

The Legal Landscape of Psychedelics

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Definitions of Legal Terms

Legal

Something is legal only when there is no local, county, state, or federal law prohibiting it. Under this definition, cannabis is not fully legal even in states that allow its sale because it is still illegal under federal law (see state legal, below). A substance or activity can be both legal and regulated: for example, sale of alcohol is legal, but only to adults.

State Legal

A designation for activities that are legal at the state level while still illegal federally.

Decriminalization

A policy strategy in which civil penalties, such as fines, are imposed for designated activities, such as possession of small quantities of a controlled substance. When a drug is decriminalized, the substance remains federally illegal, but civil penalties replace criminal convictions.

Deprioritization

A policy strategy in which a municipality directs its local police and prosecutors to make enforcement of a state law among the lowest of the municipality's priorities. Deprioritization is often mislabeled as decriminalization, but they are distinct. For example, people possessing a deprioritized substance in a city like Denver, Colorado, are still at risk of arrest by state police even within city limits, or by federal officers on federal park land or in federal courts, or in federally controlled places like airports. Deprioritization may also be called "functional decriminalization" or "virtual decriminalization."

Religious Accommodation

The legal requirement of federal agencies to reasonably accommodate employees whose sincerely held religious beliefs, practices, or observances conflict with work requirements, unless the accommodation would create an undue hardship. The U.S. Religious Freedom Restoration Act of 1993 prohibits the federal government from substantially burdening any aspect of religious observance or practice and mandates case-by-case exceptions to federal laws of general applicability.

Federal Law

In 1970, President Richard Nixon signed the Controlled Substances Act (CSA) into federal law, prohibiting many psychedelics in the United States. The CSA divides drugs into schedules according to their assessed risk, categorizing substances with the highest "potential for abuse" and that are said to have "no currently accepted medicinal use" as Schedule I, which includes LSD, psilocybin, cannabis, and heroin. The legislation has significantly inhibited research into the potential uses of psychedelics, therapeutic and otherwise, for decades.¹

Some exceptions have been made to allow the use of certain psychedelics in religious ceremonies, and possession and use of Schedule I substances can be legal in specially approved clinical trials. Some municipalities have deprioritized local police enforcement of laws against growing, gifting, possession, and use of plant and fungal psychedelics or entheogens. Yet these substances continue to be illegal under federal law and usually under state law as well.²

Changing State and Municipal Laws

In 1966, many states started prohibiting LSD and other psychedelics, paving the way for the CSA. In recent years, as research has shown that psychedelics can be used in conjunction with therapy to treat conditions like depression and PTSD, a growing number of legislators has pushed to ease enforcement of laws against certain substances. For the most part, these measures have focused on only psilocybin mushrooms, or on psychedelic plants and fungi generally, including mescaline-containing cacti, ayahuasca, and ibogaine.

State-level legalization versus decriminalization: Decriminalization refers to a state changing a law to replace criminal penalties with civil penalties similar to a parking ticket. However, if criminal penalties are also removed for manufacturing or selling a substance, that is state-level legalization, as has happened in several states for cannabis. Even then, cannabis can't be said to be "legal," because it remains illegal and prosecutable under federal law.

States

In 2020, Oregon decriminalized possession of small amounts of almost all drugs, and voters in the state approved Measure 109, which will allow for supervised administration of psilocybin at licensed service centers, with a regulatory framework for psilocybin services in development. In other states, including California, Colorado, Vermont, New Jersey, and Michigan, efforts to enact similar measures by voter initiative or through the legislatures are ongoing. Most common psychedelics, including psilocybin, remain illegal federally, so successful implementation of new state laws will depend upon the federal government declining to prosecute.

Municipal deprioritization efforts:

2019: Denver, Colorado, became the first U.S. city to deprioritize enforcement of psilocybin possession laws for adults over twenty-one. Shortly after, Oakland, California, deprioritized local enforcement of possession (but not sales) laws for "entheogenic plants and fungi."

2020: Santa Cruz, California, deprioritized possession and use of psilocybin, but not sales. Ann Arbor, Michigan, designated the planting, sale, possession, and use of entheogenic plants the city's lowest priority, and the District of Columbia did the same for psilocybin, ibogaine, and mescaline.

2021: Washtenaw County, Michigan, deprioritized the planting, possession, and use of entheogenic plants. In Massachusetts, Somerville, Cambridge, and Northampton all deprioritized the possession of entheogenic plants and fungi, while Easthampton ended arrests for the growing of entheogenic plants and fungi for therapeutic purposes. Seattle, Washington, and Arcata, California, deprioritized enforcement of entheogenic possession laws. Detroit, Michigan, and Port Townsend, Washington, deprioritized the possession and therapeutic use of entheogenic plants and fungi.

Today, measured support for psychedelics is no longer confined to more politically progressive states and municipalities. Rick Perry, the Republican former governor of Texas, has advocated to make psilocybin-assisted therapy available for veterans with PTSD.³ Other Republican lawmakers have also proposed legislation advocating for some use of psychedelics.⁴

Psychedelics and the U.S. Food and Drug Administration

The U.S. Food and Drug Administration has acknowledged the potential of some psychedelic-assisted therapies by granting breakthrough therapy designation, or BT, which gives especially promising drug-development programs access to extra FDA consultations in order to expedite possible drug approval. In 2017, the FDA granted BT to the Multidisciplinary Association for Psychedelic Studies (MAPS), a nonprofit research and educational organization, to develop MDMA-assisted psychotherapy to treat post-traumatic stress disorder. In 2018, the FDA granted BT to COMPASS Pathways to develop psilocybin therapy for treatment-resistant depression. And in 2019, Usona Institute was granted BT to develop a psilocybin program to treat major depressive disorder.

Even with BTD, the path to FDA approval of a psychedelic medicine is still arduous and expensive. Ketamine, a Schedule III substance (defined by the Controlled Substances Act as having a moderate to low potential for physical and psychological dependence), is legal in the United States when used for approved medical purposes as an anesthetic. Doctors are also able to prescribe it as an “off-label” treatment for depression and other mental health conditions. Some of the first ketamine clinics offering treatment for depression opened in 2012.⁵ In 2019, the FDA approved Spravato, a nasal spray containing esketamine, which is derived from ketamine, as part of a therapy protocol for treatment-resistant depression; in 2020, it was approved for treatment of major depression with suicidal thoughts. Spravato, which is under patent, can cost hundreds of times as much as generic ketamine.

Psychedelics and Religious Exemptions to the Law

The Native American Church has long fought for the legal right to use peyote in religious ceremonies and as a healing medicine that can help treat alcoholism in Indigenous communities.⁶ In 1978, Congress passed the American Indian Religious Freedom Act to enshrine protections for Indigenous religious practices. In 1984, two Indigenous drug counselors working for a nonprofit affiliated with the state of Oregon took peyote as part of a Native American religious ceremony. They were fired from their jobs for misconduct and denied unemployment benefits. The case, *Employment Division, Department of Human Resources of Oregon v. Smith*, ultimately made it to the Oregon Supreme Court, which ruled that the Oregon law prohibiting peyote use violated the Free Exercise Clause of the First Amendment, which gives people the right to practice their religion as long as it doesn’t conflict with “public morals” or a “compelling” governmental need.

On appeal, in 1990, the U.S. Supreme Court reversed the lower court’s ruling. It did so not on narrow, case-specific grounds, but rather by weakening the standing judicial interpretation of the Free Exercise Clause. It held that laws banning peyote are constitutional as long as they don’t target Native American Church use explicitly. Therefore, Native American Church members must comply with the law and refrain from using peyote, just like everyone else. Justice Antonin Scalia went on to argue that granting a peyote exception would open up religious exemptions to all kinds of state laws, including those prohibiting manslaughter, child neglect, and animal cruelty.

The Supreme Court’s surprising decision galvanized a broad coalition of religious organizations, which petitioned Congress to pass the Religious Freedom Restoration Act of 1993 in order to restore the pre-1990 judicial interpretation of the Free Exercise Clause.⁷ The following year, Congress made peyote protections for Indigenous people explicit by passing the American Indian Religious Freedom Act Amendments of 1994, which states that “the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful and shall not be prohibited by the United States or any State.”⁸

Other religions have also requested religious exemption for the ceremonial use of prohibited substances. In 2006, after years of challenges in the federal courts, the União do Vegetal church, a Brazil-based syncretic tradition, also won an exemption in the Supreme Court for its use of ayahuasca (which it calls hoasca). In 2009, another ayahuasca church, The Church of the Holy Light of the Queen, was granted a religious exemption in Oregon.

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