rosemary Woodruff complied and flushed what they had down the restroom toilets. The interesting aspect of what happened next is the fact that, because Leary and his group were in the Nuevo Laredo free-zone area of the border, they did not have to have tourist visas to stay and would not have had to return to the United States. They simply could have found a hotel and stayed the night. Instead, for reasons that were not entirely clear even to Leary himself, he turned the car around and crossed the bridge towards the U.S. (Greenfield 2006; Leary 1990).

As they neared the U.S. Customs, Woodruff realized that she had forgotten to dispose of a small silver snuff-box that contained a small amount of loose marijuana, two partially smoked marijuana cigarettes, and capsules of the legal drug dextroamphetamine. Quickly, Leary's daughter Susan took the box and pushed it into her panties, attempting to hide it as they passed through customs. Despite Leary's explanation that they had not in fact entered Mexico, the customs agent ordered them out of the car and searched it. After finding marijuana seeds and a trace amount of leaf on the floor of the car, the agents ordered the group into the customs office, where they were individually strip-searched. A female agent found the silver snuff-box in Susan's panties and arrested her immediately, charging her with three felonies: smuggling marijuana, the transportation of marijuana, and failure to pay the transportation tax on the marijuana. When confronted with the evidence, Leary took immediate responsibility for the marijuana found on Susan and was charged for the same three felonies (*Timothy Leary v. United States* 1967).

Marijuana possession and transportation had been made illegal in most states since the mid-1930s, particularly due to the efforts of Harry J. Anslinger, first head of the Federal Bureau of Narcotics, which was formed in 1930. In 1937, Congress passed the Marihuana Tax Act, which brought marijuana possession and trafficking under federal control for the first time (see Mark R. Brown in this volume for more information on United States marijuana laws). The act's legislative purpose was to "impose an occupational excise tax upon certain dealers in marihuana, to impose a transfer tax upon dealings in marihuana, and to safeguard the revenue there from by registry and recording." The Marihuana Tax Act was based heavily upon the 1934 National Firearms Act, which required a transfer tax be paid and a transfer stamp obtained by anyone selling, loaning or bartering for a machine-gun. The "catch," as Musto (2002) noted, "was that the government would not print any stamps, and so no such sales, loans, and so forth could legally take place" (p. 430).

Although the Marihuana Tax Act did in fact lead to some stamps being printed, it effectively had the same result as the National Firearms Act, in that it taxed something that was already illegal to possess. However, in 1939, the National Firearms Act survived a Supreme Court challenge to its constitutionality as a tax law that could not actually raise tax revenue (*United States v. Miller* 1939). This victory was seen as a green light for the Treasury Department and the Federal Bureau of Narcotics to pursue the passage of the Marihuana Tax Act (Musto 2002).

For Leary, the triple felonies he was charged with changed his legal status for the rest of his life. Bail was set by U.S. Commissioner Jacob Hornberger at $10,000 for Leary, $2,500 each for Susan and Jack, and $5,000 for Woodruff and Jaeger.

Initially unable to raise the funding to post bail, the group was sent to the Webb County Jail to await grand jury action. As a result, Timothy Leary and his children and girlfriend spent their Christmas Eve in separate cells at a Texas county jail ("Ousted Lecturer" 1965).

Legal Action

Finally able to raise the funds to post bail on Christmas Day, 1965, Leary and the others returned to the Millbrook estate. Susan had pled guilty to her charges and threw herself on the mercy of Commissioner Hornberger, who set her plea aside and assigned her a defense team made up of local Laredo lawyers. Leary had the opportunity to plead guilty as well, but instead chose to go to court over the case on the grounds that, as a practicing Hindu, his possession and use of marijuana was protected under the First Amendment, and that the Marihuana Tax Act that he was being charged under was a violation of his Fifth Amendment rights. Leary would later write that:

> I wasn't going to submit passively to the role of scapegoat, the Harvard psychologist who got into trouble over drugs. Liberty was at stake here, freedom of access to your own body and brain, a right I believed was protected by the Constitution. . . Sitting in a dark jail cell on Christmas Eve 1965, flush with virtuous indignation about the wickedness of the marijuana laws, I resolved to fight this case in the courts of the land, to mobilize legal teams, to devise courtroom tactics, to file appeals, motions, briefs, depositions, to speak in defense of the right of American citizens to manage their own bodies and brains. (Leary 1990, p. 239)

Billy Hitchcock attempted to hire Leary a "hotshot Texas lawyer who was busy at the time with a murder trial," but the local federal judge, Ben C. Conally, would not postpone the case, and Leary and Susan's trial date was set for March 1966 (Rosemary Woodruff, Jack Leary, and Charles Jaeger's charges were dismissed). As a result, Leary returned to Laredo with what he later described as a "makeshift" legal team made up of John Fitzgibbon, a local Laredo attorney, and Charlie Rumsey, a friend of Billy Hitchcock's. Rumsey, known as "Good Time Charlie," was the nephew of former New York State Governor W. Averell Harriman, and had never represented anyone in a felony criminal case before (Greenfield 2006; Leary 1990).

Leary's legal team's utilization of the freedom of religion defense was based largely on a recent California State Supreme Court decision that ruled in favor of defendants who had been convicted for the possession of peyote.[6] In *People v. Woody* (1964), the defendants appealed their conviction before the California Supreme Court on the grounds that they were members of the Native American

[6] Peyote (*Lophophora williamsii*) is a small cactus with powerful psychedelic properties that has been utilized by native North and Central American tribes as a ceremonial hallucinogen for hundreds of years.

Church (NAC) and that their arrest violated their right to the free exercise of their religion. The NAC, according to Calabrese, is an "intertribal revitalization movement and ethno-psychiatric pharmacological tradition that has, since the beginning of the (twentieth) century, spread from its origin point in Oklahoma to various tribes throughout the United States and Canada." A combination of traditional native spirituality and Christianity, the NAC uses peyote as their key sacrament in all-night meditation rituals, and today has approximately 250,000 practicing members (see Feeney in this volume for more information on the NAC).

Utilizing a two-fold analysis established in previous cases, the Court attempted in *Woody* to establish whether the convictions imposed any burden on the free-exercise of the practice of the defendant's religion, as well as whether there was a compelling state interest that justified the infringement (see Brown in this volume, 1983). The California State Supreme Court ruled that peyote use was indeed a "central event" within the religious ceremonies of the NAC, finding that although "peyote serves as a sacramental symbol similar to bread and wine in certain Christian Churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost" (Brown 1983). In examining whether the state had a compelling interest in justifying the infringement on the free-exercise of the defendant's religion, the Court found that the state had offered no evidence persuasive enough and reversed the convictions.

For Leary's legal team, their defense was a two-pronged approach: the free exercise of religious beliefs based on the recent *Woody* case, and the defense of his possession of marijuana based on the fact that he was an established expert on various drugs and that, as such, he should be entitled to experiment with them as he saw fit. In his statement to the Court, Leary said:

> I am pleading not guilty in this case because I am an American citizen. As such, I am entitled to the free exercise of my religion. I am entitled to engage in scientific research. I am entitled to live in my home, travel in my car and bring up my children the best I can in accordance with my beliefs and values. My motives before and during the incident of my arrest, are clearly spiritual, interior and not ulterior. (Conners 2010, pp. 216–217)

During the trial, several prominent individuals sent letters of support for Leary, including Zen philosopher Alan Watts, Harvard Professor Harry Murray, MIT Professor Huston Smith, and Rabbi Zalman Schachter, which stated that Leary was a serious scientist and religious researcher. However, others close to Leary—including Richard Alpert—questioned why he would choose to go to trial for something he had already admitted to doing. Alpert later noted that even Leary's counsel advised him that what he was doing was foolish; that, instead of going to trial, Leary could have instead pleaded guilty and received only a "warning and a small fine" (Greenfield 2006).

Thus, it was of small surprise to anyone involved in the case that the jury returned a verdict of guilty for the charges of transportation of and failure to pay the transfer tax on marijuana. Judge Conally had dismissed the charge of smuggling marijuana into the United States before the jury began deliberation, which lasted

only 45 min. For the two remaining convictions, which required mandatory sentencing under federal law due to the fact that Judge Conally ordered a psychiatric evaluation of the defendant, Timothy Leary was sentenced to a maximum of 30 years in prison and a $30,000 fine for the possession of less than a half ounce of marijuana. Susan Leary, who had waived her jury trial, was sentenced by Judge Conally to undergo psychiatric evaluation at a federal reformatory ("Former Harvard Teacher" 1966a).

There was immediate public outcry due to the severity of Leary's sentence, though the shocking totals touted by the headlines were in fact not necessarily what Leary would have actually been sentenced to pending his psychiatric evaluation. In the March 17th, 1966 edition of the *New York Times*, Dr. Howard J. Haas of Buffalo, New York, noted the irony of the fact that Leary's maximum sentence—30 years—could have been the same, or longer, than the three men sentenced the same day for the murder of Malcolm X, whose minimum sentence was 26 years. "The question of mental illness," Dr. Haas (1966) wrote, "in relation to the use of narcotics seems to be of secondary importance to the treatment of offenders as criminals in the same category as sociopathic personalities who have committed rape or murder" (p. 38).

Conversely, the *Times* itself responded with an editorial the very next day that argued that Leary's freedom of religion defense was "specious." The editorial states:

> The first Amendment casts a wide net, but it does not protect antisocial or self-destructive practices under the guise of religion…whether Dr. Leary deserves the severe sentence that he has received is for the courts to decide…but the speciousness and quackery of his specific defense on "religious" grounds are as worthless as marijuana itself. (Specious Marijuana Defense 1966b)

Leary's defense had been unsuccessful, but, as he later wrote, his stated reason for going to trial in the first place was to "build up a good record for the appeal" (Greenfield 2006). But the appeal process would cost money; more money than Leary himself had. As a result, Billy Hitchcock and other Leary associates launched the Timothy Leary Defense Fund on March 16th, 1966 at a press conference in New York City. On April 3rd, a full-page advertisement soliciting donations by the Defense Fund appeared in the *New York Times* under the banner heading "The Responsible Community Is Shocked At The Harsh Sentencing of Psychologist Dr. Timothy Leary." The ad featured a description of the Laredo arrest as well as a sample bibliography of Leary's published works and a notice that Leary would be appearing at the Town Hall club on East 43rd Street to deliver the lecture "The Politics and Ethics of Ecstasy" for the general admission cost of $2.50, proceeds of which would go to the Defense Fund ("The Responsible Community" 1966c).

The Leary Defense Fund ad also featured a statement of support signed by 52 writers, actors, artists, medical doctors, and PhDs, including Ralph Metzner, Allen Ginsberg, Norman Mailer, Alan Watts, Charles Olson, Susan Sontag, Robert Lowell, and Peter Fonda. The statement read:

We, the Undersigned, Supporters of the Defense Fund Believe that:

I. The infringement of constitutional rights of privacy, interference with religious and scientific practice, excessive enforcement and public anxiety have drawn to the crisis stage—through the application of irrational marijuana statues;
II. The long prison sentence given to the psychological researcher Dr. Timothy Leary, for the possession of one-half ounce of marijuana, illustrates the irrationality of present marijuana laws, and is a cruel and unjust punishment in violation of the Constitution of the United States ("Responsible Community" 1966, p. E9).

As Leary and his defense team geared up for the appeals process, the reality of his Laredo narcotics case and the publicity surrounding it began to affect the Castalia Foundation at Millbrook. Local residents and law enforcement in Millbrook and in Dutchess County reacted with general apathy in 1963 when Leary, Alpert, and the rest of the group first began living on the estate. The *New York Times* reported that they made "no splash in the placid waters of its (Millbrook) disposition" ("Psychic Drug Testers" 1963). However, after the Laredo arrest, things began to change. As Leary and his group gained public attention through articles published about their activities, and as the Millbrook estate attracted more and more visitors of all kinds, local attention became more focused on what was happening within the compound. The Laredo arrest and the publicity that followed had become too much for the law enforcement officials in the Millbrook area to overlook. As part of a three-county crackdown, Dutchess County Sheriff Lawrence Quinlain and District Attorney John R. Heilman Jr. sent officers to raid Leary's rented mansion on April 17, 1966. Leading the raid was Assistant District Attorney G. Gordon Liddy, who would later himself be jailed as one of the infamous Watergate "plumbers."[7]

Liddy and the other law enforcement officers found a small amount of marijuana on three of the guests at the mansion and immediately arrested them. They also arrested Leary for being in possession of a home where illegal drugs were found. Those arrested posted bail and returned to the estate to await court proceedings. It was with this second marijuana arrest hovering over him that Leary decided to start his own religion.

Turn On, Tune In, Drop Out

As his legal team prepared to appeal his sentencing, Leary held a press conference at the New York Advertising Club on September 20th, 1966 that declared the formation of the League of Spiritual Discovery (LSD), a "religion" based on the

[7] The Watergate Plumbers were a group of Republican operatives who were employed by President Richard Nixon and led by G. Gordon Liddy. First established in 1971 by Nixon to investigate leaked internal information from the White House to the press, the Plumbers eventually branched out into illegal activities, including the 1972 break-in at the Democratic National Headquarters at the Watergate Building in Washington, DC. The subsequent Watergate Scandal led to President Nixon resigning office in 1974.

"sacramental" use of psychedelics and marijuana. "Like every great religion of the past," Leary was quoted as saying, "we seek to find the divinity within and to express this revelation in a life of glorification and worship of God." Leary was taking the religious freedom defense to what he believed was its next logical conclusion: He would form his own religion, seek legitimacy through tax-free status and a board of directors, and follow the lead of the NAC and their success in the 1964 California Supreme Court ruling in *Woody* (Dallos 1966).

Scholars of psychedelic use in cross-cultural contexts have long suggested that it was the use of these substances that established in prehistoric man the very seeds of what would later be known as "religion." Anthropologist Weston La Barre (1972) suggested that "the use of powerful botanical hallucinogens has been a real and important vehicle of shamanistic ecstasy, not only in modern ethnographic time, but also in prehistory" (p. 270), while as early as 1968, mycologist R. Gordon Wasson suggested that the mysterious soma of the Rig Veda (one of the four sacred Hindu Vedas) was in fact a brew whose active ingredient was the psychedelic *Amanita muscaria* (fly agaric) mushroom (Wasson 1968). Walsh, in this volume, goes so far as to suggest that it may indeed be possible that *all* spiritual experiences are, at the root, drug induced.

If, as Robert S. Ellwood (1994) suggests, religion is a cultural reaction whose "ultimate level of significance is especially highlighted in moments of transition from one consciousness era to another" (p. 10), it would seem that the psychedelic "religions" established in the 1960s, such as the League for Spiritual Discovery and the Neo-American Church, were, in essence, attempts to legitimize psychedelic substance use in a religious context during a time of extreme cultural upheaval (Lander 2012; Stuart 2002). And, if this were indeed the case within the era of the 1960s, it would correspond with La Barre's (1972) theory that religions begin as a type of crisis-cult and are established by one "visionary seer," and that they spread over time and may eventually become a culture's established religion. Was the establishing of psychedelic religions of the 1960s such an attempt? La Barre notes that in a cultural context:

> A neurosis or psychosis is the pathological operation of the defense mechanisms of a confused and troubled individual under stress. A religion is in origin the defense mechanism of a society in confused and crisis-torn times. In states of crisis-cult helplessness, the prophet provides the omniscience, the shaman the omnipotence, that the people need. (La Barre, p. 265)

Perhaps this was the case for some members of the League for Spiritual Discovery and the Neo-American Church, among other 60s religiously oriented psychedelic groups. Were these groups reacting to the cultural turbulence of the 60s and the banning of what they considered a spiritual practice, psychedelic substance use? Or perhaps it is equally likely that these two groups were utilizing the religious metaphor more as an attempt to gain legal protections for utilizing illegal substances (Lander 2011). Leary himself later wrote that:

> One of the most offensive, flaky characteristics of 1960s acid-users was their compulsion to babble about new visions of God, new answers to the ultimate secrets of the universe. For thousands of years individuals whose brains were activated had chattered about “ultimate secrets” in the context of mystical-personal religious revelation. We were forced to recall that for most of human history, science and philosophy were the province of religion. And most specifically, all references to what we would now call the psychoneurological were described in religious terms. Our political experiences at Harvard also pushed us in the direction of the religious metaphor. When it became known on campus that a group of psychologists was producing revelatory brain-change, we expected that astronomers and biologists would come flocking around to learn how to use this new tool for expanding awareness. But the scientists, committed to external manipulations, were uninterested. Instead we were flooded by inquiries from the Divinity School! (Leary 1982, p. 85)

Regardless of his motives for forming his new religion, Leary gave it a mantra: Turn on, tune in, drop out:

> Turn on means to go beyond your secular tribal mind to contact the many levels of divine energy which lie within your consciousness; tune in means to express and communicate your new revelations in visible acts of glorification, gratitude and beauty; drop out means to detach yourself harmoniously and tenderly and gracefully from worldly commitments until your entire life is dedicated to worship and search (Dallos 1966, p. 33).

Leary noted also that members of his new religion would “turn on” every seven days with LSD and would have “marijuana sessions” for 1 h everyday. Services would take place at the Millbrook estate and at the Village Theater in New York City, where seats would cost $3 each, though no drug use would be permitted at these public events (Dallos 1966).

With the formation of the LSD, Leary seemed to be deliberately provoking the authorities at a most inopportune time, considering he was involved in two narcotics cases in which he had been indicted. It was also a time in which the public perception of the dangers to society posed by drugs had escalated to unprecedented levels. As late as 1964, Gallup polls showed that only 2% of respondents blamed “drinking, dope addiction” for the increase in the U.S. crime rate. By 1966, the public perception had changed and the media began to tailor its coverage accordingly, specifically regarding psychedelics. In 1964 there were 4 articles written about LSD; by 1966 there were 49 (Musto and Korsmeyer 2002). Leary himself had a strong role in this increased awareness of LSD and was mentioned in dozens of newspaper and magazine articles from 1962 onwards.

As Leary continued working with his legal team on fashioning an appeal to his Laredo sentence, he took time out in early 1966 to testify in front of a U.S. Senate Special Subcommittee of the Committee on the Judiciary regarding the Narcotic Rehabilitation Act of 1966. The Act, part of President Lyndon Johnson’s legislative agenda, sought to lessen some of the mandatory sentencing aspects of the narcotics and marijuana laws and emphasize treatment of narcotic addicts instead of simple punishment and jail time. The Special Subcommittee chaired by Senator Thomas J. Dodd of Connecticut heard testimony from various experts and law enforcement officials on the use of narcotics, marijuana, and psychedelics, as well as ideas for stemming such use. Leary, called on as an expert on LSD, testified that instead of outlawing psychedelics and creating a “new class of millions of college-educated

white collar criminals," legislators should instead "consider legislation which will license responsible adults to use these drugs (psychedelics) for serious purposes, such as spiritual growth, pursuit of knowledge, or in their own personal development (Leary 1966)."

Almost immediately during Leary's testimony, subcommittee member Senator Edward Kennedy of Massachusetts interjected, questioning Leary's suggestion that creating a licensing and training system for psychedelic use would stem the danger inherent in taking them. Calling Leary, pointedly, "Mr. Leary," instead of "Dr. Leary," Kennedy described his testimony as "general hyperbole." Seeming to intentionally misunderstand Leary's description of the difference between the "blindfold-like" qualities of narcotics such as heroin and the "microscope or telescope-like" quality of psychedelics to "open up reality," Kennedy asked Leary if a person needed "a microscope in order to indicate the degree or quantity in which this LSD should be taken," and if he used "a microscope each time you see the drug . . .or helped to administer the drug," to which Leary answered that he was simply using the microscope as a metaphor (Leary 1966).

The testimony devolved into an attempt by Kennedy and Dodd to bait Leary into saying on the record that LSD and other psychedelics were dangerous and should be controlled. Leary countered again and again with the idea that training and licensing for the use and distribution of psychedelics was the preferred alternative to banning them through outright legal means. He also stated that it was his opinion that the education system in the United States was more neurologically damaging than LSD and that students should drop out of college if they could not find a professor that could teach them to expand their consciousness. Dodd ended Leary's testimony at that point by stating that none of the senators' questions had been meant to embarrass him (Leary 1966).

At the same hearings, the Leary affiliated psychedelic religious group known as the Neo-American Church was represented by their "Chief Boo Hoo," Art Kleps. A former high school and prison psychologist who began self-experimentation with psychedelics in the early 1960s, Kleps established the Neo-American Church in 1964 in what has been described by Miller (1991) as a "very informal undertaking that advocated psychedelic substance use as a spiritual endeavor," with a doctrine that included "cynicism, satire, and lack of respect for propriety, all of which renders the group hard to characterize easily" (p. 33). Kleps visited Leary and the Castalia Foundation often at Millbrook, eventually moving onto the estate in 1967. Leary had actually joined Klep's "church" in 1964—before the Laredo bust—and it is interesting that his defense team did not mention this during any of his trials as the Neo-American Church was in fact an incorporated religion in New York State (Lander 2011). However, Leary's lawyers may well have felt that using membership in a church whose head is called "Chief Boo Hoo" and whose motto is "Victory Over Horseshit" may have caused more harm than good in a south Texas courtroom.

Kleps' (1966) testimony in front of the special subcommittee articulated many of his group's beliefs regarding psychedelic and marijuana use. He also, unfortunately, compared the persecution of Leary and others for drug offenses to the persecution

of the Jews in Nazi Germany. He also took umbrage with the Food and Drug Administration's 1965 action—based on the *Woody* ruling—that exempted only the Native American Church from the Federal law making possession of peyote a crime, calling it a "constitutional outrage." Kleps (1966) also described Leary as the "leader of the psychedelic religious movement in the United States" and that the Neo-American Church regarded him with the "same special love and respect as was reserved by the early Christians for Jesus, by the Moslems for Mohammed, or the Buddhists for Gotama" (p. 416).

Kleps went on to describe a militant strategy that would take place "the day the prison doors close behind Timothy Leary." "If these ill-considered laws of religious suppression are upheld by the courts," Kleps declared, "this country will face religious civil war (p. 417)." Kleps gave notice to the senate aubcommittee that if Leary's Laredo sentence was not overturned, psychedelic advocates could and would be able to get psychedelic substances into the hands of prisoners and "render most of the prisons in the United States inoperative." Short of calling for outright violence, Kleps instead was threatening to advise Neo-American Church members to "use LSD to fight back" against those who would imprison them for using psychedelics as part of their religion. This certainly got the attention of the senators in attendance. Senator Quentin N. Burdick of North Dakota pressed Kleps on his threats, asking him how he would bring LSD into prisons to make them inoperative and if he would resort to violence if challenged by law enforcement over his right to take psychedelic substances. Kleps responded that, if faced with the violation of what he believed to be his basic human rights, he would indeed resort to violence as "free men have always done." Incredulous, and more than a bit disturbed, Burdick countered that "a free country does not maintain itself without law and order," to which Kleps replied "I believe in law and order, but I also believe in basic human rights. Basic human rights, I believe, come first" (Kleps 1966, p. 417).

On Appeal

The publicity generated by Leary's second arrest and the senate subcommittee hearings could not have been beneficial to his legal appeal to his Laredo sentencing. His legal team attempted to again argue the freedom of religion defense on appeal before the United States Fifth Circuit Court of Appeals in New Orleans. The key points of error filed by Leary's counsel included the following:

1. (A) The District Court erred in refusing to instruct the jury to acquit appellant if it found his religious claims to be honest and in good faith.
1. (B) In light of the Federal exemption from the restrictive legislation granted to religious users of peyote and the Government's inability to establish that marihuana is more harmful than peyote, the denial of a religious exemption from the marihuana legislation is an invidious religious discrimination in violation of the First and Fifth Amendments.
2. Denial of appellant's motions for a bill of particulars specifying the location, direction and time of alleged transportation was reversible error; alternatively, the indictment was fatally insufficient.

3. The District Court's instructions on the meaning of the statutory presumptions (a) effectively directing conviction and imposed upon appellant the burden of proving his innocence; (b) were misleading and authorized convictions if appellant did not prove to the jury's "satisfaction" that his possession was "lawful" and "legitimate"; and (c) failed to direct acquittal if the jury believed that appellant lacked knowledge of illegal importation—all in violation of the Fifth and Sixth Amendments and amounting to "plain error" under Rule 52(b), Fed.R.Crim.P.
4. The Government's closing argument to the jury far exceeded the bounds of fair comment.
5. The Government's failure to disclose that one of the major witnesses was under two Federal indictments at the time of the trial denied appellant a fair trial.
6. The presumption under 21 U.S.C. § 176a that marihuana is illegally imported and that a possessor had knowledge of illegal importation is arbitrary and irrational in view of the high proportion of marihuana in the United States which is domestically grown.
7. The statutory requirement of a written order for (26 U.S.C. § 4742) and the imposition of a transfer tax (26 U.S.C. § 4741(a)) violate appellant's constitutional privilege against compulsory self-incrimination and render invalid the conviction under Count 3.
8. The District Court erred in refusing to instruct the jury that they could consider as a defense to Count 2, the defendant's honest and sincere belief that he had a right to engage in his activities because of his religious, scientific, or parental beliefs, and that these beliefs could negate the specific intent necessary for conviction under the statue (*Timothy Leary v. United States* 1967).

The Fifth Circuit Court of Appeals, in an opinion delivered by Circuit Court Judge Ainsworth, soundly struck down Leary's appeal and sided with the government on all counts. Of particular interest was the Court's opinion regarding the freedom of religion defense used by Leary's counsel. Citing both *Cantwell v. State of Connecticut* and *Reynolds v. United States*, the Court found that the First Amendment to the Constitution "embraces two concepts," the freedom to believe, which is absolute, and the freedom to act, which is not. "The freedom to act is conditional," Ainsworth wrote, "and relative and Congress may prescribe and enforce certain conditions to control conduct which may be contrary to a person's religious beliefs in the interest of the public welfare and protection of society" (*Timothy Leary v. United States* 1967). The Court found that since Congress had "seen fit to legislate with appropriate criminal sanctions" the possession of marijuana, the testimony of Ralph Metzner and Hindu leader Fred Swain concerning Leary's religious and scientific sincerity was not pertinent, and that Judge Conally had properly refused an attempt by the defense to instruct the jury to acquit if it was found that Leary's religious practices were in "good faith" (*Timothy Leary v. United States* 1967).

While it is true that the use of marijuana is not a formal requisite for a practicing Hindu, Brown (1983) has noted that the Court relied on a very cursory interpretation of *Sherbert v. Verner* (1963)[8] when it determined that, since Congress had

[8] *Sherbert v. Verner* was a 1963 Supreme Court case in which Sherbert, a member of the Seventh-Day Adventist Church, was fired from her job for refusing to work on Saturday, the day of rest of her church. Unable to find another job, Sherbert applied for unemployment compensation from the state of South Carolina, which denied her claims by finding that she turned down job offers without "good cause." The Supreme Court ruled in the case that the denial of unemployment benefits by

found marijuana to be a danger to society and made possession and trafficking of it a crime, the government did in fact have a compelling interest to infringe upon whatever religious beliefs regarding marijuana use Leary may have had. The Court does not mention *Sherbert* again in its opinion, instead relying on several polygamy cases to support its conclusions, which is a questionable interpretation of the law, since in *Sherbert* the Supreme Court had sided with the plaintiff and ruled that the actions of the state had in fact infringed upon the practice of her religion. Instead, the Fifth Circuit Court became decidedly political when it suggested that if it were found that marijuana use could indeed be protected under the Free Exercise Clause:

> For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, “turn on,” is the “in” thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana (*Timothy Leary v. United States* 1967).

Certainly this passage, and the reference to “turn-on,” was a direct reply to Leary’s September 1966 announcement of the formation of his own religion and the subsequent “turn on, tune in, drop out” mantra and a result of the continued sensationalism generated by his media appearances. The Court was no doubt reacting to Leary’s increasingly flamboyant public stance that flaunted conventional mores regarding drugs and religion, and even parenting, as the decision makes particular reference to the fact that Leary’s son and daughter were exposed to marijuana use in the home (*Timothy Leary v. United States* 1967).

Interestingly, it was points 6 and 7 of Leary’s appeal that would offer fodder for further legal action, not the defense of the free exercise of religion. In 1968, Leary’s legal team led by Robert J. Haft and Joel Jay Finer filed a Petition for Rehearing En Banc before the Fifth Circuit Court of Appeals. Haft and Finer argued that, subsequent to the September 1967 decision of the Fifth Circuit, the United States Supreme Court had made three decisions in January 1968 that would, in their belief, reverse count three of the original Leary verdict, that being the charge of transportation of marijuana as a transferee without paying the proper transfer tax and without securing the proper written forms from the Secretary of the Treasury. The three Supreme Court decisions noted in the Petition were *Marchetti v. United States*, *Grosso v. United States*, and *Haynes v. United States*, of which *Marchetti* and *Grosso* were cases where the defendants’ convictions were overturned for violating the Federal Wagering Tax Statutes and *Haynes* was a case in which the defendant’s conviction for knowingly possessing an unregistered firearm was overturned. In all three cases, the Supreme Court found that the Fifth Amendment

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the state infringed upon the plaintiff’s free exercise of religion. In doing so, the Supreme Court established a two-pronged test related to such situations: either it must be found that there is no infringement on the free exercise of religion or that the state must have compelling interest to infringe upon the free exercise thereof. In *Sherbert*, the Court found that the plaintiff’s free exercise of her religion was infringed upon without the state having compelling interest.

Privilege protected the defendants from self-incrimination that would have taken place under existing statute (*Timothy Leary v. United States* 1969).

The Fifth Circuit Court of Appeals found this argument lacking and ruled *per curiam*, denying Leary's request for rehearing. The brief issued by the Court described its belief that the three Supreme Court decisions were far different from Leary's case due to the fact that, according to the Marihuana Tax Act, the possession of the drug was not illegal, per se, whereas in the statutes named in the three Supreme Court decisions, there existed "no licensing provisions," and therefore "activities thereunder are always unlawful" (*Timothy Leary*, *Appellant*, *v. United States of America*, *Appellee* 1968). Citing the fact that Leary admitted upon his Laredo arrest that the marijuana was his, and testified during his original trial that he had acquired it in New York and had driven to Laredo with it in his possession, the Fifth Circuit Court determined that he had waived his privilege against self-incrimination (*Timothy Leary*, *Appellant*, *v. United States of America*, *Appellee* 1968).

Leary and his counsel continued to press their case, however, both in the court of public opinion and in the Federal Court system. By December 1968, Leary's counsel was petitioning the United States Supreme Court to grant certiorari to review the decisions of the Fifth Circuit Court of Appeals. The Supreme Court did so and, on May 19, 1969, handed down its decision.

Supreme Court Ruling

By the time the Supreme Court heard Leary's case, he had been arrested twice more in police raids on the Millbrook estate, forcing his and his associate's eventual eviction by Tommy Hitchcock in January 1968. Leary and his by-then wife Rosemary Woodruff-Leary, as well as his two children, moved to California after leaving Millbrook and, in December 1968, Leary and his son Jack were arrested in Laguna Beach for possession of marijuana, his fourth such arrest since the 1965 Laredo bust (Leary 1990). It was at this time that Leary would begin his association with the Brotherhood of Eternal Love, a loose-knit collection of marijuana and LSD dealers and manufacturers who would later earn the title of "the hippy mafia" from Rolling Stone magazine (Greenfield 2006). Leary also recorded three albums, published both his first autobiography, *High Priest* (1968), and a collection of previously published articles, interviews, and lectures called *The Politics of Ecstasy* (1969), and was much in demand on the college lecture circuit.

Despite Leary's public calls for the masses to "start their own religion" and his original legal team's reliance on the freedom of religion defense, there was little or no legal possibility that the Supreme Court would consider overturning the case on religious grounds. Robert J. Haft, a Wall Street finance lawyer specializing in mergers and acquisitions, was approached by friends of Leary to look into filing the Petition for Rehearing with the Fifth Circuit, and the Request for Certiorari with the Supreme Court. In looking over the facts of the case, Haft immediately

dismissed the possibility of appealing the case on grounds of religious freedom. "There was simply no way that the Supreme Court, or the conservative Fifth Circuit Court, would ever act to overturn Leary's conviction based on his freedom of religion argument," Haft said in an interview, "By doing so, the Court would have effectively legalized marijuana, and that wasn't even a remote possibility in 1969" (Robert J. Haft, personal interview, September 13, 2012).

Haft himself was shocked at the 30-year sentence handed down to Leary by the Texas District Court and agreed to take the case pro bono. He focused his attention on the Marihuana Tax Act and the two main thrusts inherent in it: whether failure to comply with the transfer tax provisions of the Marihuana Tax Act violated Leary's Fifth Amendment privilege against self-incrimination and whether Leary was denied due process by the part of the Tax Act that established that a person's mere possession of marijuana was sufficient evidence that the marijuana had been illegally imported into the United States. "With the *Marchetti*, *Grosso* and *Haynes* decisions handed down by the Supreme Court in 1968, I knew that the self-incrimination aspect of the Tax Act would be a slam dunk," Haft said. "But, the presumption piece was going to be much more difficult to prove because the trial record lacked any proof of evidence that all marijuana in this country was not imported" (personal interview, September 13, 2012).

Haft proved to be correct in his assumption. Unlike the decision of the Fifth Circuit Court of Appeals in denying Leary's petition for rehearing, the Supreme Court immediately drew comparisons between Leary's case and the 1968 rulings in *Marchetti*, *Grosso* and *Haynes*.

The Supreme Court ruled that if "read according to its terms," the Marihuana Tax Act would in fact compel Leary to "expose himself to a real and appreciable risk of self-incrimination" similar to what had been established in *Marchetti*, *Grosso* and *Haynes*. According to sections 4741–4742 of the Tax Act, Leary would have been required to obtain an order form for the marijuana he possessed—marijuana that was illegal in both New York and Texas—as well as identify himself as a transferee of marijuana who had not registered or paid the occupational tax under sections 4751–4753 of the Act. Seeing this as a clear reason to fear potential criminal charges due to fact that section 4773 of the Marihuana Tax Act directed that a transferees' information be conveyed to the IRS and to state and local law enforcement officials, the Supreme Court ruled that such a requirement was a violation of the Fifth Amendment (*Timothy Leary v. United States* 1969).

The Supreme Court also criticized the Fifth Circuit Court of Appeals' interpretation of the *Marchetti* decision. In their denial of rehearing brief, the Fifth Circuit Court of Appeals declared that Leary's privilege of self-incrimination had been waived during the trial by his testifying to where and how he acquired the marijuana. The Fifth Circuit Court had relied on a statement the Supreme Court made in their *Marchetti* decision in which they declared that their decision in that case "shall not provide a shield for any taxpayer who was 'outside the privilege's protection'" (*Timothy Leary v. United States* 1969)." The Supreme Court (1969), however, asserted that:

> . . .we think the Court of Appeals misconceived the thrust of that dictum. The aspect of the self-incrimination privilege which was involved in *Marchetti*, and which petitioner (Leary) asserts here, is not the undoubted right of an accused to remain silent at trial. It is, instead, the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. Thus, petitioner is not asserting he had a right to stand mute at his trial, but that he cannot be convicted for having failed to comply with the transfer provisions of the (Marihuana Tax) Act at the time he acquired marijuana in 1965.

John S. Martin Jr., arguing on behalf of the Federal government, held a position in defense of the constitutionality of the Marihuana Tax Act that was irregular at best. Martin argued that Congress had never truly intended to issue the tax forms called for in the Act, but instead had used the whole idea of taxing marijuana as a ruse to bring marijuana trafficking within the taxing power of the Constitution and the implied police powers therein. In reviewing the legislative history of the Marihuana Tax Act, the Supreme Court soundly rejected this argument and found that Congress had indeed intended to not only tax marijuana, but had established within the Act that both registered and non-registered possessors could obtain the forms that would allow them to prepay the tax. It was in coming to this conclusion regarding the legislative intent of the Tax Act that the Supreme Court ruled that if a non-registered possessor of marijuana complied with the provisions of the Act, they would, in fact, be admitting guilt due to the fact that marijuana possession was illegal in all 50 states ("Due Process" 1970).

The second part of the appeal taken up by the Supreme Court regarded the statutory presumption that any person possessing marijuana imported it into the United States illegally and/or was aware of such illegal importation. The Supreme Court rejected the Fifth Circuit Court of Appeals reasoning regarding presumption as well; noting that there is no realistic evidence to suggest that all marijuana found in possession in the United States came from abroad. Though the Court did make the suggestion that a majority of marijuana probably did come from foreign lands—most likely Mexico—it also found that it would be nearly impossible for someone possessing marijuana to know exactly where its origins lay. Attorney Robert J. Haft, arguing the point before the Court, used a late 1968 newspaper article that showed a photograph of thousands of pounds of domestically grown marijuana seized across the river from Manhattan in New Jersey. Haft photocopied the article and handed it out to the Supreme Court Justices to illustrate the fact that not all marijuana could be presumed beyond a reasonable doubt to come from outside the United States (Haft, personal interview, September 13, 2012). Thus, the Supreme Court found this aspect of the Marihuana Tax Act unconstitutional as well. In a unanimous 9–0 decision, the Supreme Court found in favor of Leary on both counts, reversed his conviction on Counts 2 and 3 of the District Court's original verdict, and remanded the case to the Fifth Circuit Court of Appeals for further proceedings consistent with the Supreme Court's opinion (*Timothy Leary v. United States* 1969).

Conclusions

Leary's 1969 Supreme Court case was a victory insofar that it overturned his Laredo conviction, although it did nothing to protect marijuana use under the Free Exercise Clause, which had been Leary's original main defense and increasing passion throughout his trial and appeals process (Leary 1990). Although there has been a growing movement at the state level for the legalization of marijuana for medicinal use, the federal government remains resolute in its opposition, and marijuana is still classified as a "dangerous narcotic." There has been no successful court case in the United States that establishes marijuana possession or use as a religious freedom, though such precedents have been established both by the Native American Church's use of peyote and the União do Vegetal's (UDV) sacramental use of the traditional psychedelic brew ayahuasca (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* 2006; Labate and Feeney 2012).

As Brown (1983, this volume) has noted, the Supreme Court has historically tied the question of whether or not a religion truly exists to the questions of "whether one sincerely follows the professed beliefs and whether the tenets actually burdened are central to the religious belief" (p. 133). In this regard, the Court has established that it can decide whether a defendant is sincere in his or her proposed religious beliefs as well as whether a particular tenet of the religion is central to said religion's observance and practices. In the case of Leary, the Texas District Court found that his adherence to Hinduism did not require him to smoke marijuana, nor did his status as a psychologist, since he did not possess the proper license for controlled experimentation with marijuana. This differed from the 1964 California State Supreme Court decision in *Woody* that adhered to the same "test" regarding members of the NAC and found that peyote was central to that church's beliefs and ceremonies. The failure of Leary's religious defense was the result of his description of himself as a practicing Hindu who used marijuana for spiritual reasons in following the tenets of his religion, which he became a loose practitioner of after a honeymoon trip to India in 1964 following his brief marriage to model Nena von Schlebrügge (Leary 1990, 1995). In his claim that he smoked marijuana as part of his religious beliefs, he used fallacious reasoning in regards to Hinduism. Although some Hindu sects in India do use marijuana spiritually—and have for thousands of years—its use, or lack thereof, is not necessary to practice the Hindu faith. If anything, Hindu sects that utilize marijuana do so more as a catalyst towards reaching the spiritual plane than as any type of sacramental necessity they are bound to as part of their religious beliefs. If Leary had instead utilized his membership in the Neo-American Church, for his religious defense, an organization that did profess that the use of both psychedelics and marijuana were essential to their church's belief structure, then perhaps the outcome of his original Laredo trial would have been different. Or, perhaps if Leary had utilized his membership in the Neo-American Church, the question of whether or not that "church" was in fact truly an established and recognized religion would have been brought up by the Texas District Court. It was certainly no guarantee that the outcome of the original Laredo trial would have been different, as illustrated by

a 1966 North Carolina Supreme Court decision ruling against an active member of the Neo-American Church who used the religious defense argument when arrested for possession of marijuana and peyote (Brown 1983). And, as attorney Robert J. Haft has noted, allowing marijuana to be tied to religious freedom would have the effect of legalizing its use, making the federal courts reluctant to move in that direction.

Though Leary's federal court cases failed at his original intent regarding defense of religious freedom, they were successful in effectively rendering unconstitutional the Marihuana Tax Act, which had been in existence since 1937, and had helped lead to the incarceration of hundreds, if not thousands, of people. The Supreme Court's 1969 decision regarding Leary's case illustrated that the criminal statutory presumption inherent within the Marihuana Tax Act was, in reality, simply a "convenient way to secure a conviction without having the government bear the burden of producing all the evidence sufficient to show guilt ("Due Process" 1970, p. 376). A direct result of this Supreme Court decision was President Richard Nixon's July 1969 Message to Congress that outlined the Nixon proposal for legislation that would "meet the narcotic and dangerous drug problems at the federal level" (Nixon 1969). The Special Message made direct mention to Leary's May 1969 Supreme Court case and requested that since the Court had "struck down segments of the marihuana laws and called into question some of the basic foundations for the other existing drug statutes," the Attorney General should submit an interim measure to correct the "constitutional deficiencies" of the Marihuana Tax Act. Nixon urged Congress to "act swiftly and favorably on the proposal to close the gap now existing in the federal law and thereby give the Congress time to carefully examine the comprehensive drug control proposal" (Nixon 1969).

What resulted was the creation by Congress of the Controlled Substance Act (CSA); title II of Comprehensive Drug Abuse Prevention and Control Act of 1970. The CSA established five classification levels, called Schedules, with particular qualifications for each substance to belong to a given Schedule. Marijuana was named a Schedule I narcotic by the CSA, meaning that in the opinion of Congress it fit the following criteria:

1. The drug or other substance has a high potential for abuse.
2. The drug or other substance has no currently accepted medical use in treatment in the United States.
3. There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Other substances on the Schedule I list include heroin and the psychedelic substances LSD, psilocybin, DMT, and peyote (see Griffin III in this volume for more information on Schedule I substances).

There is an increasing movement within many states to remove marijuana from this Schedule I list due to the fact that it is being used ever more frequently for medicinal reasons. Currently, 18 states plus the District of Columbia have enacted legislation regulating the use of medicinal marijuana, and following the November 2012 U.S. elections, the states of Colorado and Washington both legalized the use

of marijuana recreationally. The direct results of this action are unclear as the federal government continues to remain resolute by thus far refusing to remove marijuana from the Schedule I list even as the controversy surrounding the United States' "War on Drugs" and its worldwide ramifications continues to be a topic of much debate. There may be a thawing, however, in the federal government's stance regarding marijuana as President Barack Obama was quoted as saying on December 14, 2012, "It would not make sense for us to see a top priority as going after recreational users in states that have determined that it's legal" (Dwyer 2012). Perhaps this represents a turning point regarding U.S. drug policy in general and marijuana in particular; a turning point that will ensure that the type of long prison sentences and high fines brought against Leary in 1966 for the possession of less than one ounce of marijuana are completely a thing of the past.

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Cannabis and the Psychedelics: Reviewing the UN Drug Conventions

Amanda Feilding

Psychoactive Substances and the Origins of Regulation

The three United Nations drug conventions of 1961, 1971, and 1988 oblige almost every country in the world[1] to criminalize the production, trade, and possession of psychoactive substances originating from three plants—the opium poppy, cannabis and coca leaf—as well as from other sources. The unintended consequences of these conventions have been devastating worldwide. They have resulted in millions of otherwise innocent people being criminalized and imprisoned, ruining their career prospects and life chances; facilitated the spread of AIDS and hepatitis C; fostered an illegal market which is estimated to be the world's third-biggest industry (after food and oil, worth around $350 billion per year), empowered ruthless, transnational criminal organizations; destabilized nation states through violence and corruption; enabled the widespread curtailment of basic human rights; caused tens of thousands of deaths each year in an unending "War on Drugs"; required the expenditure of hundreds of billions of dollars of taxpayers' money on enforcement; and created a regulatory regime so draconian that 80 % of the world's population now lack access to the pain-killing medicines they need (World Health Organization [WHO] 2009).

Prohibitionism is a relatively new phenomenon, but the practices it seeks to proscribe and regulate are as old as human culture itself. The human mind underwent an extraordinary change between around 70,000 and 50,000 years ago.

[1] The only countries which are not parties to the 1961 Convention and/or the 1971 Convention are South Sudan (which became a nation only in July 2011 and still has no stable institutions of state), Equatorial Guinea (with a population of well under a million), and a handful of tiny Pacific island nations. Countries outside the 1988 Convention include many of the above, plus the significantly larger countries of Somalia and Papua New Guinea.

A. Feilding (✉)
The Beckley Foundation, Beckley Park, Oxford OX3 9SY, UK
e-mail: office@beckleyfoundation.org

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We developed language, an aesthetic sense, and a spiritual propensity. After a hundred thousand years of making flint arrowheads, we rapidly progressed to producing beautiful and inspired art.

Cave paintings, dating back 35,000 years or more, show evidence that artists had experienced the psychedelic state. In historical times, the religions and spiritual practices of Ancient Egypt, India, Mesoamerica, and others included changing states of consciousness. The Eleusinian Mysteries of the cult of Demeter, one of the foundation stones of Greco-Roman culture, and hence of modern Western civilization, had at its core the ingestion of a psychedelic potion, most probably based on ergot. In modern times, too, psychoactive substances play a central role in the traditions of many indigenous and religious groups: the *ayahuasqueros* of the Amazon basin, the bhang drinkers of Hindu tradition, the Aymara coca chewers of the Andes, the peyote-gathering Wixáritari, the khat users of East Africa and Arabia, the ganja-smoking adherents of Ras Tafari, the iboga-eating Bwiti of West Africa, and many others. (For more information on ayahuasca, see: Feeney and Labate, this volume.) These and other users have found that the altered state of consciousness induced by these drugs is conducive to spiritual engagement and development, and to the creation of social bonds.

Over the past 3,000 years, the consumption of cannabis in particular has spread across Asia, the Arab world and Africa, reaching Europe and the USA only in modern times. By the mid-nineteenth century cannabis, apart from its role as a popular medicine, was used by small groups of intellectuals, particularly in France, where a hashish-eating club was established in Paris, patronized by writers and artists such as Baudelaire, Dumas, and Delacroix. However, apart from the activities of this bohemian minority, cannabis use remained largely the preserve of traditional peoples. The recreational use of cannabis in the West did not take flight until the 1960s, when it became identified with the anti-Vietnam war movement and the emergence of the counter-culture. Nowadays, it is prevalent, particularly among the youth in many developed countries. The adoption of cannabis and psychedelics by the youth of the West set in motion a violent official reaction against these drugs and the people who used them.

The prohibition of psychoactive substances, initiated by the Opium Convention of 1912, had started as an attack on the habits of minority groups such as Chinese-Americans, African-Americans, and Hispanics. In the following years, other treaties followed, culminating in the consolidating UN Single Convention on Narcotic Drug*s* in 1961, later expanded and strengthened by the 1971 UN Convention on Psychotropic Substances and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs.

The aims of these three conventions, expressed in their preambles, are noble and lofty. Declaring themselves "concerned with the health and welfare of mankind," the parties set about formulating an international regime of control which would ensure access to medication "indispensable for the relief of pain and suffering," and would combat the "evil" of addiction to narcotic drugs and the concomitant dangers to society. As recently as 1998, the 20th UN General Assembly Special Session

restated the conviction that prohibition would eliminate the problem, under the slogan "A drug-free world: We can do it!"

Fifty years after the Single Convention came into force, it is evident that the war against "controlled" psychoactive substances, and the people who use them, has been a catastrophic failure. It has not succeeded in its aim of eliminating drug use, and has caused devastating collateral damage resulting in human misery and death. It is time for world leaders to review this issue from the perspective of scientific evidence and common sense.

The UN Drug Conventions: An Impediment to Progress

Two areas in which the possession and use of "controlled" drugs are expressly permitted by the UN Conventions are medicine and science. Nevertheless, in practice, the conventions severely obstruct progress in both fields. In the medical arena, narcotic and opioid medications are indispensable, for example, in the treatment of pain, epilepsy, opioid dependence, and in emergency obstetric care. Because of their status as essential medicines, access is a human right as defined in the International Covenant on Economic, Social, and Cultural Rights (UN 1966). Yet in 2003, six developed countries accounted for 79 % of the total global consumption of morphine (for severe pain), while developing countries, representing 80 % of the world's population, accounted for just 6 %. Around 75 % of people with epilepsy in developing countries, and around 90 % in Africa, do not receive the treatment they need. In developing countries, only about 2 % of injecting drug users, with opioid dependence, receive treatment with methadone or buprenorphine (WHO 2010).

The World Health Organization identifies three key barriers blocking access to these essential medications:

- Limited medical knowledge, including a fear of abuse and dependence;
- Overly restrictive regulations and lack of enabling policies. This category includes the criminalization of injecting drug users, and the imposition of undue controls on the storage and distribution of "controlled" drugs for fear that they will be diverted into the illicit market;
- Supply challenges, including the difficulty of providing accurate estimates of need to the International Narcotics Control Board (INCB), and the complexity of licensing.

It is apparent that all three barriers identified by the WHO are caused by or exacerbated by the prohibitionist system of international control.

In the scientific arena, too, the prohibitionist approach of the conventions acts as a severe impediment. Ethical approval for work with these substances is rarely forthcoming. Indeed, the expectation that approval will be refused deters most of the few scientists who are willing, in principle, to undertake this work from even applying. This is particularly so in the case of LSD which, due to its negative

reputation left over from the 1960s, has yet to be investigated in a modern neuroscientific research setting.[2] Research is further hampered by the cost and complication of obtaining the licenses needed to handle "controlled" chemicals. Similarly, the burdensome regulatory requirements imposed on manufacturers mean that there are very few legal suppliers of clinical-grade psychoactives such as psilocybin or LSD, so that even those scientists who have, exceptionally, obtained permission to use them find them difficult and very expensive to procure. Furthermore, the power of the taboo means that academic institutions are often reluctant to become involved in research involving "controlled" substances, fearing a backlash in the popular press. Funders, too, are wary of becoming associated with such research.

This deficit in scientific research is an enormous problem. Without scientific investigation, there can be no understanding of how psychoactive drugs work and of what they can tell us about consciousness; no sound evidence on which to base harm-reduction strategies and other policy decisions; and no exploration of the potential medical and therapeutic benefits that many "controlled" drugs may provide. It was to overcome these problems that in 1998, the Beckley Foundation Scientific Programme was established.

Psychoactive Drugs in Science and Medicine

Despite the difficulties placed in the path of scientific research by the combination of the conventions and the effects of the societal taboo, there have, in the past few years, been some important developments in the study of cannabis and the psychedelics, initiated and sponsored by organizations including the Beckley Foundation, the Heffter Research Institute, the Multidisciplinary Association for Psychedelic Science (MAPS), and others.

A review of the findings is beyond the scope of this chapter, but detailed below are a few highlights of the recent studies in which the Beckley Foundation has been involved. In 2012, the Beckley Foundation/Imperial College Psychedelic Research Programme published results from a series of studies that used the latest fMRI and MEG brain-imaging technology to investigate changes in cerebral blood supply and brain function following the injection of a dose of psilocybin in comparison with a placebo. Contrary to expectations, the findings showed for the first time that psilocybin acts by decreasing the flow of blood to the brain, and especially to the "default mode network" (DMN), a system of interconnected brain regions responsible for coordinating and filtering the flow of information through the brain

[2] In 2007, The Beckley Foundation, working in collaboration with University of California, Berkeley, obtained the first approvals in modern times to use LSD with human participants. However, due to unforeseen difficulties involving the principal investigator, the study was not completed.

(Carhart-Harris et al. 2012a). The research provides a neuroscientific underpinning for the metaphor, popularized by Aldous Huxley, of the brain as a "reducing valve" whose censoring activity is limited by psychedelics, which constrict the blood supply to those brain hubs involved in censorship (Huxley 1954).

The DMN is shown to be active when people are not performing any specific task, and particularly when they are engaging in self-reflection. Certain centers of the DMN are chronically over-active in depression, an illness characterized by excessively rigid ruminative thought patterns. The fact that psilocybin reduces the activity of these centers by throttling back their blood supply, raises the possibility that it may be a valuable new avenue of treatment for chronic depression that would allow dysfunctional thought patterns to be reset. The program has now received a large government grant from the UK's Medical Research Council to study this possibility. Other regions of the DMN are overactive in cluster headache, a particularly agonizing condition that is notoriously hard to treat. Our findings reinforce the anecdotal evidence that LSD and psilocybin are among the few treatments to provide effective relief.

The brain imaging results complemented subjective reports of vivid and lifelike memories under psilocybin by showing that psilocybin, but not placebo, activates areas of the brain responsible for visual and other sensory processing. This finding also points to the potential value of psilocybin as an aid to psychotherapy, showing how it may help patients to access, vividly relive, and process painful memories (Carhart-Harris et al. 2012b).

The Beckley/Imperial program is continuing with a broadly similar series of studies into the effects of MDMA. At the time of writing, the results have not been published;[3] however, preliminary results show that, in response to positive memory cues, MDMA increases the activation of brain regions involved in visual and other sensory processing. In response to negative memory cues, it decreases the activation of brain regions involved in anxiety and fear response, enabling the subject to more easily access these memories and to work through them, thereby releasing the negative charge left by trauma.

These findings complement previous MAPS-supported work on MDMA-assisted psychotherapy as a potential treatment for post-traumatic stress disorder (PTSD) (Mithoefer et al. 2011). At the time of writing, a Phase 2 pilot study is under way in the USA with veterans from the Armed Forces, firefighters, and police officers as subjects. The brain-imaging results mirror the subjective experience of particularly vivid recollections under MDMA, and provide a neuroscientific rationale for the psychotherapeutic studies by showing that MDMA can allow people to access painful memories without the overwhelming emotional response characteristic of PTSD.

The Beckley Foundation's brain-imaging studies at Imperial College also complement their collaboration with Johns Hopkins University, where the Beckley and Heffter Foundations are working with Dr. Roland Griffiths and his team on a pilot study investigating psilocybin-assisted psychotherapy in overcoming

[3] This research was recently featured live on UK television (Murdoch 2012).

treatment-resistant addiction; in this case, to nicotine. This is a small pilot study, but so far, the results have been extraordinary, with an unprecedented success rate of almost 100 %.[4] This initial study is in need of government funding in order to carry out a much more extended double blind clinical trial.

An earlier series of studies, in collaboration with Dr. Paul Morrison at the Institute of Psychiatry at King's College, London, highlights the important protective effects of CBD (cannabidiol) against short-term psychotic symptoms and memory impairment caused by THC (Englund et al. 2013). Modern breeds of street cannabis are bred to be high in THC, with little or no CBD; a composition that we would expect to carry a particularly high risk of harm. This state of affairs cannot be avoided under the present prohibitionist regime. An inevitable consequence of prohibition is that it creates illicit supply channels; and an illegal market is a completely unregulated market. This theme will be revisited later in the chapter.

Cannabis: The Elephant in the Room

Over the course of many years' work in drug policy at national and international levels, we reached the conclusion that the treatment of cannabis (and the psychedelics, considered below) is highly anomalous. Cannabis accounts for three-quarters of illicit drug use, according to UN estimates (United Nations Office on Drugs and Crime 2012), and is thus the mainstay of the War on Drugs, supporting huge interdiction and enforcement efforts. In the USA, for instance, some 800,000 people are arrested each year for cannabis offenses, and worldwide there are many millions of people in prison for personal possession. Cannabis is listed in Schedule IV of the UN Single Convention. Although the convention does not formally define what that listing means, the European Union characterizes drugs in Schedule IV as "the most dangerous substances, already listed in Schedule I (i.e., addictive drugs with a high risk of abuse), which are particularly harmful and of extremely limited medical or therapeutic value" (European Monitoring Centre on Drugs and Drug Addiction [EMCDDA] 2012a).

Yet, despite the severity of this classification, cannabis attracts barely a mention in the meetings and publications of the UN and other international bodies. Without cannabis, the War on Drugs would collapse: since only around 1–1½ % of the world's population use all the other illicit drugs combined, the expenditure of hundreds of billions of dollars would be impossible to justify.

[4] Typically only about 4–7 % of those aiming to quit smoking are successful. Most medical intervention studies report success rates of around 25 % (source: The American Cancer Society website. Retrieved February 13, 2013 from http://www.cancer.org/healthy/stayawayfromtobacco/guidetoquittingsmoking/guide-to-quitting-smoking-success-rates.

The work of the Beckley Foundation's Global Cannabis Commission highlighted this anomaly and explored how it could be resolved. The commission brought together five of the world's leading scholars to examine the legal position of cannabis in jurisdictions around the world, as well as at UN level, to review the latest scientific evidence surrounding cannabis and the policies that control its use, and to develop proposals for policy reform.

The Commission's Report (Room et al. 2008) was presented and discussed at the Beckley Foundation's international meeting at the House of Lords in 2008, and its findings were re-published in book form (Room et al. 2010) in collaboration with Oxford University Press, with an endorsement by President Fernando Henrique Cardoso of Brazil, whose thinking was influenced by the report's findings. The commission's conclusions included the following:

- The probability and scale of harm among heavy cannabis users is modest compared with that caused by many other psychoactive substances, both legal and illegal, in common use; namely, alcohol, tobacco, amphetamines, cocaine, and heroin.
- Variations in the rates of cannabis use within and between countries do not seem to be much affected by the probability of arrest or by the penalties for use or sale, however draconian. The widespread pattern of cannabis use indicates that many people gain pleasure and therapeutic or other benefits from use.

The Commission's analysis led to a series of recommendations, which are discussed later.

Psychedelics and the Trap of Insufficient Harm

If cannabis is the elephant in the room, hugely important in policy terms but barely discussed at international meetings, then psychedelics are the mouse, ignored simply because they are barely noticed. This may seem a strange statement to make about a class of drugs with such potency and profound effects as the psychedelics. Indeed, it cannot be denied that LSD and other psychedelics carry a risk of harm when inappropriately used without a proper context. The most serious risk is the possibility that, in a small fraction of cases, use may trigger a psychotic episode.

On the other hand, psychedelics such as LSD and psilocybin are not addictive, which, among other things, means that there is no social problem from crime because of dependent users. They lack the acute toxicity of, say, alcohol, heroin, and cocaine, all of which, from time to time, cause death by overdose. And long-term use does not give rise to the chronic toxic effects of, say, tobacco or alcohol. For all these reasons, it is fair to characterize the psychedelics as presenting a low risk of problem use, which partly accounts for the fact that they are so overlooked in policy discussions.

This insufficiency of harm, I would argue, has created a regulatory trap in which the psychedelics are caught. They are classed alongside the most harmful drugs: for example, in the UK, LSD, psilocybin, and MDMA are in Class A of the Misuse of Drugs Act 1971, along with heroin and cocaine.[5] Indeed, the controls on legal possession for science or medicine are more stringent for psychedelics (in Schedule 1 of the Misuse of Drugs Regulations 2001) than for heroin and cocaine (Schedule 2),[6] as it is claimed that they have no medical application. Yet, it is precisely because psychedelics do not figure in crime or health statistics that there is no compelling reason to re-examine their status. And so they languish in the most restrictive class, with all the consequences that this implies for the advancement of scientific and medical knowledge.

The "Legal Highs"

The newer synthetic psychoactives—the so-called "legal highs"—present particular problems for regulators. New substances emerge onto the market at an ever-increasing rate: 150 were identified by the EU in the whole of the period 1997–2010, but 24 of these appeared in 2009, and 41 in 2010 (European Monitoring Centre for Drugs and Drug Addiction [EMCDDA] 2011a); in 2011, 49 new substances were reported (EMCDDA 2012b). These substances are frequently sold online, and there is evidence of a rapidly expanding marketplace. The number of online shops offering "legal highs" for sale in Europe more than doubled from 314 to 631 between January 2011 and July of the same year (EMCDDA 2011b).

Many such substances appear to carry a low risk of harm, although for a government to safety-test them all would be prohibitively expensive. On the other hand, it is not justifiable to ban them simply because they are used recreationally. Since November 2011, the UK Home Secretary has had the power to make a "temporary drug class order," effective for up to 12 months, while consideration is given to classifying the substance under the Misuse of Drugs Act. So far, the power has been used only once (for methoxetamine), and the classification procedure means that, in principle, a drug should not be assigned to the temporary class unless there is genuine concern about its safety.

The recent proposal by New Zealand's Associate Health Minister Peter Dunne concerning the regulation of "legal highs" represents an attempt to balance, on the one hand, the right to produce and use psychoactive substances with, on the other hand, the need to protect public safety. Under the proposal, manufacturers would

[5] The US Classification system takes a similar route, with psychedelics classified as Schedule 1. Drugs in this classification have a high potential for abuse, no currently accepted medical use, and are unsafe for use under medical supervision.

[6] For the Home Office list of substances controlled under the Misuse of Drugs Act and the Misuse of Drugs Regulations, see http://www.homeoffice.gov.uk/publications/alcohol-drugs/drugs/drug-licences/controlled-drugs-list?view=Binary.

have to conduct safety testing at their own expense before a drug could be brought to market. If testing revealed no significant safety concerns, then a license could be given for sale of the drug. The suggestion has the merit that it closely resembles the routine procedure for licensing prescription medicines: This familiarity should lend the proposal public acceptability.

Such a regime would free governments from the impossible burden of safety-testing every new substance as it appears on the market, while at the same time allowing drugs to enter legal circulation if they are shown to pose a low risk. A procedure that would provide for the regulated supply of, say, an MDMA analogue once it had been proven safe, would surely give better protection to the youth than the current system. A recent UK/USA survey found that one-fifth of respondents aged between 18 and 25 had, in the previous year, taken a mystery white powder without knowing what it was or what it was originally sold as (Global Drug Survey 2012). In an unregulated market, when an individual has a bad reaction to an unlabeled substance they have ingested, the medical professionals have no idea how to treat the symptoms, thereby increasing the risks of serious harm or even death. (For more information on salvia, see O. Hayden Griffin III, *Salvia divinorum*: Hallucinogens and the Determination of Medical Utility, this volume.)

Reforming the UN Drug Conventions

I have argued that the present prohibitionist system of international control has both stifled access to medicines and scientific research into "controlled" drugs, and has also trampled on the traditional spiritual practices of many groups, and therefore indirectly on Article 18 of the Universal Declaration of Human Rights (UN 1948). Moreover, Prohibitionism has ensured that markets in many psychoactive drugs are completely unregulated.

Some steps towards reform are possible within the latitude, or "wriggle room," allowed under the conventions as they stand. However, such reforms often operate within a legal grey area. For example, the Netherlands makes a plausible legal argument to justify its policy of tolerating the sale, purchase, and consumption of cannabis in "coffee shops" by according it the lowest judicial priority, although it remains an offense. On the other hand, because of the requirements of the conventions, there is no legal avenue to regulate the wholesale supply of cannabis to coffee shops. Thus, for over 30 years, the Netherlands has been caught in the "back door" syndrome, where retail sale of small amounts is *de facto* legal, but the provision of the cannabis for sale is illegal. This puts the police in an impossible position, as Jan Wiarda, former Head of Police in the Hague and Chair of the European Chiefs of Police, pointed out in two Beckley Foundation seminars (Wiarda 2002, 2004).

A number of European countries provide clean injection facilities where users may inject themselves using sterile needles without fear of prosecution. Countries adopting this policy argue strongly that it is permissible under the conventions on

public health grounds. The INCB, on the other hand, argues equally vociferously that the policy, and other moves towards liberalization, are not:

> A number of States parties are shifting towards more lenient national drug policies that are not in line with the international drug control treaties. For example, some States parties have permitted the use of "safer crack kits," the existence of so-called "coffee shops" and the establishment and operation of so-called "drug injection rooms." The Board has warned that such policies promote social and legal tolerance of drug abuse and drug trafficking and therefore contravene the international drug control treaties. (INCB 2011a)

The recommendations of the Global Cannabis Commission included the following, which can be implemented without modifying the Conventions:

- In response to the evidence that more than minimal enforcement of prohibition does little to reduce cannabis use, the primary concern of any policy should be to mitigate the harms that have been produced by the prohibitionist approach.
- The enforcement of laws against cannabis use and possession should be a very low priority for the police.
- Violations should be processed administratively outside the criminal justice system.

However, the conventions are a serious impediment to more thoroughgoing policy reform, such as the creation of a legal, regulated, and taxed market for, say, cannabis. By mandating a series of legislative provisions that must be adopted by all signatories, they prevent policy experimentation and thereby stifle the creation of an evidence-base. Moreover, the cumbersome amendment mechanism and the effective need for unanimity before amendments are adopted make it difficult, if not impossible, to respond to changing circumstances which, since 1961, have included the emergence and spread of AIDS and the discovery of multiple medicinal uses for cannabis and its constituents, as well as the insights from the above-mentioned brain-imaging into the effects and possible therapeutic uses of psychedelics. Whatever the original intention of the conventions, it is therefore clear that their current operation is ideologically, rather than empirically, driven. Even allowing for the most liberal interpretations of the conventions, and the most expansive view of the allowable room for maneuvering, it is clear that certain reforms would go well beyond the available latitude. Among the recommendations of the Global Cannabis Commission's Report in 2008, was that the international drug control regime should be amended in order to allow a state to adopt, implement, and evaluate its own cannabis policy within its borders.

The commission explored in detail the changes in treaty wording that would be required in order to effect two policy reforms: (1) clear and explicit decriminalization of the personal cultivation, possession, and use of cannabis; and (2) the creation of a legal, regulated market. As a contribution to the discussion and implementation of policy reform, the commission proposed a new *Draft Framework Convention on Cannabis Control* (Room et al. 2008), based upon the WHO's *Framework Convention for Tobacco Control* (WHO 2003). The Commission also examined the process by which the reforms that it suggested could be brought about.

More recently, the Beckley Foundation has commissioned *Roadmaps to Reforming the UN Drug Conventions* (Room and Mackay 2012), which expands

the Global Cannabis Commission's work by showing how the conventions could be amended in order to permit countries to (1) clearly and explicitly decriminalize the possession and use of small quantities of one or more "controlled" drugs for personal consumption; and (2) create legal, regulated, non-medical markets in one or more "controlled" drugs. The obvious starting point for reform would be cannabis, but similar principles apply to other substances as well.

The conventions lay down the mechanisms that must be followed when a party wishes to amend them. However, the process is so lengthy and cumbersome that no country has yet managed to have an amendment proposal accepted. After a party proposes an amendment, all other parties have up to 24 months (depending on which convention is under consideration) to object. If there are objections, the Economic and Social Council of the UN may choose to call a conference to debate the proposal (in the case of the 1988 Convention, a conference will not be called unless requested by a majority of parties). An amendment takes effect only if there is unanimous assent or if a conference of parties votes in favor.

The effective requirement for unanimity presents an almost insurmountable barrier to reform, and it is not surprising that there has only ever been one successful amendment, to the conventions: namely, the 1972 Protocol to the 1961 Convention, which strengthened some of its provisions. Other than this, the only attempt to amend the treaties has been by Bolivia, which in 2009, filed a proposal to amend the 1961 treaty by removing coca leaf chewing from its scope. Coca chewing has been traditional among indigenous peoples in Bolivia for millennia. For nearly 20 years, including the date of Bolivia's accession to the convention, the country was governed by a military dictatorship. In 2009, following a referendum, Bolivia adopted a new constitution protecting the rights of indigenous peoples and affirming the status of coca as part of the country's cultural heritage and biodiversity. (For more information, see: P. Metaal, "Coca in Debate," this volume.) In the wake of the amendment proposal, a group of powerful nations, including all members of the G-8, filed objections by the deadline of January 2011.

The *Roadmaps to Reforming the UN Drug Conventions* propose two kinds of mechanism by which a country unable to achieve unanimous agreement for an amendment might nevertheless pursue policy reform. The first is the path of denunciation and re-accession with a reservation, which Bolivia initiated after its attempt to secure an amendment had failed. Parties wishing to make a reservation in respect of certain treaty clauses usually do so at the time of accession, and over 160 such reservations were made in this way to the three drug conventions, by countries including the USA, Brazil, Russia, India, China, Mexico, South Africa, Germany, the UK and many others. Indeed, the principle that reservations should be made at the point of accession is so established that the status of a late reservation, declared *after* accession, is not settled in international law.

A legally less problematic route than a late reservation, is for a country to "denounce" (withdraw from) a treaty and then immediately to re-accede with a reservation. There are a number of precedents from other treaties for this procedure, as discussed in Room (2012). Having failed to secure assent for its proposed amendment, Bolivia therefore denounced the 1961 Single Convention, at the same time expressing its intention to *re*-accede immediately with a reservation on

coca leaf. Bolivia's denunciation took effect on January 1, 2012. Although a handful of countries objected to the reservation, the number of objections received before the deadline fell far short of the one-third of parties (i.e., around 60 countries) that would have been needed to block the re-accession. Accordingly, Bolivia successfully re-acceded, with its reservation on coca leaf, in January 2013.

Although Bolivia ultimately succeeded in achieving its reservation on coca leaf, its decision to denounce the Single Convention drew a vigorous reaction from the INCB, which declared:

> The Board is of the opinion that, while this step by Bolivia may be in line with the letter of the Convention, such action is contrary to the Convention's spirit. The international community should not accept any approach whereby Governments use the mechanism of denunciation and re-accession with reservation, in order to free themselves from the obligation to implement certain treaty provisions. Such an approach would undermine the integrity of the global drug control system, undoing the good work of Governments over many years. (INCB 2011b)

The INCB's view seems surprising given that, upon acceding to the 1971 Convention, the USA, Canada, Mexico and Peru declared reservations for plants traditionally used in "magical or religious rites." These reservations are rather similar to Bolivia's; indeed, more permissive because they are less narrowly delineated. There was no objection to them, and they can hardly be said to have compromised the international drug control system. Moreover, it is hard to understand how the remit of the INCB, which is charged with monitoring compliance with the conventions, can extend to condemning an action that, by its own admission, follows the conventions to the letter.

The backlash against Bolivia was not confined to the drug policy arena: on March 19, 2012, the European Commission decided to "initiate an investigation in order to establish whether the denunciation of the UN Single Convention on Narcotic Drugs justifies a temporary withdrawal of the special incentive arrangement for sustainable development and good governance for products originating in Bolivia" (European Commission 2012). The threat of aid, trade, and financial sanctions by developed countries against poorer countries can seriously inhibit their freedom of action to devise policies better suited to their special circumstances.

A reservation specifies the treaty provisions that a party refuses to accept; the party is still bound by the remaining provisions. For that reason, reservations can only *subtract* treaty wording. *Changes* and *additions* to wording require a different mechanism, which is also outlined in the *Roadmaps to Reforming the UN Drug Conventions*. This second avenue, which provides some safety in numbers, is for a group of like-minded countries to negotiate a new treaty among themselves. Such a treaty, drawn up by a consortium of states with broadly similar views on reform, would clearly be more recent than any of the conventions. For this reason, according to the legal principle of "last in time," the amended treaty would supersede the conventions in those countries that signed it.

The supplementary treaty would also be more specific in its ambit than the UN Conventions, inasmuch as it would cover only certain areas of policy or certain

substances. The legal norm is that a law dealing with the specific case at hand takes precedence over a more general law. For this reason, too, it can be persuasively argued that the new amended treaty would supersede the conventions.

Provision would, of course, need to be made for those countries wishing to remain within the conventions as they stand. States that did not become parties to the new treaty could be accommodated through the usual principles of comity (reciprocity) that govern international relations, so that, for example, no country would export a drug to a country unwilling to import it. For a much fuller development of the arguments and a detailed discussion of specific treaty wording, see Room and MacKay (2012).

Steps Towards Reform

The "legal highs" proposal from New Zealand described above is among several recent reforming developments from around the world. Particularly notable at the time of writing are the initiatives emerging from several Latin American countries, including Guatemala, Uruguay, Colombia, and Mexico. Uruguay never criminalized the possession of drugs for personal consumption, giving the state something of a head start towards the social acceptance of drug use and the liberal reform of its cannabis policies. Decriminalization was formally introduced in 1974, and legislation was updated in 1998 with Law 17.016, in order to clarify some ambiguities. According to Article 31: "Whoever is found in possession of a reasonable amount of drugs meant exclusively for personal consumption, as determined in good faith by a judge, will be exempt from punishment; the judge must substantiate the reasoning behind his/her ruling" (Transnational Institute 2012).

In August 2012, President José Mujica sent a proposal to Congress that would establish a state-run cannabis monopoly, allowing the government to assume control over the production, acquisition, and distribution of marijuana. Under the proposals, marijuana would be sold only to users who register on a government database, allowing the authorities to keep track of purchases made by an individual and, for example, divert particularly heavy users into rehabilitation. The main aims of the bill are to create a divide between the legal and illegal markets, take profits away from the criminal cartels and put them into the hands of the government, and to strengthen the treatment options available for problem drug users. As the Minister of Defense Eleuterio Fernandez Huidobro said some months before the proposal was formally taken to Congress, "It's a fight on both fronts: against corruption and drug trafficking. We think the prohibition of some drugs is creating more problems to society than the drug itself" (Associated Press 2012). If the law passes, government-licensed cannabis cultivation could begin shortly. In order to serve the country's 70,000 cannabis consumers, of whom 18,000 are regular users, the government will need to produce approximately 5,000 pounds of the drug a month, requiring around 150 hectares of land.

The case of Guatemala has been more unexpected, but has the potential to be more far-reaching. President Otto Pérez Molina, a retired general and former head of military intelligence, took office in January 2012 after a tough "iron fist" election campaign. Within days of coming to power, he surprised commentators by calling for a rethink of the country's drug policies and for an examination of all possible avenues for reform, including regulation. Two months earlier, the Beckley Foundation had launched its *Global Initiative for Drug Policy Reform* at a meeting at the House of Lords in London, which brought together high-level representatives of 14 countries interested in reform, and countries where reform had already been successfully implemented, together with members of the *Global Commission on Drug Policy*. To coincide with the launch, the foundation published a public letter in leading British newspapers (Beckley Foundation 2011). Signed by 7 former presidents, 12 Nobel laureates and over 60 distinguished figures from the worlds of politics and diplomacy, academia, business, and the arts, the letter declared the "War on Drugs" a failure and called for a new health-oriented, evidence-based approach to drug policy.

The *Global Initiative for Drug Policy Reform* is a declaration of intent to drive the process of reform internationally as well as nationally. Recognizing a confluence of interests in both national and global change, President Pérez Molina invited the Beckley Foundation to set up a Latin American Chapter in Guatemala. He launched the chapter, and signed the Beckley Public Letter, at a ceremony at the Presidential Palace on July 3, 2012.

The *Beckley Foundation Latin American Chapter* will produce a series of detailed, evidence-based drug policy reports for President Pérez Molina and his government. The first will analyze the effects of the current prohibitionist regime on Guatemala which, as a transit country sandwiched between the large producers in the south and the world's largest consumer in the north, is particularly hard hit by the violence and corruption which has destabilized large swathes of the region. Subsequent reports will make concrete and rigorously evaluated proposals for a range of policy alternatives, including regulation. The Beckley Foundation has convened an international advisory board representing leading scholars in the fields of economics and development, law, health, and drug policy, who will assist in the preparation of these reports.

Reform in Guatemala and the wider region will require a change in public perception as well as legislative change. Consumer countries must accept a share of the responsibility for the devastation that the illicit drug trade leaves in its wake. As the Colombian Ambassador to London, Mauricio Rodríguez Múnera, eloquently phrased it: "For so many years it has been easy for politicians to blame drug-producing nations like Colombia for poisoning their lovely kids. And the result has been a stigma on Colombia. But that game—that farce—is now over" (Vulliamy 2012).

The Ambassador's words underline the leading role being taken by Colombia in bringing drug policy issues to international attention. As early as February 2011, President Juan Manuel Santos said in an interview that decriminalization was one of the options that should be considered (Preferiría no reelegirme 2011). As host of the Sixth Summit of the Americas in Cartagena in April 2012, he announced that

the delegates had mandated the Organization of American States (OAS) to prepare reports that will "examine the results of current policy in the Hemisphere and explore new approaches for responding more effectively to the problem" (Inter-American Drug Abuse Control Commission 2012). Referring to the OAS project at the 67th Session of the UN General Assembly in September 2012, he declared:

> This is only a first step, but one of great importance as it is the beginning of a discussion that the world has avoided for many years and one we hope will produce concrete results. The debate on drugs must be frank, and without a doubt, global. (UN 2012a)

The statement is typical of Colombia's stance under President Santos, that reform requires international action.

The outgoing President of Mexico, Felipe Calderón, is equally clear that the reform of drug policy must transcend national boundaries. As he told the 67th General Assembly:

> drug consumption in many developed countries is causing violence and thousands of deaths in producer and transit countries. . .the nations suffering most acutely from the devastating effects of this situation are those countries positioned between the Andean zone of production and the principal drugs market: the USA. (UN 2012b)

At the same meeting, President Pérez Molina also characterized drug control as "a transnational phenomenon," noting that:

> it is for this reason that I raise it in the universal forum of the United Nations. . .We believe that the basic premise of our war against drugs has proved to have serious shortcomings. . .I call on the member states of the United Nations to review the international norms that currently govern our global policies regarding drugs. (UN 2012c)

President Pérez Molina has consistently gone further than other leaders in spelling out the need for a new approach, but also in drawing attention to the opportunities that reform could generate by freeing resources currently consumed by the fight against drug trafficking. At the 67th General Assembly, he noted that his country's efforts in respect of

> . . .lowering chronic malnutrition in children, reducing violence and insecurity, and promoting employment and fiscal reform are partially challenged by a scourge represented by the trafficking of narcotics. . .The most affected group of the population from drug consumption, our youth, demands more effective responses from us. Let us address the problem for what it is: largely a public health issue, more than a problem of criminal justice. . .I invite the members of the General Assembly to jointly seek avenues that allow us to offer our youth a more promising future [and] a lowering of violence and poverty. (UN 2012c)

Where to from Here?

In my view, reform should begin immediately with the decriminalization of personal drug use, and of acts preparatory to that use (for example the growing and possession of small amounts of cannabis). Use without crime should not be a crime. Explicit decriminalization would enable drug users to more easily access treatment,

both for health problems directly related to drug use, such as the toxic effects of heroin, and for those arising indirectly from drug use, such as infections transmitted by shared needles. It would reduce the strain on over-burdened criminal justice systems, allowing funds currently spent on interdiction and incarceration to be reallocated for education and treatment facilities. And it would protect users who commit no other crime from the devastating effects of a criminal record, which stigmatizes their life thereafter. We should also note that minorities bear a vastly disproportionate burden of convictions and incarcerations.

A further step would be to experiment with the creation of legal non-medical markets; as I have stated, there is no other way to bring about *regulated* markets. While harms cannot be eliminated through regulation, they can surely be more effectively reduced by strict regulation than by no regulation. One must presume that governments, aided by experts, can do a better job of managing the potential harms associated with the use of psychoactive substances than criminal cartels whose only motivation is profit.

In addition to reducing harms, effective regulation could foster important societal changes. As we have seen, psychoactives have been used since the dawn of human culture—and continue to be used—for spiritual growth. Psychedelics in particular can help to bring about profound and lasting personal change. However, in order to do so, they must be treated with a high degree of respect. The current prohibitionist climate tends to shift the emphasis away from the more spiritual and creative uses of psychedelics towards the more purely hedonistic.

An important aspect of any well-designed regulatory regime should be that it would effectively differentiate between the various drugs and drug classes. The status quo, which restricts scientific research into LSD more severely than into heroin and cocaine, is scientifically untenable. Indeed, the current classification system of drugs as a whole, which has been in place for many years, has a very poor alignment with scientific reality. In 2003 and 2004, Dr. Colin Blakemore, Waynflete Professor of Physiology at Oxford University and one of the UK's most eminent neuroscientists, gave presentations at the Beckley Foundation's Seminar Series entitled "Drugs and Society: A Rational Perspective," on the development of a scientifically based scale of harms for all social drugs (Blakemore 2003, 2004). These presentations were later elaborated by Dr. David Nutt, then Professor of Psychopharmacology at Bristol University, Dr. Blakemore, and others, and published in the medical journal the *Lancet* in 2007 (Nutt et al. 2007).

The details governing regulated markets would need to be formulated by states in the same way as any other national policy. However, the recommendations of the *Global Cannabis Commission* (Room et al. 2008), the *Roadmap to Reforming the UN Drug Conventions* (Room and MacKay 2012), and the work a few of other organizations (e.g., Transform Drug Policy Foundation 2009) provide some pointers and would suggest, for example, that the following points should be included:

- Any regime that makes a currently "controlled" drug legally available should involve state licensing or state operation of entities producing, wholesaling, and retailing the drug (as is true in many jurisdictions for alcoholic beverages).

- A possible model for regulation of cannabis would be to permit, alongside government-licensed production, the establishment of members-only clubs, along the lines of the existing Spanish cannabis-growing clubs. This is a particularly interesting model because unlike existing markets in alcohol, tobacco, and prescription medicines—it operates on a not-for-profit basis (Barriuso Alonso 2011).
- The state should impose regulations that would be appropriate to the specific drug. They would include, for example: mandatory labeling of potency; controls on the product's quality and purity; age limits for purchase and use; minimum pricing; a ban on advertising; licensing of outlets; training and licensing of vendors (e.g., by permitting sale only by qualified pharmacists or other expert professionals); restrictions on the density and location of outlets; rationing; a ban on sale to or for intoxicated people; restrictions or bans on public consumption; bans on driving or operating machinery after using certain drugs; and, for certain substances, a mandatory time delay between order and collection of the product.
- The state should ensure that appropriate information is available and actively conveyed to users about the harms associated with drug use. Education should highlight *inter alia* the dangers of combining alcohol with certain other drugs, and of poly-drug use more generally.
- The impacts of any changes, including any unintended adverse effects, should be closely monitored, and there should be the possibility for prompt and considered policy revision in response to such impact assessments.

Monitoring the effects of a new policy *after* it has been implemented is a necessary step, but the policy needs to be implemented first. For legislative reform to be a serious proposal, alternative scenarios need to be visualized, and how they might operate, *before* they become enacted as policy.

One of the reports that the Beckley Foundation has commissioned for this purpose is a *Licensing and Regulation of the Cannabis Market in England and Wales: Towards a Cost / Benefit Analysis* (Bryan et al. 2013). As with any prognostication, there are significant uncertainties; these include, for example, the following:

- The size of the existing cannabis market is not known with any degree of accuracy.
- The assumption that the creation of a licensed market may increase cannabis use. However, it is not clear whether consumption of the more dangerous, high THC/low CBD strains is likely to rise or fall. (For a discussion of THC and CBD see above under the heading "Psychoactive Drugs in Science and Medicine" in the present chapter.) This makes the health impacts of reform hard to gauge.
- It is difficult to predict what share of the market will remain illicit. Estimates suggest that the black market accounts for around 12 % of the tobacco market. The figure for cannabis is unlikely to be much lower than this.
- "Gateway" effects are very hard to quantify. The "gateway" hypothesis is usually taken to mean that cannabis users may go on to use hard drugs. If this were the case, then increasing cannabis use would presumably also increase hard

drug use. However, it should be noted that countries such as the Netherlands and Portugal which have effectively decriminalized cannabis use, have lower heroin use than countries with more draconian policies, thereby throwing the gateway hypothesis into doubt.

Because of these uncertainties, the *Cost–Benefit Analysis* considers various eventualities and gives a wide range of possible outcomes, with net annual savings in England and Wales of between just under £700 million and just over £1 billion. The lists below summarize the major headings under which costs and benefits are being analyzed (although it presents no more than a highly simplified sketch of a complex and detailed analysis):

Main Predicted Costs

- Production costs; administration of regulation
- Information and health education campaigns
- Increased physical and mental illness treatment costs, including treatment for dependency (may be net benefit if prevalence of high-potency strains decreases, particularly among youth)
- Cost of cannabis-related accidents (may be net benefit if prevalence of high-potency strains decreases)

Main Predicted Benefits

- Savings in enforcement and criminal justice system
- Increased employability and earning potential of users, including tax on earnings lost during incarceration
- Tax revenue on sales of licensed products
- The "gateway" effect would be net cost if cannabis use increases significantly, but would be a net gain if, as found in Portugal and the Netherlands, heroin use decreases.

Conclusions

Psychoactive substances bring about changes in brain function that empirically have been found by shamans and other spiritual seekers throughout the millennia to be an aid in their quest for fuller awareness. The neurophysiology underlying these experiences is both fascinating and of great importance; and to engage in scientific exploration in order to throw light on the mysteries of consciousness is one of the Beckley Foundation's primary aims.

Cannabis and the psychedelics can be used for the benefit of mankind by stimulating and freeing-up brain function that is normally suppressed. Just as the shaman traveled to "other worlds" in traditional cultures, and brought back insights from the far shores of consciousness for the benefit of the group, so too can the modern psychonaut. For example, in the field of technology, many of the discoveries that spawned the IT revolution were attributed to altered states of awareness.

The late Steve Jobs, co-founder of Apple, described taking LSD as "one of the two or three most important things I have done in my life" (Markoff 2005).

Taking psychoactive substances should be neither encouraged nor criminalized. To encourage practices that have potential harms without taking steps to minimize those harms would be irresponsible. But, as made evident by alcohol prohibition in the 1930s, the innate desire of certain individuals to experiment with different techniques to alter consciousness is not extinguished by prohibition, and never will be. The use of psychoactives should therefore be regulated, because regulation provides the best mechanisms to minimize the potential harms.

Cannabis and the psychedelics also offer great potential benefits. The medical uses of cannabis and its components are becoming increasingly understood; and as brain-imaging and memory-recall investigations show, psilocybin and MDMA may also be valuable in medicine and psychotherapy. Prohibitionism has for too long thwarted the exploration and development of these potentially invaluable substances, thereby depriving patients of the possibility of new, fruitful, avenues of treatment.

Finally, we should not forget that there is an individual and societal benefit in allowing people to do things that they enjoy and value, so long as they cause no harm to others and minimal harms to themselves. Indeed, as illustrated by current policies, society is happy to tolerate the consumption of alcohol and tobacco even in the face of all the harms and expenses that this behavior brings in its wake.[7] Scientific evidence has shown that cannabis is less harmful—and therefore less costly to society—than either of these legal drugs.

After decades in the wilderness, cannabis and the psychedelics are beginning to resume their rightful place in scientific and medical research. Policy reform remains severely impeded by the UN Drug Conventions. But the tide of history is now surely with those leaders who are speaking out in favor of reconsideration, and of reform that eschews ideology and puts scientific evidence and common sense at its core.

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Beyond Religious Freedom: Psychedelics and Cognitive Liberty

Charlotte Walsh

Introduction

Many of the chapters in this collection detail the cultural practices of people using psychedelics as sacraments, along with their struggles to have these rituals recognized as religious in their nations' courts in a bid to be exempted from prohibitive drug laws. This paper takes the argument further, proposing that such absolution should also apply to those who have more loosely spiritual experiences on psychedelics, unbounded by any established matrix, especially given the lack of crystalline division between religion and spirituality. Logic drives this contention onwards, leading to the proposal for a right to ingest psychedelics in the broad interests of freedom of thought and of cognitive liberty. Such proposals are potentially given substance through a liberal and evolutive reading of Article 9 of the European Convention on Human Rights (ECHR): the right to freedom of thought, conscience and religion. Finally, the possibility of pursuing this line of reasoning to its zenith is introduced, supporting the notion of creating a distinct right to use psychedelics.

It will be noted that the discussion here is limited to psychedelics, an overarching term for a range of substances—both naturally occurring and synthesized—that alter human, and other animal, consciousness when ingested. The more commonly used psychedelics include LSD; DMT; psilocybin, found in a variety of mushrooms; and mescaline, found in a number of cacti. Humans take psychedelics—and are known to have done so over wide spans of historical time and geographical space—for a multitudinous medley of reasons, encompassing religious, spiritual, therapeutic, and recreational motivations; not necessarily entirely separable or distinct from one another. The focus on this particular group of molecules reflects the author's special area of interest and should not be taken as indicating that other drugs are exempt from potentially falling within the parameters of the arguments

C. Walsh (✉)
School of Law, University of Leicester, England, 83 Regent Road, Leicester LE1 6YG, UK
e-mail: ckw2@leicester.ac.uk

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put forth here. However, it is submitted that, due to their largely non-addictive, non-toxic nature, psychedelics are less likely to fall afoul of the harm principle—the necessary precursor to criminalization, from a liberal perspective, discussed in detail below—than a number of other substances.

Religious and Spiritual Use of Psychedelics

A more expansive view of religion will acknowledge alternate ideologies to those belief systems that are steeped, to greater or lesser degrees, in dogma. The great philosopher William James defined religion as "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine" (James 1961, p. 31). Thus, religion, in its broadest sense, encompasses one's understanding of the world, of one's part in it; as such, everyone has their own "religion" and the individual in question can be the only true arbiter of what "counts" in this respect. Psychedelics may, or may not, play a part in this existential quest. Eminent religious studies scholar Huston Smith describes his motivation for taking such substances thusly: "I wanted to know the final nature of things: reality's deepest structure and what follows from that structure for maximizing the human potential" (Smith 2000, p. 3). Smith talks poetically of "chemicals replacing angels as divine intermediaries" (Smith 2000, p. 15), instrumental in precipitating "psychedelic theophanies" (Smith 2000, p. 33).

Psychedelics can induce an experience of unified transcendence evoking the *philosophia perennis* Aldous Huxley viewed as being at the heart of all religious and mystical experiences (Huxley 2004b). Often anchoring one firmly in the present, these substances can help with penetrating through to the shifting, vibratory, quantum nature of existence, generating an appreciation that "all forms of life and being are simply variations on a single theme" (Fadiman 2011, p. 42). Huxley himself avidly believed psychedelics to be an indispensable technology in accessing the mystical realm through their function of temporarily partially disabling what he metaphorically described as the brain's reducing valve:

> Each one of us is potentially Mind at Large. But in so far as we are animals, our business is at all costs to survive. To make biological survival possible, Mind at Large has to be funneled through the reducing valve of the brain and nervous system. What comes out at the other end is a measly trickle of the kind of consciousness which will help us to stay alive on the surface of this particular planet. (Huxley 2004a, p. 10)

Recent neuroscience research into the effects of psychedelics on the brain supports Huxley's intuitive trope of the reducing valve, albeit via an unexpected (and somewhat circuitous) route, with fMRI scans strongly suggesting "that the subjective effects of psychedelic drugs are caused by decreased activity and connectivity in the brain's key connector hubs, enabling a state of unconstrained cognition" (Carhart-Harris et al. 2012a, p. 2138). As the influence of the connector

hubs that underpin the well-worn *samskaras*—the yogic grooves—of thinking is dampened down, something akin to the reducing valve being loosened a turn or two takes place. (For further information on recent scientific research into psychedelics, see Feilding, this volume.)

In spite of this potential for psychedelics to stimulate spiritual occurrences, there is a resistance to their usage that theologian Alan Watts noted as arising both from the secular and non-secular values of the Occident:

> Western culture has, historically, a particular fascination with the value and virtue of man as an individual, self-determining, responsible ego, controlling himself and his world by the power of conscious effort and will. Nothing, then, could be more repugnant to this cultural tradition than the notion of spiritual or psychological growth through the use of drugs. (Watts 1968)

Further, the traditional monotheistic religions of the Western Hemisphere reject the more pantheistic spirituality that such experiences can often elicit. Despite this spurning, there is a distinct possibility that many, arguably even all, spiritual experiences are drug-induced at root, with perhaps the only difference being that some involve exogenous, others endogenous, chemicals. This is not to belittle the significance of either such occurrence—which is as important as the experiencer believes it to be—but rather a statement of the fact that, to the best of current scientific knowledge, *everything* in the universe is chemically based. Whether the visions of Saint Teresa of Avila, for instance, have supernatural explanations or entirely natural ones, such as enhanced sensitivity in the temporal lobes, is both unresolved and somewhat beside the point: It is the subjective value with which such epiphanies are laden that is most significant (see also James 2012).

For many, there is a tendency to package up and label their spiritual experiences, with the added advantage that neatly defined denominations can often afford rights and privileges that would not otherwise be available; for others, this drive is less apparent. The heart of the issue is whether it is justifiable that designated religious experiences involving psychedelics might be protected, while other such drug-induced unveilings—potentially of equal import to the individual involved—leave them open to criminal prosecution. Consider the following description of his first magic mushroom trip by psychedelic evangelist, Dr. Timothy Leary (for more information on Leary, see Lander, this volume):

> During the next five hours, I was whirled through an experience which could be described in many extravagant metaphors but which was, above all and without question, the deepest religious experience of my life . . . The discovery that the human brain possesses an infinity of potentialities and can operate at unexpected space-time dimensions left me feeling exhilarated, awed, and quite convinced that I had awakened from a long ontological sleep. (Leary 1980, pp. 13–14)

Despite its obvious spiritual momentousness to Leary himself, this experience would only "count" as religious by adopting a broad perspective on this term, along with overlooking the prevailing inclination to denigrate drug-precipitated epiphanies. In actuality, such observances may be all the more powerful for occurring outside the potentially constrictive confines of often-desiccated religions:

> Our mystic experience is like a volcanic eruption. Fire, heat, light gush forth from our innermost depth. But the hot lava flows down the side of the mountain and cools off. The farther we are in space and time from the fiery eruption, the more this glowing magma turns into cold rock. Our task is to push through the "isms" of our particular religion as through thick layers of volcanic rock and to catch fire from the original fire. After all, that is what all the great masters and saints have done. If you stand in an ancient tradition . . . there is work to be done . . . The truly religious people . . . are to be found outside as well as inside any religious institution." (Forte 1997, p. 21)

Regardless, spiritual exemptions from prohibition for psychedelic sacraments are extremely rare. Indeed, it has been (somewhat acerbically) remarked upon that, in order to qualify: "The drug must be not only religiously important to its user but also an essential part of a traditional rite of communal significance . . . It is as though mountain climbing were regarded as generally so dangerous and useless that climbers would be fined and jailed unless they could prove they were making a pilgrimage to a holy site on the peak certified by an established church" (Bakalar and Grinspoon 1984, p. 32). This, paradoxically, in spite of the fact that an offshoot of ingesting these molecules is often a questioning of orthodoxies: "The psychedelics are a red-hot, social/ethical issue precisely because they are de-conditioning agents. They will raise doubts in you if you are a Hassidic rabbi, a Marxist anthropologist, or an altar boy because their business is to dissolve belief systems" (Forte 1997, p. 61).

Article 9 and Religious and Spiritual Freedom

Taking psychedelics may catalyze a spiritual experience; then again, it may not. Not everyone finds (themselves to be) God in a sugar-cube. These substances are best understood as non-specific amplifiers, with their effects largely determined by who is ingesting them, with what mindset, and in which environment. Additionally, what does it even mean to describe an experience as "non-spiritual"? As the Tantrics, among countless others. have long since recognized, there is no clear division between the "sacred" and the "profane"; adding psychedelics into the mix can fudge the interface yet further, with the relayed narratives of many users exposing the inadequacy of any such binary distinctions. A sense of awe in the face of the beauty, magnitude, and fundamental inter-connectedness of the universe, and of the elegance of the laws of physics may not be so very different from a belief in God. When even the leader of a formalized and established religion such as the Church of England, (now former) Archbishop of Canterbury Rowan Williams, esoterically described his vision of God as "a combination of love and mathematics," it is apparent that we are dealing with slippery concepts (Williams and Dawkins 2012). Complicating the issue even more, visionary experiences can creep in unbidden, as described here by psychiatrist Stanislav Grof:

> I was able to see the irony and paradox of the situation. The divine manifested itself and took me over in a modern scientific laboratory in the middle of a scientific experiment

> conducted in a Communist country with a substance produced in the test tube of a twentieth-century chemist. (Fadiman 2011, p. 52)

Even were there such a thing as a categorically non-spiritual experience on psychedelics, does it follow that it should not deserve protection? It may still be of equal significance to the individual concerned; or, it may not. Should this even matter? Whether or not it is believed that individuals should have to "justify" their drug use on any grounds is bound up with one's view of the proper relationship between the individual and the state. In his paper "What is so Special About Religion?" political philosopher Bedi addresses the question: "Why, at the most basic level, does a particular religious group even deserve a simple exemption from a facially neutral law but not a mere preference or a voluntary association?" (Bedi 2007, p. 235). His answer is that it does not, and that society should work towards maximizing *everyone's* autonomy, rather than reifying religious or, indeed, spiritual practices. Accordingly, it should not be necessary to contort direct experiences into a shape that approximates those of established religions, nor to determine the almost impossible question of whether the episode was in any way spiritual, to be afforded human rights-based protections. And, happily, under the ECHR, it is not.

Article 9 of the European Convention provides that: "Everyone has the right to freedom of thought, conscience and religion; this right includes . . . freedom, either alone or in community with others and in public or private, to manifest this religion or belief, in worship, teaching, practice, and observance." It is not requisite to prove that one's beliefs are religious in the narrow, or, indeed, in any, sense in order to fall within the ambit of the religious element of this provision: this loose-limbed style allows the European Court—and, consequently, domestic courts—to sidestep questionable doctrinal attempts to delineate what does and does not constitute a religion, as happens in the United States, applying the framework laid down in *Meyers* (*Meyers* 1996). (For more information on the laws surrounding religious freedom in the United States see Brown, this volume.) Interpreting Article 9, the European Court of Human Rights has stated that "it is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their concept of life, but it is also a precious asset for atheists, agnostics, skeptics, and the unconcerned" (*Kokkinakis v Greece* 1994, para. 31). This pluralistic approach is to be commended, avoiding, as it does, discrimination against the irreligious:

> This wide protection has enabled the Court to find no difficulty in holding the Article to be applicable not merely to traditional and long-established religions . . . but to other forms of religious movement, including druidism and the Church of Scientology, as well as to a wide range of philosophical beliefs, notably pacifism, atheism, and veganism." (Bratza 2012, pp. 258–259)

In the most significant UK case regarding interpretation of freedom of religion under Article 9, *R (Williamson & Others) v Secretary of State for Education and Employment* (2005) UKHL 15, in which the appellants were arguing for their right to assault children in the name of discipline as a manifestation of religious belief, Lord Nichols echoed the sentiments of the European Court regarding the breadth of the term "religion" under Article 9, stating: "The atheist, the agnostic, and the

skeptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom." Freedom of religion or belief is protected absolutely, on the grounds that individuals can believe what they like; however, as regards whether or not a *manifestation* of that belief is also safeguarded, prior to considering this, the courts apply minimal threshold requirements as regards the belief in question. In Lord Nichols' words: "In particular, for its manifestation to be protected by Article 9, a non-religious belief must relate to an aspect of human life or behavior of comparable importance to that normally found with religious beliefs."

Does a firmly held conviction regarding the value of the psychedelic experience amount to a "belief" under Article 9, the manifestation of which might thus be protected? Are the experiences of those who use these substances outside of a religious context as important to them as other people's religious experiences with or without a psychedelic sacrament? As illustrated above, there is a strong argument that this is the case. If this hurdle is cleared and belief in the value of the psychedelic experience is acknowledged as coming within the auspices of Article 9, the second issue is whether the manifestation of this belief—namely, ingesting psychedelics—may thereby be protected. An early European case that dealt with the issue of what constitutes a manifestation of a religion or belief drew a distinction between acts that actually *express* such a belief, and those that are merely *motivated* by it, with only the former attracting protection (*Arrowsmith v United Kingdom* 1981, 3 EHRR 218). It is submitted that taking psychedelics is, or certainly can be, an indispensable manifestation of the belief that taking psychedelics is an invaluable practice.

Article 9 and Freedom of Thought

To date, no cases have cogently argued before the UK courts for the right to take psychedelic drugs as a manifestation of a heartfelt philosophy, rather than under the auspices of a religion, which may potentially protect this use under the religious freedom limb of Article 9. However, it will be remembered that the protections in Article 9 extend beyond even the expansively interpreted freedom of religion limb, with this provision also safeguarding freedom of thought; it has been legally argued in an English courtroom that disallowing access to psychedelics interferes directly with freedom of thought, with cognitive liberty, and is afforded absolute protection under this provision. This claim was made in the case of *Hardison* (Lewes Crown Court January 2005, unreported). This is a case that I have been involved with for a number of years, in my capacity as academic legal adviser. In 2004, following a tip-off, police discovered a laboratory at the home of underground psychedelic chemist, Casey Hardison. He was subsequently charged with eight counts under the Misuse of Drugs Act 1971 (MDA, the UK's domestic drug prohibition law) including producing and supplying LSD, 2C-B, DMT, MDMA, and mescaline: all psychedelic Class A drugs.

Hardison's trial began with a 10-day human rights argument before the judge sitting alone in his capacity of determining which strands of the defense could be put before the jury. Hardison's contention was that his right to freedom of thought was infringed by the MDA. Thus he argued that this legislation should be read with a view to render the two instruments compatible; additionally, he submitted that, if the MDA could not be read in accordance with the ECHR, a Certificate of Incompatibility was called for. Hardison pointed out that the practice of using psychoactive substances for altering consciousness has existed from the dawn of history; consequently, all efforts to eradicate it are based on an incomplete understanding of human nature. He further emphasized the absolute protection of freedom of thought mandated by Article 9, contending that laws that proscribe psychedelic drugs offend against cognitive liberty, with his defense deeply influenced by the work of the Center for Cognitive Liberty and Ethics (http://www.cognitiveliberty.org/).

Founder of the aforementioned center, lawyer Richard Glen Boire, one of cognitive liberty's greatest proponents, has described this concept and its importance thusly:

> The right to control one's own consciousness is the quintessence of freedom. If freedom is to mean anything, it must mean that each person has an inviolable right to think for him or herself. It must mean, at a minimum, that each person is free to direct one's own consciousness; one's own underlying mental processes, and one's beliefs, opinions, and worldview. This is self-evident and axiomatic. (Boire 1999/2000).

Cognitive liberty underpins many other freedoms. For instance, any interference with freedom of thought in turn disrupts freedom of expression, protected under Article 10, as the words to express the different aspects of oneself simply cannot be formulated if the thoughts that lie behind them are literally unthinkable. Certain notions become inconceivable through the prohibition of psychedelics, with these substances being the necessary precursors to particular styles of thinking:

> Whatever may be at the roots of human consciousness, there is no debate that what, and how, a person thinks is deeply intertwined with his or her functional neurochemistry. Simply put, controlling what chemicals can or cannot reach a person's brain synapses, directly affects how that person thinks. (Center for Cognitive Liberty and Ethics 2004, p. 36)

Drug prohibitions "manipulate consciousness at its very roots," (Boire 2000, Free Thought and the First Amendment section, para. 7) with Boire likening them to book censorship, seeing both as driven by the same intention: "Efforts to prohibit heterodox texts, and to make criminals out of those who 'manufactured' such texts, were not so much interested in controlling ink patterns on paper as in controlling the ideas encoded in printed words" (Boire 2000, An Introductory Note on Banned Books and Other Controlled Substances section, para. 3). The potential importance of these banished states of consciousness should not be underestimated. In the oft-quoted words of William James:

> Our normal waking consciousness, rational consciousness as we call it, is but one special type of consciousness, whilst all about it, parted from it by the filmiest of screens, there lie

> potential forms of consciousness entirely different. We may go through life without suspecting their existence; but apply the requisite stimulus, and at a touch they are there in all their completeness, definite types of mentality which probably somewhere have their field of application and adaptation. No account of the universe in its totality can be final which leaves these other forms of consciousness quite disregarded. (James 1961, p. 305)

In his seminal paper, "Academic and Religious Freedom in the Study of the Mind," Thomas Roberts describes how the cognitive sciences, multistate psychology, religion, mystical experiences, and personal freedom all fall victim to the current drug laws and their curtailment of cognitive liberty:

> From an information-processing perspective, a mindbody state is analogous to a software program. By increasing the number of programs we use in a computer, we expand our productive use of the computer: By increasing the number of mindbody states we use, we increase the productivity of our minds. If we are to develop the most complete knowledge of human memory, perception and thinking that we can, then we must explore these processes in as many states as we can. By needlessly restricting the accessibility of drug produced states, current laws limit what we can know about our minds and how we can use them . . . our overall map of the human mind is incomplete when some mental lands are 'off limits' to exploration. This is reminiscent of the fifteenth century fear of sailing out into the ocean because you might fall off. (Forte 1997, pp. 139–140)

The situation is approximate to potentially having the totality of human knowledge at your fingertips via the Internet, yet with the state applying a filter, inducing a kind of psychopharmacological North Korea.

That the UK Government, like most others, has effectively criminalized unorthodox mindstates is deeply problematic in terms of the appropriate relationship between the individual and the state: "In a free democracy, the government has no authority to dictate the content or form of our brain functions" (Ruiz-Sierra 2003, p. 56). However, as Lenson describes it: "What crosses the blood–brain barrier is now open to the same surveillance as what crosses international borders. There is a customs in the cranium, a Checkpoint Consciousness" (Lenson 1995, pp. 190–191). This seems wholly inappropriate:

> From the skin inward is my jurisdiction, is it not? I choose what may or may not cross that border. Here I am the Customs Agent. I am the Coast Guard. I am the sole legal and spiritual Government of this territory, and only the laws I choose to enact within myself are applicable . . . What I think? Where I focus my awareness? What biochemical reactions I choose to cause within the territorial boundaries of my own skin are not subject to the beliefs, morals, laws or preferences of any other person! I am a sovereign state, and I feel that my borders are more sacred than the politically drawn boundaries of any country. (Shulgin and Shulgin 1991, pp. 449–450)

Such reasoning, the backbone of Hardison's defense, held little weight in the courts; rather, he was barred from even articulating his human rights-based arguments in front of the jury. The presiding judge, Judge Niblett—while commenting upon the sincerity with which it was apparent that Hardison held his views—nonetheless rejected his logic, finding that the MDA did not infringe on human rights. Specifically, he dismissed Hardison's Article 9 claim on the grounds that he viewed the court as bound by *R v Taylor* (*Taylor* 2001) (discussed in detail in Bone's chapter in this volume), a case involving intent to supply cannabis in the

context of Rastafarian worship. In *Taylor*, the courts afforded the prohibitions in the MDA superiority over those protections in the ECHR relating to freedom of religion, relying heavily on the existence of a system of international global prohibition in justifying this.

It is worth taking a small diversion here to consider whether the UN drug conventions really do present insurmountable barriers to successfully arguing that the MDA conflicts with Article 9 of the ECHR. (The issue of the relationship between the drug conventions and human rights instruments, such as the ECHR, is discussed in greater detail in the chapter by Boiteux et al. this volume.) Ironically, it has been suggested that adherence to the conventions has itself become a sort of religion:

> Whatever the origin of the UN Drug Treaties, and whatever the official rhetoric about their functions, the best way to look at them now is as religious texts. They have acquired a patina of intrinsic and unquestioned value and they have attracted a clique of true believers and proselytes to promote them. They pursue a version of Humankind for whom abstinence from certain drugs is dogma in the same way as other religious texts might prohibit certain foods or activities. The UN drug treaties thus form the basis of the international Drug Prohibition Church. Belonging to the Church has become an independent source of security, and fighting the Church's enemies has become an automatic source of virtue. (Cohen 2003, p. 213)

In a similar vein, Husak pithily remarks, "for reasons that are deep and mysterious, this topic is among a small handful of issues that seem almost immune to rational debate. One might as well attempt to shake the confidence of a fundamentalist about the existence of God" (Husak 1992, p. 7).

Despite the quasi-religiosity of global prohibitionists, the UN drug conventions are not inscribed on tablets of stone. The Beckley Foundation, an independent drug research and policy institution, is currently involved in breaking the taboo of never questioning these instruments, convening expert drug policy analysts to consider ways in which they might be rewritten, and moving from a rigid prohibitionist approach towards greater freedom for nation states. (For more information, see the chapter by the Beckley Foundation's founder, Feilding, this volume.) Even in the current reality, with the drug conventions firmly *in situ*, it is important to remember that, unlike the ECHR, they have not been incorporated into UK domestic law; thus, the provisions in the latter should legally take precedence. Further, there is clear scope for exemptions embedded within them: Article 36(1)(a) of the Single Convention on Narcotic Drugs 1961 contains the words "subject to its constitutional limitations," to be utilized when prohibitions unduly conflict with issues of domestic importance, such as, feasibly, protection of Article 9 rights to religious freedom under the ECHR, as was sought in *Taylor*.

However, it is clear that Hardison aimed to go much further than this. To argue for a right to psychedelic drugs as a component of freedom of thought is to do more than to ask for limited religious exemptions: It threatens the very existence of the structure of global prohibition. Accordingly, Judge Niblett saw the issues raised in Hardison's defense as being political matters, outside the legitimate province of the court:

> I am the judge of the law. It is no part of my function, or any court's function, to engage in philosophical or political debate, or to make decisions based upon arguments relating to the efficacy, or otherwise, of any particular enactment of the legislature. Nor is it my function to make moral judgments one way or the other. (*R v Hardison*, Lewes Crown Court, January 2005, unreported)

It is certainly true that for the court to have stayed proceedings against an underground chemist on the basis that he had a right to synthesize psychedelics in the name of cognitive liberty would have been stretching its powers somewhat, potentially conflicting with the principle of parliamentary sovereignty. Such claims stand a greater, though still outside, chance where it is simple possession that is at issue, with Hardison's case—which involved production and supply—perhaps being most useful symbolically as a showcase to highlight the injustices of drug policy. It is a brave defendant who makes such a stand, given that guilty plea mitigation is lost in the process. In the words of Martin Luther King:

> An individual who breaks a law that conscience tells him is unjust and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law. (King 1963)

Following conviction by a jury, Judge Niblett sentenced Hardison to 20 years' imprisonment. It is submitted that the absence of any proportional relationship between the activities engaged in and the manifestly excessive sentence handed down is so acute here as to potentially engage Article 3 of the ECHR, entering into the realm of inhuman or degrading treatment, especially given that "no laws enforced by such harsh punishments rest on a more flimsy rationale than those prohibiting . . . drugs" (Husak 1992, p. 2). It is revealing to contrast this sentence with the 15 years that can be expected for an "average" murder (Criminal Justice Act 2003), the 5 years that can be anticipated for a rape where there are no aggravating factors (Sentencing Guidelines Council 2007), and the fact that Hardison received his 20 year term in the same week in which Kamel Bourgass was given a lesser 17 year sentence for planning a bioterrorist assault on the London Underground, involving the substance ricin, a poisonous toxin deliberately extracted with a view to endangering human life, yet seemingly not viewed by the courts to be as much of a threat as psychedelics (*Hardison* 2005). Indeed, upon hearing his sentence, Hardison said to the judge, "Thank you for your love and compassion. You would think I was a terrorist" (personal communication). In the words of Szasz: "Clearly we regard drug heresy as a graver threat to our society than violent crime. This may seem like madness, but there is method in it. The method . . . lies in the threat autonomy poses to authority" (Szasz 2003, pp. 188–189).

It is interesting to consider in greater depth how such a sentence was seen as warranted by the courts: The discourse used and the "justificatory" narrative is crucial. When delivering Hardison's 20 year sentence, Judge Niblett remarked: "The most serious element of this case is that you were not doing this for your own consumption or the good of mankind but for greed, a human emotion that goes back to the dawn of time" (*Hardison* 2005, Lewes Crown Court, unreported). Similarly,

when refusing Hardison leave to appeal, dismissing his human rights arguments as a "portmanteau" defense, Justice Keith said:

> He claimed to regard the bond between man and plants as a sacred one, although the prosecution was to say that his assertions about the benefits which he claims the use of such drugs generate was just an excuse for his commercial production of hard drugs on a large scale. (*Hardison* 2007a)

Indeed, while attempting to appeal his conviction, Hardison remarked upon the terminology that had been applied to him throughout his journey through the criminal justice system, observing that he had been subjected to a barrage of slanderous allegations by various judges and prosecutors, having been described, among other things, as "dangerous," "greedy," and even "evil" (personal communication).

In contrast, Hardison himself imputes the following as motivating his decision to create psychedelics:

> So, why did I do it? There is no single pat answer. The simplest: my love of learning. The veiled: for my ego, for the attention, to feel special, to be loved, etc. The flippant: because I could. With hindsight: civil disobedience, academic and religious freedom in the study of the mind, and an expression of equal rights. The most accurate: my desire to share entheogenesis with others, to wake humanity up from the penumbral dream-world of materialist delusion, to help end the blatant injustice and rape of human dignity that occurs within the context of a "War on (some people who use some) Drugs," to seize the world stage and help create a forum for the cooperative and conscious stewardship of Mother Earth and all her relations. (Hardison 2007b, p. 31)

On Cognitive Liberty

Given that embracing the concept of cognitive liberty ultimately has the potential to undermine the drug laws, it is salient to subject it to analysis from the perspective of political philosophy. Cognitive liberty can be seen as a natural extension of the classic liberalism espoused by John Stuart Mill, a doctrine that can itself be used to critique both the incursions into cognitive liberty that arise out of psychedelic drug prohibition and this regime more broadly. Applying the work of Mill to such issues leads to a perhaps surprisingly natural fit:

> Written in the midst of the growing political power of Christian temperance groups pushing for alcohol prohibition and speaking directly to the issue of the rights of individuals and the limits of authoritarian control, *On Liberty* is a seminal antiprohibition text. (Boire 2003, p. 15)

Mill's inspiring paean to individuality is concerned with "the nature and limits of the power which can be legitimately exercised by society over the individual" (Mill 1982, p. 59). His famous "harm principle" warrants quoting at length:

> That principle is, that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own

> good, either physical or moral, is not a sufficient warrant . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. (Mill 1982, p. 68–69)

Mill continues:

> This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them even though they should think our conduct foolish, perverse, or wrong. (Mill 1982, p. 71)

Thus, liberty comprises freedom to choose, including the freedom to make what others might consider to be bad choices. How could it be otherwise? Who but themselves should decide what is of value to individuals? It is through such choices—including those regarding which substances to ingest, or not—that people engage in self-creation, in autopoiesis: “Embedded in our choice of highs is the question of our aspirations, fears, and identity” (Lenson 1995, p. 64). When the law limits such choices, it curtails who people can become.

Mill famously advocated “experiments in living” (Mill 1982, p. 147) in accordance with this view, individuals should be free to carry out chemical experiments in the living laboratory of their own bodies. While not without its risks, such bioassays can lead to progress, both individual and societal:

> This argument reminds us of the theory of evolution. Progress is best served by an infinite variety of blind mutations. Apart from many failures, this process produces time and again surprisingly viable species that would not even have been considered had the process been a regulated one. He who believes himself to serve progress by limiting diversity makes therefore a tragic mistake. (van Ree 1999, p. 94)

In his book *Sex*, *Drugs*, *Death and the Law: An Essay on Over-Criminalization*, legal academic David Richards applies deontological, rights-based theory to the drug laws *in toto*, seeing this as necessary because “the extension of the criminal law beyond the confines of the harm principle, properly understood, creates a tyranny of majoritarian convention which, if left without any moral constraint, erodes the foundations of autonomous personhood” (Richards 1986, Chapter One, The Harm Principle Reinterpreted section, para. 7). Richards concludes that the drug prohibitions do exactly that, as prime examples of “a radically inappropriate form of paternalistic interference . . . grounded in the substitution of the interferer’s own personal ends for the ends of the agent” (Richards 1986, Chapter Four, Paternalistic Arguments Against Drug Use section, para. 2).

Liberalism rejects such paternalists; those that seek to compulsorily “protect” competent adults from the allegedly harmful consequences of freely initiated choices. How can being subjected to state punishment possibly be for one’s own good when the primary, and often solitary, harm being suffered is that inflicted from on high, rather than from having been high? With its implicit infantilization, paternalism is deeply problematic: It should remain up to the individual, not the

state, spuriously on their behalf, to prioritize whether or not they accord greater value to the possibility of, say, a mystical experience, versus an outside risk of either physical or psychological harm. As moral philosopher Feinberg (1986) comments, drug users "may have a well-thought-out philosophical hedonism as one of (their) profoundest convictions" (p. 133); thus:

> To prohibit outright for everyone would be to tell the voluntary risk-taker that even his informed judgments of what is worthwhile are less reasonable than those of the state; and that therefore, he may not act on them. This is the purest hard paternalism . . . As a principle of public policy, it has an acrid moral flavor, and creates serious risks of governmental tyranny. (p. 134)

Balancing Freedoms

Thus, Mill advocates a negative liberty, the freedom to be left alone to do as one pleases. But what of the fact that—as the psychedelics often render vividly apparent—human beings are all inextricably interconnected with each other, along with the entirety of the biosphere and, indeed, the universe, given that everything is woven of the same molecular fabric? Does this fact not create societal obligations, meaning that judgments relating to whether someone may or may not freely ingest a psychedelic cannot be taken at an atomized, individualized level? It does, but, in line with the harm principle, incursions will only be valid where partaking of a drug would create real, measurable harms in society. Given that *all* actions affect others, the question is whether they set back others' interests sufficiently to warrant criminalization. To give a concrete example, in the UK Coalition Government's latest drug strategy, one of the reasons given for prohibition itself is that drug use leads to family breakdown (HM Government 2010). Even were this unsubstantiated claim true in the context of psychedelics, this is not the kind of harm that legitimately invites a criminal response, or else adultery and divorce would be illegal.

It is out of recognition that some actions can impact others to an extent that justifiably warrants state interference that there are qualifiers to the articles in the ECHR. Article 9(2) states that:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Recall, however, that the right to freedom of thought and to cognitive liberty under Article 9 is absolute. Thus, if it is accepted that freedom of thought encompasses the *processes* of thinking, and that psychedelics can be an important facet of such, their usage should be afforded unqualified protection under this provision and Article 9(2) is incidental. If this proposition is not accepted—if psychedelic ingestion is instead seen as a *manifestation* of a belief system, engaging Article 9, yet subject to limitation—these qualifiers become relevant.

When considering Article 9(2) in greater depth, it is apparent that, in applying this provision, the courts need first to determine whether any purported interference with Article 9 is prescribed by law. As an important aside, prosecutions for activities involving many of the plant psychedelics in which only the constituent psychoactive ingredient, but not the actual plant itself, is scheduled under the MDA, can potentially be seen to fall foul of this preliminary test, mired as they are in legal uncertainty (see Walsh 2014).

The courts then consider whether the limitation is necessary in a democratic society. This requires balancing the severity of the restriction placed on the individual against the importance of public interest, with only the perceived minimum interference with the right permitted, viewed as necessary to secure society's legitimate aim. It is of crucial importance to emphasize that the lawful utilization of psychedelics is not merely restricted by the drug laws, but is, rather, entirely shut down by them. This is significant because, in a number of (non-drug-related) cases brought before the courts claiming infringement of Article 9 rights, these were defended on the basis that those concerned could manifest their beliefs elsewhere. For instance, in *Regina (SB) v Governors of Denbigh High School* (*Regina (SB) v Governors of Denbigh High School* 2006), the fact that one school prohibited a Muslim girl from wearing the full jilbab was seen as acceptable, given that she had the choice to attend another educational establishment. No such alternatives are offered to those who wish to take psychedelics legally, not even within the privacy of their own homes; thus their ability to manifest their belief becomes impossible without breaching the law.

Finally, in applying Article 9(2), the courts consider if the aim of the limitation is legitimate, and that it fits one of the expressed headings of that provision. At surface level, these qualifiers can be seen, on the whole, though certainly not exclusively, to arise from concerns about tangible harm to others, rendering them largely unproblematic from a liberal perspective. What is more contentious is the ease with which they can seemingly be engaged in practice in cases involving drugs, with supposed posited harms rarely empirically demonstrated in the courtroom, or with the existence of an international regime of global prohibition the only factor accorded any weight, as per *Taylor*. This is not to deny that these substances can lead to harm, with varied psychedelics associated with differing risks, but rather that such harm should be *proven*, rather than *assumed*. While the public, most certainly, has a right to be protected, the futuristic weaving of prospective worst-case-scenarios arising out of individuals' drug-taking that is used to justify engaging the qualifications fatally undermines the protection Article 9 ostensibly affords. Consequently, the qualifiers can be used by the courts to avoid protecting certain people's freedoms when to do so would be unpopular, either with politicians or the public. Thus, they have been described as amounting to "an invitation to the courts to make value judgments behind the veil of legal objectivity" (Beck 2008, p. 237).

To illustrate, the predominant harm to society that is normally cited in engaging the qualifiers to human rights protections (and, indeed, to justify the drug laws in general) is that drugs are criminogenic: This is not the case with the non-addictive psychedelics, a truism that the UK Government implicitly accepts through its policy

that, while under the Drugs Act 2005, Class A drugs are routinely tested for at various points in the criminal justice system in an attempt to identify (and to break) this posited drug-crime connection, psychedelics are excluded from such screenings. Considering harm to society more broadly, a group of scientists, led by David Nutt, have synthesized the available relevant literature and given a score to potential harms from different drugs, creating the most reliable such matrix to date (Nutt et al. 2010). Nutt's grid reveals the UK's drug classification system to be composed of pseudoscientific divisions not borne out by empirical evidence, with an almost perversely inverse correlation between risk of harm and positioning within the MDA. The clear front-runner in terms of harm, both personal and social, is the legally and culturally sanctioned substance alcohol, curiously exempt from the MDA, while the Class A psychedelic LSD is down at the bottom end of the scale, with harm to others deemed practically non-existent and harm to self, minimal.

These issues are taken up by Husak who contends that the average harm a drug user risks either to themselves (irrelevant from a liberal perspective) or others (relevant) is so slight as to be inconsequential: "Drug use per se is almost never harmful to others in the absence of further acts the drug user performs" (Husak 1992, p. 178). Where harm *is* demonstrated, the state can, of course, justifiably engage the qualifiers. In reality, "Many, if not most, recreational drug users are attentive parents, good neighbors, fine students, and reliable employees. Most will not resort to (further) crime. How, then, can their recreational use of drugs be condemned on the ground that it is harmful to others?" (Husak 1992, p. 181). This reasoning is amplified yet further due to the fact that "a subgroup of users creates virtually all of the harm"; as this is patently not psychedelic users, they effectively suffer "vicarious liability for the acts of others" (Husak 1992, pp. 188–189). Unless the state is dallying with paternalism, it is thereby punishing individuals for inchoate, victimless crimes, on the basis of a posited risk of harm to others: "The state should not be given unbridled authority to reach into someone's life and punish her for conduct that might eventually lead to harm, even though it is not harmful per se" (Husak 1992, pp. 182–183).

That the ECHR provides substantial, rather than merely rhetorical, protection of human rights is of great importance for minority groups; those that require shielding from the tendency of democracies without such safeguards to veer towards mob rule. "Rights by their nature are designed to trump consequentialist, utilitarian or majoritarian considerations" (Beck 2008, p. 224). Drug takers are not, of course, a minority group—that term aptly describes practically everyone on the planet—but psychedelic users are. Where human rights and freedoms are being restricted, the burden of proof as regards harm to others should be on the state, to avoid these ostensible protections being hollowed out. Much finer distinctions between the different types of controlled drugs and the ways in which they are taken need to be made when assessing whether or not they represent a threat to public safety. In short, a far more parsimonious and evidence-based approach is advocated. Importantly, any fair consideration of harms should include an assessment of those caused by prohibition itself: these fall outside the scope of this paper but have been

impressively documented elsewhere for the interested reader (see Transform http://www.tdpf.org.uk/).

Furthermore, undertaking a proper balancing exercise when applying Article 9 (2) would involve weighing any potential harms against the benefits of psychedelics; the fact that these substances may advantage their users remains largely absent from both policy discussion and the language of the courts. The benefit of simple pleasure, ostensibly so central to the inherently hedonistic utilitarian calculus, is notable by its absence. That people should be allowed to take drugs because they enjoy them is rarely invoked in the courtroom, even on the part of defendants; as though pleasure were a dirty word, and there must be some higher motivation to get high. This is, doubtless, partially tactical, but it also renders defendants complicit in the implicit puritanism of accepted discourse: “To legislate against drugs of pleasure is like legislating against music, chess, golf, or any other form of play: It is arbitrary” (Lenson 1995, p. 74). Exceptionally, in 2008 the *International Journal of Drug Policy* dedicated an entire edition to the theme of pleasure, noting in the opening editorial that: “While there are many potential motivations for drug use, the failure to acknowledge pleasure contributes to the idea that those who continue using are irrational or unintelligible” (Holt and Treloar 2008, p. 349).

Fortunately, the traditional silencing of alternative perspectives to the dominant paradigm is becoming ever more untenable in this multi-mediated world (see Walsh 2011). As is being increasingly publicized, psychedelic drugs may lead to great benefits, both for individuals and, consequently, for society as a whole. Famous examples include Stewart Brand’s LSD-soaked vision of the need for a photograph of the whole earth, pivotal in the birth of the ecology movement, and the fact that two Nobel Prize winners have attributed their lauded breakthroughs to their usage of LSD (Fadiman 2011, p. 4). Many of the multiple ways in which psychedelic ingestion can lead to benefits are documented by the Multidisciplinary Association for Psychedelic Studies (MAPS), whose primary work is in spearheading the current renaissance of psychedelic psychotherapy, a practice used extensively and with great success in the 1950s and 1960s and ever since by underground networks, which was (officially) stymied by prohibition (http://www.maps.org/). For instance, the ongoing pilot studies into deploying MDMA in work with people with seemingly intransigent PTSD has yielded unprecedentedly positive results (Mithoefer et al. 2011). Again, novel neuroscience research gives us deeper insight into the mechanisms through which psychedelics can be a useful adjunct in psychotherapy:

> Psychedelic drugs have a history of use in psychotherapy, linked to the hypothesis that they lower defenses to facilitate access to salient emotions and memories. The results of this study provide initial support for this idea and a potential neurobiological mechanism is proposed: decreased medial prefrontal cortex activity leading to disinhibited limbic and sensory activity. (Carhart-Harris et al. 2012b, p. 243; for further information, see Feilding, this volume)

MAPS also produces themed journals, gathering together experts in different fields to discuss the ways in which psychedelics have been useful to them. To offer just a few illustrative examples here, in the *Special Edition: Psychedelics, Death and Dying*, the editor discusses how, having experienced ego-death under the

influence of psychedelics, transition to the real thing (especially for those for whom this is a long, drawn out, and painful process, such as cancer sufferers) can be eased: "One of the most commonly reported experiences that people have with the classical psychedelics is a sense of boundary-dissolving unity, where one's personal consciousness merges with a much larger transpersonal planetary or cosmic awareness" (MAPS 2010, p. 4). In the *Special Issue: Psychedelics and Ecology*, the aforementioned well-known influence of these substances in that movement is explored:

> The link between psychedelics and ecology comes primarily from the long-term changes in attitudes and behaviors flowing from these mystical experiences ... The essence of the mystical experience is a sense of unity woven within the multiplicity, forging a deeply felt and unforgettable common bond between humans, other life forms, nature and matter. This common bond can generate respect and appreciation for the environment, for caretaking and wonder. (MAPS 2009, p. 2)

Special Issue: Psychedelics and Technology reviews the many and varied ways in which these substances have impacted human tool development and use (MAPS 2008). The list goes on. Moreover, the impact of psychedelics ripples out into popular culture, reaching many more people than have personally ingested them.

Given the great benefits that so many claim from psychedelics—up to and including achieving enlightenment!—it should not be necessary for users to prove that these substances are risk-free in order to avoid the clutches of the qualifiers (for, like most things, they are not), but rather for the state to prove that the harms to society actually do outweigh the benefits. Of course, the notion of employing a coolly rational empirical calculation when deciding whether the qualifications should be engaged sounds more "objectively" clinical an exercise in theory than it could ever actually be in practice. Decisions regarding what is measured, what weight is accorded to any given harm or benefit, and so on, will be indelibly infused by value judgments. While this is unavoidable, a more valiant attempt at balance is certainly warranted. Without this, what we are really dealing with here is legal "moralism": that notorious conclusion in search of an argument.

A Conclusion in Search of an Argument

It is important to acknowledge that the articulated aims in this sphere are often subservient to the silent true motivations, which reek of legal moralism. Indeed, protection of public morals is one of the recognized qualifiers under Article 9(2), a fact that is deeply troublesome from a liberal perspective. Legal moralism—the notion of a sort of "free-floating evil," unrelated to measurable harm—is an entirely unacceptable, even immoral, basis for qualifying Article 9 rights, or indeed, for Prohibition itself (Feinberg 1990). Immoral, because the devastating power to impose punishment should be taken seriously by the state: The consequences of sanctions for the individual can persist long after any penalty has purportedly expired, with those convicted of drug offenses often existing thereafter as *de*

facto exiles within their own nation (see The Exile Nation Project http://www.exilenation.org/). While it can be difficult to understand why anyone would object to psychedelics, distinct from any verifiable harm they may precipitate, this appears to be the case. Perhaps deconstructing the moralistic approach might help with comprehending it?

Understanding this rationale is almost unavoidably based on supposition, as legal moralists rarely state their case in such terms, generally hiding behind a rather unconvincing mask of utilitarianism. It has been mooted that legal moralism is rooted in a belief that the mindstates catalyzed by ingesting psychedelics are "unnatural" and accordingly less valuable:

> No argument supporting the moral condemnation of drug use has had a stronger and more pervasive hold . . . than the argument for protecting the perfectionist ideal of the person . . . It is as if the Augustinian concern to keep religious experience unpolluted by alien agents were generalized to subjective experience in general. (Richards 1986, Chapter Four, Drug Use and Degradation section, para. 6)

This viewpoint becomes ever more anachronistic in an increasingly secular, technological and augmented age: "The notion that an organic creature should be left alone merely to exist with all its inherent powers and limitations seems utterly quaint" (Lenson 1995, p. 188).

Regardless, such "perfectionism" is evident in the UK Coalition Government's aforementioned drug strategy, displayed even in its subtitle, "Supporting People to Live a Drug Free Life" (HM Government 2010). The hypocrisy here is self-evident, given that practically nobody leads a drug free life, particularly in the context of the arbitrary social acceptability of alcohol. That alcohol is excluded from drug prohibition—though, interestingly, repeatedly acknowledged as being a key contributor to social harm in the drug strategy—is an important issue that, while left largely unexplored here, undermines the already shaky claims of legal moralists. Moreover, the fact that imbibers of alcohol can alter their consciousness freely, their Article 9 rights to cognitive liberty undisturbed by state sanction, while psychedelic users are persecuted, is legally questionable given the existence of Article 14 of the ECHR, a provision that ostensibly guards against arbitrary discrimination in the protection of rights: "The only acceptable answer to the 'why his preference and not mine?' question requires a principle that cites a morally relevant difference between the permissible and the prohibited" (Husak 1992, p. 94). (Parallel issues of differential treatment are discussed in the chapter by Feeney 2014, in the context of the protection of peyote use for only Native Americans in the United States.)

Relatedly, there is perhaps a concern on the part of legal moralists that psychedelic users are not playing by the rules of the game; indeed, these substances can be game changers. Maybe this unearths the deeper, underlying fear beneath the psychedelic prohibitions: the deconditioning effect ingesting these substances can have, undermining conformity of consciousness. All laws are social and cultural products; the MDA entombs a vestigial remembrance of the social upheavals of the era that birthed it, an epoch with which psychedelics are so closely entwined (see

Lee and Shlain 2001; Seddon 2009). Under the influence of these molecules, "ideas of order crumble in a sort of ontological slapstick" (Lenson 1995, p. 74); consequently, psychedelics may lead to a questioning of the political status quo. This raises

> the very real possibility that the prohibition of drug use should not be understood in rational terms ... that the war on drugs is largely symbolic, serving to express the anxiety that authorities with political power feel towards persons who are deviant and unconventional" (Husak 1992, p. 6).

The state is concerned with governing risk and users of psychedelics are often viewed, rightly or wrongly, as anarchic, wild, and unpredictable outlaws.

Perhaps even more worryingly, psychedelics can engender a stepping back from the consumerist paradigm: "The contention that drugs are escapist may be accurate. And those who profit from consumer culture do not want anyone to escape it" (Lenson 1995, p. 28). This is how political writer Hakim Bey explains the paradox that, in spite of demand, psychedelic drugs remain (officially) uncommodified in an increasingly commodified world:

> Global Capital and universal Image seem able to absorb almost any "outside" and transform it into an area of commodification and control. But somehow, for some strange reason, Capital appears unable or unwilling to absorb the entheogenic dimension. It persists in making war on mind-altering or transformative substance, rather than attempting to "co-opt" and hegemonize their power. In other words, it would seem that some sort of authentic power is at stake here. Global Capital reacts to this power with the same basic strategy as the Inquisition—by attempting to suppress it from the outside rather than control it from within. (Bey 1999/2000, para. 2)

In short, the War on (some people who use some) Drugs is a culture war, with psychedelics as ciphers for inchoate angst.

A Right to Psychedelics?

Through the looking glass from the legal moralists are those who argue for a moral right to drugs, such as libertarian political philosopher Szasz (1996). The notion of a right to drugs may seem radical, but Szasz's key argument is that it only appears so because of societal conditioning. In his view, transcending this cultural soup would lead to the realization that it is actually the notion that the state has the right to tell individuals what they can and cannot ingest that is extreme. Husak makes a similar point in his insightful book dedicated to the issue of whether or not adults have a right to drugs:

> Why are whatever rights may be involved in ... drug use regarded as so insignificant? Sometimes a policy or practice is so familiar and widespread that it becomes all but impossible to return to a state of innocence and to imagine how strange and peculiar it would appear from the perspective of an outsider. Suppose that a person who did not have a particular issue in mind were asked to prepare a list of general rights that are most important or fundamental in a free society. General rights that could easily be interpreted to protect ...

> drugs would be prominent on this list. One such right is the right to determine what happens in and to one's body. Another such right is the right to regulate the ways in which the mind processes the sensory data it receives from the world. (Husak 1992, pp. 39–40)

van Ree suggests enshrining a right to drugs within a newly created Article 31 to the Universal Declaration of Human Rights for the following reasons:

> Human rights concern forms of behavior which we regard as positive and enriching for our lives to such a degree that we experience it as a violation of our personal dignity when we are forced to give them up. Drug use belongs in that category. Instead of being included in the category of murder and rape, drugs should be appreciated as a cultural asset, similar to religion and art. Despite the possibility of abuse, drugs provide their users with access to a unique inner field of experience, that would remain closed forever without them. (van Ree 1999, p. 89)

While again it may seem outlandish to argue for a specific human right to drugs, van Ree contends that this is necessitated by their prohibition in a way that it would not otherwise be; just as if the state arbitrarily decided to ban the playing of all sports, the need for an explicit right to partake in these activities would also emerge. Further, the fact that many people may not take the argument for a right to drugs seriously is to be expected: "Before the recognition of a specific right is a fact, public opinion often considers it for a long time to be simply ridiculous, and its violation to be irrelevant" (p. 93). If one commences from this premise, that there is a right to psychedelics, then their usage could not be interfered with in such a perniciously casual fashion: Moreover, the problem that Article 9 rights are selectively implemented and their qualifiers too readily engaged would be circumvented.

Concluding Remarks

Given that the idealized scenario outlined above, wherein an explicit right to psychedelics is afforded seems unlikely, it is worth paying some attention to whether there are more realistic prospects of progress in this area before closing. To date, Casey Hardison's challenge to the MDA on the grounds that it conflicts with the freedom of thought limb of Article 9 stands alone in the UK courts. There have, however, been cases brought on the grounds that the freedom of religion element of Article 9 is transgressed by the MDA (*Taylor* 2002, as discussed above; Bone, this volume) and on the basis that being unable to lawfully self-medicate with controlled substances brings the MDA into conflict with the Article 8 right to privacy (*Quayle and others* 2005) and the Article 3 protection against inhuman or degrading treatment (*Altham* 2006). These cases reveal the tendency for drug users to claim the labels of either religious or therapeutic use when trying to exempt themselves from the prohibitive framework, both because this is a genuine description of their motivations, and because there is believed to be protective power attached to such categorizations. However, just as with Hardison's attempt, these cases were unsuccessful.

It has been argued here that we need to go beyond the claims of religious and, indeed, therapeutic freedom when disputing the prohibitive drug laws and their compatibility with human rights obligations. Given that Hardison was not permitted to have his cognitive liberty-based vindications tested before an open court, these arguments have not been judicially closed down in any legally binding sense. It is hoped, therefore, that similar challenges will be brought by defendants in the future, perhaps in less extreme circumstances than when they are involved in manufacture and supply; with possibly only possession at issue. This would have the benefit of arguably allowing for more fluidity in terms of avoiding criminalization without transgressing the UN Drug Conventions (for more detailed discussion of which, see the chapter by Boiteux et al. this volume). With luck, the courts will give such contentions a fair and balanced hearing, applying the qualifiers to Article 9 judiciously, within the true spirit of the ECHR and the principles of liberalism.

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Fear and Loathing in Drugs Policy: Risk, Rights and Approaches to Drug Policy and Practice

Ross Coomber and Nigel South

Introduction: Contested Policy Arenas

Nearly 10 years ago in an edited book on cross-cultural drug use (Coomber and South 2004), we briefly introduced the argument that there is, and has been, an overly homogenized understanding of "drugs," drug risks, and the dangers they present to the societies in which they are used. We further argued that there has also been a relative homogenizing of how drug risks have come to be perceived across cultures and nations largely following from the dominant drug control policies pursued by Western nations that have assumed that it is axiomatic that all drug use is problematic, unneeded, and should be prohibited or controlled. Epitomizing this position (only slightly relaxed in 2012) we referred to the United Nations General Assembly Political Declaration from 1998 that stated:

> Drugs destroy lives and communities, undermine sustainable human development, and generate crime. Drugs affect all sectors of society in all countries; in particular, drug abuse affects the freedom and development of young people, the world's most valuable asset. Drugs are a grave threat to the health and well-being of all mankind, the independence of States, democracy, the stability of nations, the structure of all societies, and the dignity and hope of millions of people and their families. (United Nations General Assembly Political Declaration 1998, p. 3)

Although statements of this nature are not uncommon in generalized discourses of governments and major organizations around drug use, homogenizing drugs and thus drug risks in this way over-simplifies to a level that is unhelpful in too many respects: it fails to differentiate risks between substances; between contexts of use,

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R. Coomber (✉)
School of Government and Society, Plymouth University, 9 Portland Villas, Plymouth, Devon PL4 8AA, UK
e-mail: ross.coomber@plymouth.ac.uk

N. South
Department of Sociology, University of Essex, Colchester CO4 3SQ, Essex, UK
e-mail: soutn@essex.ac.uk

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and between cultures of, and motivations for, use. In addition, this statement generates questions that are not answered and contains contradictions that are not recognized. Briefly, for example, the ideals of "sustainable human development" and the "freedom and development of young people" are referred to and seem to imply a life-stage development model of "growing up," but the idea of *sustainability* might also lead us to wish to critically consider the economic and environmental contexts in which young people are "growing up." The declaration is also aspirational in stressing the need to preserve independence of states, democracy, and the dignity of peoples. These are concepts, principles, and values that are very much tied to the idea of rights. Giving due consideration to such matters complicates debates and raises questions that are uncomfortable for prohibitionists and drug-warriors who wish to set out and stand by stark statements that differentiate between what they see as "right" and what they see as "wrong." In fact, as most commentators on drug use and supply acknowledge, the world is more complicated than this and, furthermore, as we will show, questions relating to both risks and rights manifest themselves frequently but differentially in relation to all drugs, depending on a variety of factors.

In many respects, the imperialism of homogenizing risks backwards (to all drugs and drug use) and "downwards" (from "developed" to less developed nations) has meant Western values and concerns have polluted traditional and less developed nations' views on how multifarious forms of comparatively non-problematic drug use should, or can, be both understood and managed. In such a context complexity is simplified and traditional practices become marginalized in the face of "progress" and managing risks. In reality, nearly all ideas and statements on risks are politically, morally, and historically located and they do not present themselves to be simply read off from some set of objective risk criteria. Often they emanate—as is the case with drugs and drug use—from a framework of fear, confusion, and misconception (Coomber 2011, 2013).

This chapter will consider how and why forms of drug use are feared and situated as they are, the consequences this has for understanding traditional drug use in its original settings, and also for understanding how drugs are understood and dealt with in new settings beyond their origins. We will also consider this from a perspective of human rights and social justice related to drug use and how this relates to the preservation of both the environment and traditional ways of life. The key concept of "drug, set, and setting" will be used to provide illustration of complexity and of "situated risk" (Coomber 2006). We will argue that cross-cultural policy can be understood as operating within a broad framework of fear and misunderstanding around "drugs," and that it is this which makes much policy overly simple in approach and policy makers resistant to the arguments of evidence-based and rights-based positions.

Drug, Set and Setting: Situated Risk

In this section, we will consider how drug risks have been both culturally and formally presented, but, more importantly, how those risks have been transposed into legal frameworks and punishment guidelines. Having considered the limitations of these frameworks, as well as some that have been promoted and accepted as more rational and thus progressive in their understanding, we will consider drug-related risks in light of Zinberg's (1984) notion of drug, set, and setting, as well as that of the "risk environment" (Rhodes 2002).

Understanding risk, despite common sense notions, is not straightforward. The risk of danger from any one specific thing is always contingent. It is contingent on the likelihood of that risk actually occurring (say, in the case of an outbreak of an air-borne disease such as SARS), and then also on the risk of exposure (those working in schools, universities, and airports, for example, may be more likely to contract a population-level disease than those working in the open air with few other people to come into contact with). Beyond that, if the disease is contracted, the level of risk will then depend on other factors, such as whether those that contract it are healthy or less so, and thus vulnerable to greater harm. The risks will be even greater for some members of a given population if the cultural practice is to exercise little by way of interpersonal consideration for others (such as sneezing, coughing, or spitting with little care in public settings), or if the population perceives little risk and does not alter its behavior in ways to mitigate against possible harms. The latter may or may not depend on the extent to which government or other authority chooses to consider the risk as worthy of meaningful public health action, and if so, the effectiveness of any consequent action taken. Numerous factors may affect such decisions. In the case of HIV/AIDS in South Africa, for example, the cost of the Mbeki government's denial of risk related to HIV/AIDS, and the failure to provide antiretroviral treatments, has been estimated to have caused the early deaths of over 300,000 individuals (Chigwedere et al. 2008).

In the case of drugs and national laws, it is not uncommon for arrest and punishment criteria to be broadly based upon perceived risks (Police Foundation 2000; Rolles and Measham 2011; Sentencing Council 2012). In the UK, such a position is effectively enshrined in the 1971 Misuse of Drugs Act and its classification system that allocates specific substances to either Class A, B, or C. Drugs that are listed under Class A are considered to be those that constitute the greatest individual and social risk. Heroin is listed under Class A, as is cocaine (with no differentiation between powder and crack), MDMA or ecstasy, coca leaf, and poppy straw. Class B includes amphetamine, methylamphetamine, cannabis, and cannabis resin. Class C includes, among others, cathinone (and derivatives), and various prescribed benzodiazepines and opiate derivatives. Such classifications are not necessarily consistent even across developed nations in the West. In the US, heroin (diamorphine) is illegal and prohibited even for medicinal use, much to the consternation of many US medics. In the UK and most other countries of the world, diamorphine is a controlled drug with prescribed use permitted, including

the self-administration of diamorphine by patients in certain settings (Mann et al. 2005). The risks considered to pertain to diamorphine (heroin) in most countries are thus, in part, reflective of differential contexts and motivations or need for use; whereas, in the US, the presumed risks attached to it place it firmly outside the boundaries of beneficial use.

Such schemata have been subject to a range of criticism that essentially argues that current control systems rely less on the evidence base of comparative risk and more on historic, non-evidence based assumptions about relative harms associated with substances (Coomber 2006; Rolles and Measham 2011; Beynon et al. 2007; Nutt et al. 2010; Walsh, this volume). There have been attempts to discuss and displace these schemas with more "rational" ones based on improved evidence-based data on relative risks (e.g., Nutt et al. 2010). These newer approaches have also been notable for their inclusion of tobacco and alcohol being placed meaningfully high up the list and the inclusion of a "societal harm" index as well: a measure of the harm done to society beyond the inherent riskiness of the substance. However, while these newer approaches try to deal with the inconsistencies of the classification system and recognize risk as relative to actual, rather than perceived, harm regarding each substance, and that legal drugs also need to be included if a rational approach to drug control is to be undertaken, they fail to go far enough: They still see risk as something essentially located within the substance itself, similar to how people would view a poison like cyanide. They fail to grasp the complex social and political contexts that, in part, *produce* schemas of risks, including those related to supposedly objective data around mortality and dependence (Rolles and Measham 2011), and thus fall prey to some of the same criticisms they have laid at the door of conventional understandings. However drugs, and indeed many poisons, cannot have their risks simply read off in this way; the risks to both individual and society from drugs, just like the example of SARS above, are fundamentally contingent on circumstance, culture, group, and individual. Rolles and Measham (2011) sum this up thusly:

> If analysis is to include the capacity to capture the complexity relating to drug using behaviors and environments, specific personal and social risks for particular using populations, and the broader socio-cultural context to contemporary intoxication, there will need to be acceptance that analysis of the various harm vectors must remain separate—the complexity of such analysis is not something that can or should be over-generalized to suit political discourse or outdated legal frameworks. (p. 243)

If we take heroin as an example, we can find many confounding factors for how heroin risks should be understood as opposed to how they are commonly portrayed. Heroin is a drug that has been subject to a great deal of misconception over many years (Coomber and Sutton 2006; Kaplan 1985; Darke and Zador 1996; Zinberg 1984; Krivanek 1988; Brecher et al. 1972; Smith 1972; Coomber 2011). Some of these common misconceptions are that it kills very easily and that heroin users will likely end up dead, either through overdose or through dangerous cutting agents in the heroin, or addicted for life. The onset of addiction is thought by many to be extremely quick, if not nearly instant, and as such, heroin (perhaps now vying with crack cocaine) has long been considered as the most dangerous

and feared of all illicit drugs. When we look at heroin mortality statistics, however, the first thing we find (in the absence of epidemics of HIV/AIDS) is that there are less people dying of heroin per se than might be arguably expected. In addition, very few fatal overdoses are simply “heroin overdoses”: most heroin overdoses in countries like the UK occur because either long-time users newly released from prison attempt to use the amount they used to when they had a higher tolerance or, just as commonly, because the heroin user had been consuming too much alcohol or other drugs, or are successful intentional suicides (Darke and Zador 1996). Fatal heroin overdoses are thus contingent on context and other drug use patterns. This is further evidenced by the fact that few neophyte (new) users die from heroin overdose; the opposite of what might be expected. So, heroin does not conform to popular stereotypes in many respects: it is *not* like a poison in the sense that merely using it at doses the user is introduced to or used to will kill or even likely cause overdose; addiction is *not* particularly rapid and usually takes months if not years to occur (Coomber and Sutton 2006); heroin is *not* cut with dangerous substances like rat-poison, ground glass, and scouring powders (Coomber 2006), and there is an ageing population of heroin and other opiate users around the world demonstrating that mortality is far from inevitable (Beynon et al. 2007; Gfroerer et al. 2003; European Monitoring Centre for Drugs and Drug Addiction [EMCDDA] 2007). Injecting heroin is riskier than inhaling (“chasing the dragon”) or snorting; using daily is riskier than using occasionally; using heroin only is less risky than using it with other drugs; injecting street heroin in unhygienic spaces and/or through poor injecting techniques is riskier than doing so in clean spaces with pharmaceutical heroin by people with good injecting technique and experience (like doctors, nurses, and dentists). As long ago as 1972, Brecher et al. had previously related a whole list of eminent opiate addicts for whom decades of managed use presented almost no problems other than those brought about by having to hide their habit:

> In July 1969, Dr. Stephen Waldron of Arthur D. Little, Inc. presented some of the findings of these two studies in testimony before the House Select Committee on Crime. The Federal Bureau of Narcotics files and the Lexington data, he reported, independently led to the same conclusion, that "roughly 30 percent of all the drug abusers actually are legitimate people, in the sense that they have a job which they keep - whether because of, or in spite of, using drugs, it is hard to tell.” They tend to be professional people, doctors and lawyers, quite a number of housewives, some musicians, but not too many; people who appear to the outside world to be fairly normal, and people who do not seem to get in trouble with the law, except after long periods of use when they may get picked up through a contact, or in some cases where they turn themselves in for treatment in the Public Health Service Hospital. (1972, p. 291)

People can inject heroin for 20 or 30 years with either few harms accruing (e.g., if they have a steady supply of good quality heroin they can afford; clean injecting equipment and appropriate safer approaches to injecting), or they can be subject to serious health harms and/or death if circumstances conspire to make riskier behavior more likely, as can be compounded by prohibition. In the absence of risky ways

of using heroin, there is also a relative absence of harms. Context and motivation matter.

What all this suggests is that drug risks are not simply inherent to the nature of the substance per se and as such should not be simply "read off" as if any indications of appropriate policy trajectory were entirely evident. Chewing coca leaf is not the same thing as using cocaine and that is not the same as using crack cocaine (see Metaal, this volume). Using opium in the fields of rural India is not the same, either in function, meaning, motivation or risk, as using opium or, indeed, heroin for hedonistic or self-medicating reasons. To declare hallucinogenic mind-altering use as having no purpose to society (as in the case of the US and UK) ignores the cohesive and functional and less risky use of it in ritualized and traditional contexts such as the use of ayahuasca by the Church of Santo Daime (MacRae 2004) and related derivative or alternative groups; Ebene by the Yanomamo in Venezuela (Chagnon 1983) or coca leaf chewing in the Andes (Rivera Cusicanqui 2004; Metaal, this volume) to list but a scant few.

To formalize this conceptually, an informed statement on drug risks (just like drug effects more widely) has to go "beyond" the drug. Such a statement would have to encapsulate what it is that the individual or group does, the kind of person/s or group/s they are, and be sensitive to the context that the individual or group is within: what Zinberg (1985) usefully introduced as a triumvirate of drug, set, and setting. Set refers to the psychological state of mind (e.g., anxious, happy, excitable) of an individual but also, for example, the beliefs that they might hold about the effects of a drug or how others might perceive them. Setting intermingles with this to some degree, as context and setting affect mind-set, but it is also important as a structural context, i.e.: prohibition; an immediate context where drug use is frowned upon or fully accepted; using in a group or alone; living or working with drug using peers or non-drug using peers; using in a culture that uses in more risky fashions, rituals, or patterns of administration, and so on. We would like to add to this the notion of process (Moore 1993), whereby temporal shifts in set and setting produce changing patterns of use, risk, and behavior. The effects of a drug and the consequent behavior of the user are thus neither predictable nor fixed, as Zinberg effectively demonstrated in relation to addiction and heroin. Some heroin users are able to desist their use, others can effectively control their use either at non-addicted levels or even when addicted. In relation to risk, for example, Bourgois et al. (2004), has shown that, in a drug-using culture where men control the injecting process and paraphernalia and are the "protectors" of women, conventional gendered power relations can increase the risk of blood borne disease to those women as compared to the men. This shows us that the specific risk environment (Rhodes 2009) drug use takes place in will affect all manner of related outcomes, including the extent and nature of related health harms and risks.

Drug risks are thus contingent and situated. The risks are contingent on a variety of factors such as type and strength of the drugs being used, how they are used, and in what context and with what motivations and purpose they are being used. They are situated because the wider context of prohibitions, beliefs about any one drug and its risks, and how drug users and "drugs" should be managed or dealt with, all

frame the contingencies even further. This framing has a broader history and, in relation to drugs, we argue that it is a framework of fear that has been instrumental in policy decisions and legal frameworks reflecting risk rather than a sensible and contextualized evidence-based approach to risk.

Fear, Risk, and Policy Developments

As we can see from the discussion above, there is an overly bio-chemical and overly homogenizing approach to understanding the risks that drugs present. This narrow framing of drug risks as relatively separate from context has had the consequent effect of presenting drugs and types of drug use as problematic beyond the setting in which they are perceived as problematic. This has happened many times in history, as has the attribution to drugs of powers far beyond those they possess in reality (Musto 1987; Coomber and Sutton 2006; Krivanek 1988; Kohn 1992). Thus, from the doom-mongers who saw the supposed ravaging of China by foreign opium as justification for harsh international control in the nineteenth and twentieth centuries (Dikötter et al. 2004), to those who saw the mid-1980s experience of crack cocaine in New York as the start of probable epidemic desolation wherever crack was to appear (Reinarman and Levine 1997), fearsome stories of what will happen if prohibition isn't enacted forcefully has been the norm. This is not the place to rehearse the various myths, misconceptions, and exaggerations of risk attributed to specific drugs, from opium, heroin, cocaine, crack-cocaine, methamphetamine, and LSD through to (now ex-)"legal highs" such as mephedrone; but to merely state that this has been commonplace, continues, and is problematic in that it contributes to a framing of how the drug problem is conceptualized (Coomber 2011, 2013).

So, while an exaggeration of drug powers, of drug risks, and the very nature of the drugs in question, has been common and important in framing the nature of the drug problem, we need to go beyond fears related to just drugs and also consider the fears, anxieties, and prejudices that have tended to group around those that are the *users* of the drugs. This is because, along with the fear of drugs and the chemical risks they seem to present, the drug control policy literature also strongly points to an ever-present duality whereby fear of substance has been accompanied by a mistrust and fear of the users of those drugs (Lloyd 2010; Berridge 1998; Musto 1987; Kohn 1992; Coomber 1998, 2006, 2011, 2013; Dikötter et al. 2004; Courtwright 1995; Fitzgerald and Threadgold 2004). This fear of users has long been shown to have its roots in racism, prejudice, and a fear of "others" seen to be undermining or polluting society with behaviors and practices poorly understood while using substances similarly misunderstood (Musto 1987; Berridge 1998; Kohn 1992; Coomber 1998). Risks from both are weakly understood and unreasonably amplified. Exaggeration of risk amplifies levels of fear, and policy—increasingly of the precautionary kind in the modern world—responds accordingly. In relation to drugs and drug use, the prohibitionary trajectory has been consistent.

Fear and risk are thus inextricably linked to how the problem is conceptualized and then responded to. More evidence-based and reasoned understanding of risks leads to moderated fears and thus provides an opportunity for policy to also be moderated and become more evidence-based in turn (Coomber 2011; Feilding, this volume).

Human Rights, Social Justice, and Drug Use

In our earlier work (Coomber and South 2004), we were recognizing the wrongs that undermine human rights and social justice when labels of "otherness" are applied and policies based on dominant Western sets of beliefs and assumptions prevail in political agenda-setting forums. Regardless of claims that we live in a late-modern world of globalization and hyper-communication, where cosmopolitanism is replacing colonialism and cultures, and where borders and prejudices have been breaking down, the reality is that problems of misunderstanding persist (Habermas 2001). When it comes to culturally sensitive and "different" behaviors, it is still the case that much can be "lost in translation." As Schuerkens (2003) observes:

> In the emerging contemporary world, two processes of social transformation increasingly and inextricably intertwine. On the one hand, there are universalizing processes of modernization and globalization, mostly of Western origins, that are spreading all over the world. On the other hand, there are tendencies to maintain traditional life worlds, attempting at keeping up the authenticity of their cultures. The interaction of these processes results in varying forms of implantation of, and adaptation to, Western modernity and culture, crystallizing in differing mixtures and hybrid modes of Western modernity and non-Western traditions, various forms of reaction and resistance to the imposition of the Western model, or various forms of dissolution and destruction of traditional life-worlds through the impact of the Western civilization. (p. 195)

Examples of the latter informed many of the chapters in our earlier book, while other chapters illustrated forms of accommodation or hybridization; similar examples and themes are elaborated in Labate and Jungaberle (2011) in relation to ayahuasca use and changes in cultural systems in Brazil. (See also Feeney and Labate, this volume.) However, although we partially interpreted these forces in terms of the legacy and impact of colonialism, we didn't take this further to look at the denial of rights and imposition of super-ordinate rules, laws, and powers of exploitation.

The latter has been described in the literature on Western-led anti-organized crime strategies (here we should recall that the "War on Crime" and the "War on Drugs" are close relatives) in terms of functioning as vehicles for repressive and racist tendencies, embedded in attempts to assert particular forms of governance of urban life through the "colonization of democratic states by the penetration of political institutions" (Woodiwiss and Hobbs 2009, p. 112; see also Hobbs 2013). This is part of a process described by Tupper and Labate (2012), involving a

> broad set of trends in modern global economics and politics in the 19th and 20th centuries, including the consolidation of the nation-state geopolitical system, the economic dominance of Euro-American industrial capitalism, the rise of professionalization of medicine and policing, and the epistemic hegemony of science as the sole source of authorized knowledge. (p. 18; see also Feeney and Labate, this volume)

As they remark, "In the realm of drug policy, these trends culminated in the establishment of the modern drug control regime." As part of the ongoing evolution and extension of this regime, recent recommendations from the International Narcotics Control Board (INCB) have been described by Tupper and Labate (2012) as an unjustified and unjustifiable assertion of the need to widen powers of control based on a culturally insensitive misunderstanding and misrepresentation of highly diverse plants and their effects. The INCB is therefore failing to distinguish between "use" and "abuse" of psychoactive substances and appears to assume that cultural traditions involving substance use are—or ought to be—static; eternally frozen in time and place. This provides a further example of the persistence and embeddedness of cultural misunderstandings that may also threaten to undermine human rights through a homogenization of all non-medical substance-consumption practices, characterized and categorized as abuse and, preferably, illegal. Tupper and Labate (2012) remark that this way of seeing can be interpreted as the:

> legacy of a particular worldview that guided the construction of the international drug conventions, based in an underlying moralism and pharmacological reductionism. Today, such a conceptual frame is of limited use in comprehending and respecting bone fide religious practices or equivalently sincere spiritual or self-actualization pursuits involving psychoactive plants, which engage the fundamental rights of freedom of religion and thought. (p. 26)

The INCB seems to be proposing that it can be the arbiter of when and where "authentic" cultural practices and symbols can be recognized, and assumes that these can only be associated with particular groups and at particular times, in particular geographical locations. Yet, as Tupper and Labate (2012) show, in the original process of negotiation and drafting of the expanded Drug Convention of 1988 that guides the work of INCB, there were indications of a recognition that such fixed-point, essentialist views of culture and history are at odds with the dynamic and fluid nature of the social world and ways in which cultural practices spread and change. Bearing in mind that "drug control within the UN system is technically subordinate to other higher order principles, such as the promotion of human rights" (Tupper and Labate 2012, p. 20), the implication is that expanded and future drug control measures that seek to limit and prohibit religious, minority, and traditionally-rooted but possibly evolving substance use practices, will breach such higher order principles.

Fear of drugs and the resulting policies of prohibition also means that states have a tendency to try to enforce what we could describe as conditions of quarantine around their own (particularly young) people. This is a process based on fear of "invasion" or "infection." So, while quarantine is a protective strategy, it is also accompanied by forces of neutralization and sterilization deployed to eradicate sources of corruption and pollution both within the quarantine zone and outside,

where they threaten to infiltrate, erode, and, as the UN Declaration put it, "destroy lives and communities." A particularly acute and graphic illustration of what we mean here was provided by Del Olmo's (1987, 1998) work on drug crop eradication schemes during the 1980s Reagan era "War on Drugs."

The Reagan administration has, as others before and since, maintained that the root of the threat to the USA found in the availability of drugs was less to do with demand and far more to do with supply. Hence, externally directed interdiction and plant crop eradication were the favored and vigorously pursued twin strategies set in motion. The basic aims were to seize drugs prior to reaching—or at the point of contact with—the USA border, or, as pre-emptive action, to destroy crops in the fields and on the mountains before they could be harvested. The latter actions are the focus of Del Olmo's consideration of "a type of crime committed on the pretext of preventing another crime." This is, as she wrote:

> A crime which has the characteristics of ecocide by virtue of making war with certain methods, systems, or prohibited weapons. Vietnam was a good example, with napalm and Agent Orange. Today the new war is on drugs and its weapons are toxic chemicals, especially herbicides prohibited in their place of origin for causing poisoning, contamination of food, and serious environmental problems, like *paraquat*, *gliphosphate* and *Agent Orange*. (Del Olmo 1987, p. 30).

Crop eradication programs have limited effectiveness as a method of curtailing drugs production, but do have serious effects on the "quality of life" and the health of local inhabitants, especially when toxic chemicals are liberally used, as in the frequent employment of aerial spray diffusion methods which, of course, mean that the chemicals used can be blown across a wide area. Del Olmo argues that historically such programs fail and merely nudge and push the drug production industry into new areas, ultimately increasing the sources of supply:

> We are thus faced with a transnational crime of broad scope which we can call eco-bio-genocide. (This) involves the utilization of a whole complex of toxic chemicals . . . which are prohibited and/or restricted in the developed countries but have an unlimited market in Third World countries . . . such chemicals are utilized widely in programs of drug eradication because the sole preoccupation is to destroy the marijuana and cocaine crops before they arrive in the United States in order to protect North American youth, regardless of the consequences for Third World youth. (Del Olmo 1987, p. 31)

These policies and practices continue today, and not just in Latin America. The official focus is on outcomes related to the destruction or depletion of drug harvests and hence supply reduction. It need not detain us here that, in these terms, such programs have been far from outstandingly successful. What seems to be largely neglected in reviewing such strategies are the consequences of chemical crop-eradication for those living with the toxic residues, the contamination of water, and the effects on local plant-life, all, of course, producing associated impacts on human and animal health. Del Olmo's work connects the consequences of the Drug War with important matters of environmental justice and the rights of environmental victims of the human-made harms that are the frequent, but often overlooked, results of Drug War and crop eradication initiatives (Williams 1996). It has been estimated that in the current conditions of clandestine production, for every gram of

cocaine that is used, foursquare meters of rainforest will have been destroyed in the process of cultivation (Laville 2008). At the same time laboratory processing of drugs will result in chemical residues running off into water sources and contaminating the land. Both traffickers and international police interception operations have become “a serious but largely neglected impediment to conservation efforts” (Aldhous 2006, p. 6). All of this has human rights implications as a matter of principle. It also poses questions about justice and rights to health where current populations and future generations are affected not only by chemical, but also by other military forms of drug crop eradication and control, or, indeed, by wider patterns of state, corporate, and organized crime exploitation of, and disregard for, the environment (South 1998; South and Brisman 2012).

The impacts on the natural environment of both drug control and drug production must become an increasingly important issue to consider when seeking a better understanding of matters of risks and rights as they relate to drug, set, setting, and process. Ecological impacts have been noted, but need to be tied to and analyzed alongside human rights abuses and victimization caused by both criminal and law enforcement groups: “deforestation, erosion, draining off water resources, loss of biodiversity, water contamination, indiscriminate application of chemicals plus regional violence” were counted as important ecological impacts of poppy cultivation in the Andes by Parra (1994, p. 71). And, as Molano (1992) concludes of the consequences of illegal drug crop cultivation:

> The *natural* unbalance which is produced is worse than the *social* because it is irreversible. The damp forest is irrecoverable. The poppy’s illegality drives its cultivation towards remote zones. Its economic benefits draw the peasant and the businessman to cut trees instead of buying fertilizers because it is cheaper. After two or three harvests the plot is abandoned or sold for cattle rearing . . . Poppy cultivators searching for thick forests are affecting the heart of the wilderness and water springs. (p. 45)

Conclusion

In this chapter, we have argued that the growth of drug policy in the West has had serious consequences for the progression of policy trajectories on and within countries where traditional, religious, and culturally embedded drug use takes place. We have suggested that how drugs and drug use has been conceptualized in the West, as formalized in statements by bodies such as the United Nations and in the scheduling of substances in drug control laws supposedly related to objective harms inherent to them, is largely misconceived and inappropriately applied both at home and to other (usually) developing nations. Broadly, we have argued that it is the long-standing fear of drugs and drug users, based upon the exaggerated risks and health harms assumed to be objectively contained within “drugs” and on fears related to “othering,” prejudice, and misconception, that has driven this approach and continues to do so. Specifically, we have argued that a weak understanding of how drug risks manifest in reality, and a failure to apply the framework of drug, set, setting, and process to understanding drug-related risks and harms, has resulted in

drug control policy that is mistakenly reliant upon un-contextualized, worst-case scenarios. This approach suggests that illicit drugs, by and large, have no, or few, beneficial effects to society, and that their use should be prohibited. We have further argued that the consequence of such a fear and risk based approach is not only unhelpful as regards nuanced understanding of health harms, but also is in contradiction to the individual rights and social and cultural norms of various groups, and of traditional and cohesive practice. At their worst, we have shown that these assumptions have been destructive not just of individual and social rights, but also ecologically.

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