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State Drug Laws

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STATE DRUG LAWS

Mason Marks*

States have long enacted drug laws that depart from federal laws and regulations. In the early twentieth century, several states prohibited marijuana while it remained federally unregulated. In the 1960s, states started criminalizing psychedelic substances. Shortly thereafter, in the early 1970s, they started reversing the trend to criminalize drugs by reducing or eliminating criminal penalties associated with personal marijuana use. State-level decriminalization accelerated in the 1990s and 2000s.

More recently, states have extended drug policy reforms to other substances, including psychedelics, stimulants, and opioids. Some states have eliminated criminal penalties while others have replaced criminal penalties with fines or diversion to drug treatment programs and other support services. Some have funded clinical trials or policy research. Others have legalized facilities where people can consume federally controlled substances socially or with support from medical professionals. Meanwhile, many states have shifted away from decriminalizing federally illegal drugs to regulating their manufacture, testing, distribution, and sale.

This Essay provides a typology of state drug laws comprising thirteen categories, including decriminalization, recriminalization, adult use, supported adult use, medical use, supported medical use, religious use, social consumption, safe consumption, clinical research, policy analysis, trigger laws, and food and agricultural laws. Several states have enacted hybrid legislation that blends features from different categories. A higher-level categorization can also be imposed onto the typology, dividing the categories into three broader groups, including laws regarding independent drug use, supervised drug use, and drug policy or procedure.

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INTRODUCTION

Since the early twentieth century, states have enacted drug laws that depart from federal laws and regulations. In 1913, California prohibited marijuana while it remained federally unregulated.¹ By 1931, twenty-two states had prohibited marijuana.² Congress soon caught up and imposed its own restrictions, for instance, through a burdensome 1937 tax program that effectively banned marijuana.³ By the 1970s, state marijuana policies started moving in the opposite direction by reducing or eliminating criminal penalties for personal marijuana possession despite federal prohibition.⁴ Decades later, in 1996, California expanded marijuana decriminalization to include a broader range of activities, such as possession and home cultivation for medical use by patients or their caregivers.⁵ Shortly thereafter, states shifted from decriminalizing marijuana to enacting complex laws that strictly

1. See Dale H. Gieringer, *The Forgotten Origins of Cannabis Prohibition in California*, 26 CONTEMP. DRUG PROBS. 237, 238 (1999) (stating that California prohibited marijuana in 1913 when the California State Board of Pharmacy amended California's poison laws).

2. Alex Kreit, *Marijuana Legalization*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 115, 117 (Erik Luna ed., 2017).

3. *Id.*

4. See, e.g., Paul H. Blachly, *Effects of Decriminalization of Marijuana in Oregon*, 282 ANNALS N.Y. ACAD. SCI. 405, 405 (1976) (describing Oregon's replacement of criminal penalties for marijuana possession with a fine of up to \$100).

5. See generally CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996) (passed as Proposition 215, the Compassionate Use Act of 1996).

regulated its cultivation, testing, distribution, and sale.⁶ State laws regarding other drugs have followed similar patterns of prohibition, followed by subsequent decriminalization, strict regulation, and in some cases, recriminalization.⁷

However, those trends followed decades behind the arc of state marijuana legislation. Although many states banned marijuana from 1915 to 1927,⁸ it was not until 1966 that states started prohibiting psychedelics like lysergic acid diethylamide (LSD).⁹ It was around that time that states started decriminalizing marijuana for personal use. Oregon was the first in 1973.¹⁰ Half a century would pass before a state decriminalized psychedelics or other federally controlled substances.¹¹

In the past five years, state drug law reforms have accelerated and diversified. Amid growing enthusiasm for psychedelic drug research and commercialization, many U.S. cities and states are reforming drug laws to promote psychedelic research or make the substances available before the U.S. Food and Drug Administration (FDA) approves them for marketing and sale.¹² Several states have funded FDA-sanctioned clinical trials or formed task forces to study the implications of future psychedelic legislation.¹³ Some have created regulatory programs to provide psychedelics to consumers in controlled settings or under medical supervision.¹⁴ Others have reduced or eliminated criminal penalties for activities associated with personal psychedelic use, including producing, possessing, consuming, or sharing psychedelics.¹⁵

Motivated not by drug research and commercialization, but by the worsening overdose crisis, Oregon eliminated criminal penalties associated with possessing small amounts of many substances, including psychedelics, stimulants, and opioids.¹⁶ Rhode Island legalized facilities called safe consumption sites, where people can consume their own drugs with clean

6. See *infra* Part I.C.

7. See, e.g., Ben Botkin, *Oregon Legislature Passes Bill to Dial Back Drug Decriminalization Law*, WASH. STATE STANDARD (Mar. 1, 2024, 9:10 PM), <https://washingtonstatestandard.com/2024/03/01/after-months-of-discussion-oregon-legislature-sends-drug-addiction-proposal-to-gov-kotek/> [https://perma.cc/7YTR-8FVN].

8. See *Historical Timeline: History of Marijuana as Medicine – 2900 BC to Present*, BRITANNICA PROCON.ORG, <https://medicalmarijuana.procon.org/historical-timeline/> [https://perma.cc/V86J-U92V] (last visited Oct. 12, 2024).

9. See *The States: The Law & LSD*, TIME (June 10, 1966), <https://time.com/archive/6875092/the-states-the-law-bsd/> [https://perma.cc/NNJ2-X4EX].

10. Eric Josephson, *Marijuana Decriminalization: The Processes and Prospects of Change*, 10 CONTEMP. DRUG PROBS. 291, 296 (1981).

11. See *infra* Part I.B.

12. See Mason Marks, *The Varieties of Psychedelic Law*, NEUROPHARMACOLOGY, Mar. 15, 2023, at 1, 1.

13. See *id.* at 2.

14. See *id.* at 3–4.

15. See *id.* at 3.

16. See *The Conversation, Oregon Just Decriminalized All Drugs – Here’s Why Voters Passed This Groundbreaking Reform*, U.S. NEWS (Dec. 10, 2020, 11:07 AM), <https://www.usnews.com/news/best-states/articles/2020-12-10/oregon-just-decriminalized-all-drugs-heres-why-voters-passed-this-groundbreaking-reform> [https://perma.cc/4B9E-S9W5].

medical supplies and support from healthcare professionals.¹⁷ Several states have legalized facilities where people can consume marijuana or other substances publicly and socially.¹⁸

This Essay presents a typology comprising thirteen categories of state drug laws. States can enact or reform drug laws through bills,¹⁹ ballot initiatives,²⁰ or constitutional amendments.²¹ All states can utilize the legislative process. However, only twenty-one states allow voter ballot initiatives.²² Regardless of whether bills or ballot initiatives produce drug legislation, state lawmakers can amend or repeal them, and they often do, sometimes quickly and substantively.²³ Achieving more enduring reforms may require constitutional amendments, which would increase the difficulty of enacting subsequent reforms.²⁴ For instance, in 2012, Colorado voters approved Amendment 64, which amended the state constitution to legalize adult use of marijuana.²⁵ In 2020, New Jersey voters adopted a similar constitutional amendment.²⁶

The following sections present a typology comprising thirteen categories of state drug laws, including criminalization, decriminalization, independent medical use, independent adult use, supported adult use, supported medical use, social consumption, safe consumption, religious use, clinical research, policy analysis, trigger laws, and food laws. One can impose higher-level categorizations onto the typology of state drug laws. For instance, the thirteen types described below can be divided into three more general categories, including laws regarding independent drug use,²⁷ supervised drug

17. See Michael Casey, *Providence Approves First State-Sanctioned Safe Injection Site in Rhode Island*, ASSOC. PRESS (Feb. 2, 2024, 5:44 PM), <https://apnews.com/article/safe-injection-site-opioids-rhode-island-06f7483df7c12199c29587d2a86ffcd1#> [<https://perma.cc/D44G-LNU3>].

18. See *State-by-State On-Site Consumption Laws*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/legalization/state-by-state-on-site-consumption-laws/> [<https://perma.cc/6KKJ-LULL>] (last visited Oct. 12, 2024).

19. Marks, *supra* note 12, at 2.

20. *Id.*

21. See, e.g., Sam Sutton, *New Jersey Voters Approve Constitutional Amendment to Cannabis*, POLITICO (Nov. 3, 2020, 10:27 PM), <https://www.politico.com/states/new-jersey/story/2020/11/03/new-jersey-voters-approve-constitutional-amendment-to-legalize-cannabis-1332854> [<https://perma.cc/2YE2-ACE3>].

22. See *Initiative and Referendum States*, NAT'L CONF. STATE LEGIS. (Mar. 15, 2023), <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-states> [<https://perma.cc/CC4T-F932>].

23. See, e.g., Botkin, *supra* note 7.

24. Massachusetts allows both statutory and constitutional amendments by ballot initiative, but constitutional amendment petitions must go through two sessions of the state legislature and be approved by at least 25 percent of the legislature each session. *The Initiative Petition Process*, MASS.GOV, <https://www.mass.gov/info-details/the-initiative-petition-process> [<https://perma.cc/6E47-BK54>] (last visited Oct. 12, 2024). By comparison, Washington state allows statutory but not constitutional changes by ballot initiative. See WASH. OFF. OF THE SEC'Y OF STATE ELECTIONS DIV., INITIATIVE & REFERENDA HANDBOOK 4 (2024).

25. COLO. CONST. art. XVIII, § 16.

26. See Sutton, *supra* note 21.

27. See *infra* Part I.

use,²⁸ and drug policy or procedure.²⁹ These labels lack sharp boundaries, and some drug laws could fall into more than one category. For instance, the general category of independent drug use likely includes criminalization, decriminalization, independent medical use, and independent adult use.³⁰ However, a decriminalization law could also affect supervised drug use. The category of supervised drug use would typically include supported adult use, supported medical use, social consumption, safe consumption, religious use, and clinical research.³¹ But a clinical research bill could fund studies of independent drug use instead of supervised use. Additionally, although the law typically views religious worship as a communal activity with supervision from church leadership, some people engage in religious practice independently. The drug policy or procedure category includes policy analysis laws and trigger laws.³² This Essay placed food laws in the policy or procedure group because food laws categorize drug-producing plants or fungi as foods. However, food laws might impact independent or supervised drug use, depending on the nature of relevant legislation.³³ Because criminalization and decriminalization are among the oldest approaches to drug legislation, the Essay addresses them first. In several cases, drugs that were previously unregulated become criminalized, they are later decriminalized, and then subsequently recriminalized.³⁴

I. INDEPENDENT DRUG USE

A. Criminalization

State drug criminalization involves imposing criminal penalties on drug-related activities. It may involve drugs that lack federal control, such as the Southeast Asian plant kratom,³⁵ or substances that are federally regulated, such as FDA-approved abortion medications.³⁶ As discussed above, state marijuana prohibitions in the early twentieth century exemplify state criminalization of substances that lack federal control. In 1913, California was among the first states to prohibit marijuana while it remained

28. *See infra* Part II.

29. *See infra* Part III.

30. *See infra* Parts I.A–D.

31. *See infra* Parts II.A–F.

32. *See infra* Parts III.A–C.

33. *See infra* Part III.C.

34. *See, e.g.*, Botkin, *supra* note 7.

35. *See* JASON O. HEFLIN, CONG. RSCH. SERV., LSB11082, KRATOM REGULATION: FEDERAL STATUS AND STATE APPROACHES 2–3 (2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB11082> [<https://perma.cc/S2NM-CJYW>] (reporting state kratom bans in Alabama, Arkansas, Indiana, Rhode Island, Vermont, and Wisconsin, as well as a ban on synthetic kratom products in Tennessee).

36. *See* Rosemary Westwood, *Louisiana May Reclassify Drugs Used in Abortion as Controlled Dangerous Substances*, GPB (May 18, 2024, 7:57 AM), <https://www.gpb.org/news/shots-health-news/2024/05/18/louisiana-may-reclassify-drugs-used-in-abortion-controlled> [<https://perma.cc/L2BJ-24DV>].

federally unregulated.³⁷ By 1931, twenty-two other states had followed California's example.³⁸

State kratom prohibitions are more recent examples of restrictions on substances that are not federally controlled. In Southeast Asia people have long consumed kratom leaves.³⁹ The leaves contain substances called mitragynines that can have stimulant or sedative effects depending on the dose consumed.⁴⁰ The FDA and the U.S. Drug Enforcement Administration (DEA) view kratom and its major mitragynines as dangerous opioids.⁴¹ For years, the agencies sought to classify kratom as a Schedule I controlled substance.⁴² However, the U.S. Department of Health and Human Services blocked their efforts.⁴³ Nevertheless, despite the lack of federal kratom prohibition, several states have prohibited kratom and its best-characterized mitragynines.⁴⁴ Other states have banned kratom sales to people under the age of eighteen or twenty-one.⁴⁵ In contrast to these examples, which occurred in the absence of federal restrictions, state criminalization of LSD in 1966 occurred shortly after Congress put LSD and other psychedelics under federal control through the Drug Abuse Control Amendments of 1965.⁴⁶

Some states have considered criminalizing FDA-approved drugs that have widespread medical uses. In 2024, Louisiana lawmakers proposed adding mifepristone and misoprostol to the state's list of dangerous controlled substances.⁴⁷ Both drugs have multiple medical uses in reproductive care.⁴⁸ For instance, they are used to stop obstetric bleeding, help manage miscarriages, and treat the cervix prior to operating on the uterus.⁴⁹ The FDA has approved mifepristone and misoprostol for use in medication-induced abortions.⁵⁰ Doctors worry Louisiana's proposal could set a harmful precedent, encouraging other states to criminalize possessing or dispensing drugs they perceive as dangerous or morally objectionable, regardless of their

37. See Gieringer, *supra* note 1, at 238 (stating that California prohibited marijuana in 1913 when the California State Board of Pharmacy amended California's poison laws).

38. Kreit, *supra* note 2, at 117.

39. DRUG ENF'T ADMIN., DIVERSION CONTROL DIV., KRATOM (MITRAGYNA SPECIOSA KORTH) 1 (2024), https://www.dea diversion.usdoj.gov/drug_chem_info/kratom.pdf [<https://perma.cc/B7WY-CSDR>].

40. *See id.*

41. *See id.*

42. See Mason Marks, *Automating FDA Regulation*, 71 DUKE L.J. 1207, 1227–36 (2022).

43. *Id.* at 1233–36; *see also* Letter from Brett P. Giroir, Assistant Sec'y for Health, Dep't of Health & Hum. Servs., to Uttam Dhillon, Acting Adm'r, Drug Enf't Admin. (Aug. 16, 2018), <https://static1.squarespace.com/static/54d50ceee4b05797b34869cf/t/60145eab6df59e7e36a7cfc1/1611947693695/dhillon-8.16.2018-response-letter-from-ash-radm-giroir.pdf> [<https://perma.cc/ZX58-UMTU>].

44. See HEFLIN, *supra* note 35, at 2–3.

45. *Id.* at 3.

46. Pub. L. No. 89-74, 79 Stat. 226 (1965) (codified as amended in scattered sections of 18 U.S.C. § 1114 and 21 U.S.C.); *see also The States: The Law & LSD*, *supra* note 9.

47. Westwood, *supra* note 36.

48. *Id.*

49. *Id.*

50. *See id.*

scientific and federal legal status.⁵¹ In another case, Massachusetts recently attempted to prohibit Zohydro ER, an FDA-approved anesthetic.⁵² The manufacturer filed suit, arguing the product ban was unconstitutional, preempted by the Food, Drug, and Cosmetic Act.⁵³ In 2024, a judge in the U.S. District Court for the District of Massachusetts blocked the state's ban with a preliminary injunction.⁵⁴ She said the ban would “undermine the FDA’s ability to make drugs available to promote and protect the public health.”⁵⁵ In another example, over a dozen states categorized carisoprodol, an FDA-approved muscle relaxant, as a controlled substance prior to federal action.⁵⁶ In a different type of case, Florida anticipated that the FDA would withdraw its approval of the weight loss drugs fenfluramine and dexfenfluramine, which were linked to valvular heart disease, and Florida preemptively restricted their use before the FDA acted.⁵⁷

B. Decriminalization

Drug decriminalization is the process of reducing or eliminating criminal penalties for drug-related activities associated with personal use, which may include cultivating plants that produce drug products, possessing those substances, processing them, or consuming them.⁵⁸ In contrast, drug legalization typically involves the licensing and regulation of commercial activities such as drug manufacturing, distribution, storage, transportation, testing, packaging, labeling, advertising, and sales.⁵⁹ There can be significant overlap between drug-related activities that can be decriminalized and those that can be legalized. For instance, a state could decriminalize home marijuana cultivation for personal use while also legalizing commercial marijuana cultivation for subsequent distribution and sale.

Instead of being monolithic, drug decriminalization policy is flexible, and existing approaches are diverse.⁶⁰ One can draw a few general conclusions.

51. *See id.*

52. *See* Lars Noah, *State Affronts to Federal Primacy in the Licensure of Pharmaceutical Products*, 2016 MICH. ST. L. REV. 1, 3–16.

53. Ch. 675, 52 Stat. 1040 (codified as amended in scattered sections of 21 U.S.C.); *see id.* at 6–8.

54. *See* Milton J. Valencia, *US Judge Blocks Mass. Ban on Painkiller*, BOS. GLOBE (Apr. 15, 2014), <https://www.bostonglobe.com/metro/2014/04/15/federal-judge-says-patrick-administration-cannot-block-sale-painkiller-zohydro-massachusetts/DILlZ9qETePxqC29Ob27CN/story.html> [<https://perma.cc/X8HF-KD8K>].

55. *Id.*

56. *See* Noah, *supra* note 52, at 19.

57. *See id.* at 16–22.

58. *See generally* Marks, *supra* note 12.

59. *See id.*; OR. ADMIN. R. 333-333-2010 (2023); *id.* 333-333-2300; *id.* 333-333-2400; *id.* 333-333-4510; *id.* 333-333-5170; *id.* 333-333-6100 (2022); *id.* 333-333-8100 (2023); *see also id.* 845-025-2020; *id.* 845-025-2750 (2022); *id.* 845-025-2800 (2023); *id.* 845-025-2880 (2022); *id.* 845-025-5720 (2023).

60. *See* DENVER, COLO. REV. MUN. CODE tit. 1, ch. 28, art. X (2024) (a relatively narrow local ordinance focused on decriminalizing the possession and use of psilocybin-producing fungi); *see also* S. 1009, 193d Gen. Court, 2023–2024 Sess. (Mass. 2023) (a relatively broad state bill to decriminalize the “possession, ingestion, obtaining, growing, [and] giving away without financial gain” plants or fungi containing five different psychedelic substances); Drug

Compared to legalization, drug decriminalization laws are often shorter and simpler.⁶¹ Though that may not always be true.⁶² Further, compared to legalization, decriminalization is generally a more passive “hands off” approach to drug law reform. Instead of implementing complex regulations that often govern many aspects of a drug industry, such as a state marijuana market, decriminalization can be as simple as striking penalties from a state’s criminal code.⁶³ However, like drug legalization laws, drug decriminalization statutes can also be lengthy and complex.⁶⁴

All approaches to drug decriminalization are defined by the substances they encompass, the drug-related activities they decriminalize, and the extent to which those activities are decriminalized. Early drug decriminalization laws were narrow in all these respects. In 1973, Oregon was the first state to decriminalize personal marijuana possession by replacing criminal penalties with a fine of up to \$100.⁶⁵ Over the next half decade, five other states followed Oregon’s example and replaced criminal penalties with fines.⁶⁶ Within the same period, another five states maintained criminal penalties while introducing provisions to allow expungement of criminal records after certain periods.⁶⁷

Decades later, some early efforts to decriminalize psychedelic substances were similarly narrow. In 2019, Denver, Colorado became the first U.S. jurisdiction to decriminalize a psychedelic substance.⁶⁸ Voters approved local ballot Initiative 301, producing a city and county ordinance that decriminalized personal possession and use of psilocybin-producing mushrooms.⁶⁹ By comparison, Oakland, California’s 2019 decriminalization

Addiction Treatment and Recovery Act, OR. REV. STAT. § 430.383 (2024); *Drug Addiction Treatment and Recovery Act (Measure 110)*, OR. HEALTH AUTH., <https://www.oregon.gov/oha/hsd/amh/pages/measure110.aspx> [<https://perma.cc/NCR7-HH6A>] (last visited Oct. 12, 2024) (discussing the ballot initiative to decriminalize possessing small amounts of a variety of controlled substances, to replace criminal penalties with a \$100 fine, and to route tax revenue from the state’s cannabis industry to substance use support services); S.B. 23-290, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (a hybrid law that combines the decriminalization of several psychedelic drug-related activities with a regulated program for the supervised use of psychedelics).

61. See *Drug Addiction Treatment and Recovery Act (Measure 110)*, *supra* note 60 (an example of a relatively long and complex drug decriminalization law); see also H.B. 6734, Gen. Assemb., Jan. Sess. (Conn. 2023) (a decriminalization bill of intermediate length); Mass. S. 1009 (a decriminalization bill that is very concise).

62. See *Drug Addiction Treatment and Recovery Act (Measure 110)*, *supra* note 60.

63. See, e.g., Blachly, *supra* note 4, at 405.

64. Examples include Oregon’s Measure 109 and H.B. 4002 that repealed it. See OR. REV. STAT. ANN. § 475A (West 2020) (codifying Measure 109); H.B. 4002, 82 Leg. Assemb., 2024 Reg. Sess. (Or. 2024).

65. See *Josephson*, *supra* note 10; Blachly, *supra* note 4, at 405.

66. See Richard J. Bonnie, *The Meaning of Decriminalization: A Review of the Law*, 10 CONTEMP. DRUG PROBS. 277, 277–78 (1981).

67. See *id.* at 278.

68. DENVER, COLO. REV. MUN. CODE tit. 1, ch. 28, art. X. (2024).

69. *Id.*

resolution, adopted a few months after Denver's ordinance, was broader.⁷⁰ In addition to psilocybin producing fungi, it included a variety of plants that produce psychoactive substances such as cacti, iboga, and combinations of plants, such as *Banisteriopsis caapi* and *Psychotria viridis*, which are mixed to brew ayahuasca.⁷¹ Compared to Denver's ordinance, Oakland's resolution also encompassed a wider array of activities, including planting, cultivating, possessing, transporting, distributing, purchasing, and generally participating in practices with psychedelics.⁷²

Oregon was the first state to decriminalize a variety of controlled substances when voters approved Measure 110 during the 2020 U.S. presidential election.⁷³ Measure 110 decriminalized possessing small amounts of many controlled substances, including psychedelics, heroin, cocaine, and methamphetamine.⁷⁴ It decreased the criminal penalty for personal possession, which Oregon had already reduced from a felony to a misdemeanor, replacing it with a citation and \$100 fine.⁷⁵ Under Measure 110, individuals cited could avoid the fine by calling a drug treatment hotline and completing health assessments.⁷⁶

In November of 2022, Colorado became the second state to decriminalize psychedelics when voters approved Proposition 122, the Natural Medicine Health Act⁷⁷ (NMHA). The NMHA decriminalized a narrower range of substances than Measure 110.⁷⁸ It was limited to four psychedelic-producing plants and fungi.⁷⁹ However, the NMHA decriminalized a broader range of drug-related activities than Measure 110, including cultivation, transportation, and sharing with other adults without remuneration.⁸⁰ It also decriminalized drug-related activities to a greater extent.⁸¹ The NMHA imposed no civil penalties for the activities within its scope.⁸²

In theory, there are few, if any, limits to the drug-related activities that states could decriminalize. In addition to those listed above, states could decriminalize offering drug-related harm reduction services, monitoring

70. See *Oakland City Council Effectively Decriminalizes Psychedelic Mushrooms*, NPR (June 5, 2019, 4:57 PM), <https://www.npr.org/2019/06/05/730061916/oakland-city-council-effectively-decriminalizes-psychedelic-mushrooms> [https://perma.cc/6VSY-TMLN].

71. See *id.*; see also Christine VanPool, *Ancient Medicinal Plants of South America*, 116 PROC. NAT'L ACAD. SCI. 11087, 11087 (2019).

72. See *Oakland City Council Effectively Decriminalizes Psychedelic Mushrooms*, *supra* note 70.

73. See generally OR. REV. STAT. ANN. §§ 430.383–.394 (West 2021); see also *Drug Addiction Treatment and Recovery Act (Measure 110)*, *supra* note 60 (the ballot petition became Measure 110 after its proponents collected the required number of voter signatures).

74. See *Drug Addiction Treatment and Recovery Act (Measure 110)*, *supra* note 60.

75. *Id.*

76. See *id.*

77. COLO. REV. STAT. ANN. §§ 12-170-101–117 (West 2022).

78. See *id.*

79. The NMHA decriminalized plants and fungi that produce psilocybin, psilocybin, mescaline of nonpeyote origin, ibogaine, and dimethyltryptamine. See *id.* § 12-170-104.

80. See *id.* §§ 12-170-101–117; see also OR. REV. STAT. ANN. §§ 430.383–.394 (West 2021).

81. See generally §§ 12-170-101–117.

82. See *id.*

people for safety while they experience drug effects, testing drug products for contamination or adulteration, or sharing controlled substances with other adults, with or without compensation. In practice, decriminalizing drug sharing between adults without compensation, sometimes called gifting, is where many cities and states draw the line.⁸³ Several state and local jurisdictions have decriminalized or considered decriminalizing gifting marijuana or psychedelics without compensation.⁸⁴ However, none have decriminalized sales or gifting with compensation. Oakland's 2019 resolution deprioritized the enforcement of laws that criminalized purchasing or distributing psychedelics but not laws that criminalized their sale.⁸⁵

Because drug decriminalization can often achieve similar effects as legalization, some refer to it as *de facto* legalization, often pejoratively.⁸⁶ However, as *de facto* legalization, decriminalization may have some benefits over legalization. For instance, compared to legalization, decriminalization may pose fewer conflicts with federal drug control laws and regulations.⁸⁷ State marijuana regulations arguably conflict with the Controlled Substances Act⁸⁸ and may be preempted by it.⁸⁹ However, due to the judicially derived anticommandeering rule, Congress cannot force states to adopt laws that enforce federal regulations or penalize states for repealing such laws already in effect.⁹⁰ In other words, Congress cannot force states to implement criminal penalties for drug-related conduct.

Some state drug laws that are described as medical use legislation (a type discussed further below)⁹¹ should be categorized as decriminalization laws.⁹² For instance, in 1996, California voters approved Proposition 215, which was

83. See, e.g., Christine Stuart, *Committee Gets an Earful over Cannabis Gifting Ban*, NBC CT (Mar. 8, 2022, 6:38 PM), <https://www.nbcconnecticut.com/news/local/committee-gets-an-earful-over-cannabis-gifting-ban/2736101/> [<https://perma.cc/JYS3-YS6D>].

84. See, e.g., A.J. Herrington, *New York Lawmakers Introduce Psychedelics Legalization Bill*, FORBES (Jan. 4, 2023, 3:33 PM), <https://www.forbes.com/sites/ajherringto n/2023/01/04/new-york-lawmakers-introduce-psychedelics-legalization-bill/> [<https://perma.cc/MK6M-W8CS>]; *Can I Gift Cannabis to Other Individuals*, CT.GOV (Sept. 21, 2021), https://portal.ct.gov/cannabis/knowledge-base/articles/can-i-gift-cannabis-to-other-individuals?language=en_US [<https://perma.cc/MCV5-E9BH>].

85. See *Oakland City Council Effectively Decriminalizes Psychedelic Mushrooms*, *supra* note 70.

86. See Sam Sutton & Carla Marinucci, *Marijuana Skeptics Fear 'De Facto Legalization' in States*, POLITICO (Oct. 6, 2018, 2:34 PM), <https://www.politico.com/story/2018/10/06/marijuana-de-facto-legalization-876241> [<https://perma.cc/YLB8-R5C8>].

87. Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 16 (2013) (stating that "Congress may preempt any state regulation of marijuana-related activity," however, "Congress could not force the states to enact a marijuana ban").

88. Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended in scattered titles of the U.S. Code).

89. *Id.*

90. *Id.*; see also Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009).

91. See *infra* Part I.C.

92. Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 725, 769 (1998).

written into the state's Health and Safety Code as the Compassionate Use Act of 1996.⁹³ Proposition 215 decriminalized marijuana possession and home cultivation for medical use by patients or their caregivers, if they obtained a physician's recommendation.⁹⁴

What distinguishes drug decriminalization from legalization is decriminalization's relative lack of regulation and government oversight. Some critics of drug decriminalization claim it justifies or encourages dangerous and condemnable behavior.⁹⁵ Skeptics may blame decriminalization for a variety of social challenges, including crime, homelessness, drug overdoses, and underage drug use.⁹⁶

Though decriminalization lacks government regulation, it can be bundled with other forms of oversight such as community self-regulation. Some early state marijuana decriminalization laws allowed cooperatives or collectives to cultivate and distribute medical marijuana for patients and caregivers.⁹⁷ More recently, state and local psychedelic societies have proliferated.⁹⁸ These self-regulating organizations often provide peer education regarding safe psychedelic use.⁹⁹ Some provide other peer support services such as group psychedelic integration, a process where people discuss their psychedelic experiences to help interpret them and incorporate them into their lives.¹⁰⁰ Psychedelic societies sometimes support state or local psychedelic legal reforms.¹⁰¹ However, they remain a largely untapped resource in terms of the roles they could play in the substance of state drug law reforms.

93. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996) (passed as Proposition 215, the Compassionate Use Act of 1996); Vitiello, *supra* note 92, at 718.

94. HEALTH & SAFETY § 11362.5. *Contra* People v. Mower, 28 Cal. 4th 457 (2002) (holding that the Compassionate Use Act of 1996 did not provide complete immunity from arrest for marijuana possession or cultivation, and instead conferred limited immunity against prosecution that defendants could raise during or prior to trial).

95. *See, e.g.*, Paul H. Robinson & Jeffrey Seaman, *Decriminalizing Condemnable Conduct: A Miscalculation of Societal Costs and Benefits*, 97 S. CAL. L. REV. (forthcoming 2024).

96. *See, e.g.*, Kevin Sabet, Opinion, *The Results Are In—Oregon's Total Drug Decriminalization Was a Failure*, NEWSWEEK (Feb. 5, 2024, 2:18 PM), <https://www.newsweek.com/results-are-oregons-total-drug-decriminalization-was-failure-opinion-1866963> [<https://perma.cc/S6PU-XGDS>]; *British Columbia to Recriminalize Use of Drugs in Public Places*, CBC (Apr. 26, 2024, 2:51 PM), <https://www.cbc.ca/news/canada/british-columbia/david-ebby-public-drug-use-1.7186245> [<https://perma.cc/3KHC-QRXX>].

97. *See* HEALTH & SAFETY § 11362.775 (repealed by Cannabis: Medicinal and Adult Use, S.B. 94, ch. 27, § 140, 2017 Cal. Legis. Serv. (West)).

98. *See, e.g.*, *About Us*, BROOK. PSYCHEDELIC SOC'Y, <https://www.bps.community/about-1> [<https://perma.cc/8TVV-3Q58>] (last visited Oct. 12, 2024); *About*, ILL. PSYCHEDELIC SOC'Y, <https://www.illinoispsychedelicsociety.org/about> [<https://perma.cc/5YLG-26MW>] (last visited Oct. 12, 2024).

99. *See, e.g.*, *About*, *supra* note 98.

100. *See, e.g.*, *Group Psychedelic Integration*, HUDSON VALLEY PSYCHEDELIC SOC'Y, <https://www.hudsonvalleypsychedelicsociety.com/monthly-group-integration-circles> [<https://perma.cc/2K32-GLS7>] (last visited Oct. 12, 2024).

101. *See, e.g.*, *Psychedelic Advocacy*, ILL. PSYCHEDELIC SOC'Y, <https://www.illinoispsychedelicsociety.org/advocacy> [<https://perma.cc/4RT4-CDPB>] (last visited Oct. 12, 2024).

In addition to decriminalizing or funding peer support services, state drug decriminalization laws can fund other services such as housing for people who use drugs. Oregon's Measure 110 funneled over \$300 million in state marijuana tax revenue to similar support services.¹⁰² States can also bundle decriminalization laws with education for a variety of stakeholders such as law enforcement, healthcare professionals, and the public. For example, Denver's 2019 decriminalization ordinance facilitated harm reduction education for police and other first responders.¹⁰³

In Oregon, a series of missteps impacted Measure 110's implementation and delayed funding support programs for eighteen months.¹⁰⁴ Administrative mismanagement created openings for critics to make Measure 110 a drug policy scapegoat.¹⁰⁵ Opponents of the measure blamed the law for real and imagined social challenges such as rising rates of immigration, homelessness, drug overdose, and violent crime.¹⁰⁶ These opponents threatened to repeal Measure 110 through a new ballot initiative.¹⁰⁷ However, lawmakers saved them the effort and expense. Three years after voters approved Measure 110, Governor Tina Kotek signed House Bill 4002 (H.B. 4002), which recriminalized drug possession and forced people into drug treatment programs.¹⁰⁸ Because Oregon potentially repealed Measure 110 before its impact could be assessed, it may represent a missed opportunity rather than a failed drug policy.¹⁰⁹

C. Independent Medical Use

As discussed above, early state efforts to create medical access to marijuana, such as California's Proposition 215, are best characterized as

102. *All \$300+ Million in Measure 110 Funding Approved to Expand Critical Addiction Services in Oregon*, DRUG POL'Y ALL. (Aug. 31, 2022), <https://drugpolicy.org/news/all-300-million-measure-110-funding-approved-expand-critical-addiction/> [<https://perma.cc/X7ST-XV7V>].

103. See Colette Bordelon, *Denver First Responders to Learn How to Identify, Approach Psychedelic Emergencies*, DENVER7 (Mar. 28, 2024, 12:03 AM), <https://www.denver7.com/news/front-range/denver/denver-first-responders-to-learn-how-to-identify-approach-psychedelic-emergencies> [<https://perma.cc/N6MR-6AKL>].

104. See Emily Green, *Money for Measure 110 Addiction Services Finally Auditors Spot Problems*, OPB (June 2, 2022, 7:41 PM), <https://www.opb.org/article/2022/06/02/oregon-measure-110-funding-addiction-treatment-audit/> [<https://perma.cc/PU3W-7KBY>].

105. Emily Green, *"People Are Dying" While State Bureaucracy Holds Up Oregon Treatment Dollars, Say Measure 110 Proponents*, OPB (Apr. 16, 2022, 8:00 AM), <https://www.opb.org/article/2022/04/16/oregon-measure-110-decriminalize-drug-possession-drug-treatment-alcohol-addiction-recovery/> [<https://perma.cc/FYJ4-GC77>].

106. See, e.g., Sabet, *supra* note 96.

107. Botkin, *supra* note 7.

108. Conrad Wilson, *Oregon Governor Signs Bill Criminalizing Drug Possession*, OPB (Apr. 1, 2024, 3:39 PM), <https://www.opb.org/article/2024/04/01/drug-possession-oregon-kotek-sign-bill/> [<https://perma.cc/6S8K-PECT>].

109. See, e.g., ReasonTV, *Drug Decriminalization Didn't Cause This (Ethan Nadelmann Critiques Michael Shellenberger)*, YOUTUBE (Mar. 25, 2023), <https://www.youtube.com/watch?v=NVGjIx8XSOE> [<https://perma.cc/93VY-5FM7>].

decriminalization laws.¹¹⁰ However, subsequent medical marijuana laws imposed strict regulations, which have come to define medical use, the third category of state drug legislation.¹¹¹ State medical use legislation typically legalizes federally illegal or non-FDA-approved substances at the state level for the purpose of treating health conditions.¹¹²

In 2003, then-Governor Gray Davis signed Senate Bill 420 (S.B. 420), which required California's Department of Public Health to create and maintain a voluntary identification card program for medical marijuana patients and their caregivers.¹¹³ S.B. 420 defined a list of serious medical conditions that would allow patients to become qualified to possess medical marijuana.¹¹⁴ It authorized the state attorney general to impose limits on personal marijuana cultivation.¹¹⁵ Further, it required the attorney general to adopt security guidelines to minimize the diversion of medical marijuana for nonmedical purposes.¹¹⁶ S.B. 420 started shifting California's marijuana laws out of the drug decriminalization category and into the category of medical use legislation.

Nevertheless, S.B. 420 retained and reinforced core aspects of decriminalization. Following legal disputes, such as in *People v. Mower*,¹¹⁷ S.B. 420 clarified that qualified patients and their caregivers were exempt from arrest or criminal sanction "for possession, transportation, delivery, or cultivation of medical cannabis [marijuana]" in amounts subject to any limits imposed by the attorney general.¹¹⁸ Qualified patients and caregivers were exempt regardless of whether they chose to participate in the voluntary identification card program.¹¹⁹ S.B. 420 also exempted them from criminal sanction if they associated in California "collectively or cooperatively to cultivate marijuana for medical purposes."¹²⁰ In *People v. Urziceanu*,¹²¹ a California district court overturned a conviction for conspiracy to sell marijuana, holding that S.B. 420 extended the protections of the Compassionate Use Act to other marijuana-related activities, such as possession for sale and maintaining a location for unlawfully selling, giving away, or using controlled substances.¹²² These facets of S.B. 420 more closely resembled drug decriminalization than medical use legislation or other forms of drug legalization. Specified individuals who engaged in

110. See CAL. HEALTH & SAFETY CODE § 11362.5 (West 2018) (approved as Proposition 215, the Compassionate Use Act of 1996).

111. See, e.g., *id.* § 11362.7(d)(1) (West 2017).

112. See *id.*

113. *Id.* §§ 11362.7–.9 (West 2018).

114. *Id.* § 11362.7(h).

115. *Id.* § 11362.81(d) (West 2017).

116. *Id.*

117. 28 Cal. 4th 457 (2002).

118. HEALTH & SAFETY §§ 11362.5, .71(e).

119. *Id.* § 11362.71(f).

120. *Id.* § 11362.775 (repealed by Cannabis: Medicinal and Adult Use, S.B. 94, ch. 27, § 140, 2017 Cal. Legis. Serv. (West)).

121. 132 Cal. App. 4th 747 (2005).

122. *Id.* at 784.

certain drug-related activities were exempted from state criminal sanction.¹²³ In contrast, some aspects of S.B. 420, such as the identification card program, foreshadowed more restrictive medical use legislation that would follow.¹²⁴

In 2015, two decades after approving Proposition 215, California enacted a series of bills collectively known as the Medical Marijuana Regulation and Safety Act¹²⁵ (MMRSA). The MMRSA established strict licensing and regulation requirements for cultivating medical marijuana, manufacturing related products, testing medical marijuana, and distributing it.¹²⁶ For one year, the MMRSA exempted cooperatives and collectives that cultivated medical marijuana for qualified patients from criminal prosecution.¹²⁷ After that exemption expired, cooperatives had to obtain licenses to operate within the law.¹²⁸

In other states, medical use laws have followed similar trajectories. In 2000, Colorado voters amended their state constitution.¹²⁹ Amendment 20 created an affirmative defense to criminal sanctions for medical marijuana patients and their caregivers.¹³⁰ To some extent, it thereby decriminalized their possession of up to two ounces of marijuana and their cultivation of up to six marijuana plants.¹³¹

Like California, Colorado followed its medically oriented decriminalization law with more complex regulations. In 2010, lawmakers enacted Colorado Senate Bill 10-109 and House Bill 10-1284, which imposed restrictions on medical marijuana patients, caregivers, and physicians.¹³² The resulting Colorado Medical Marijuana Code¹³³ required licensure and regulation of medical marijuana dispensaries and manufacturing of marijuana-infused products.¹³⁴ The medical use frameworks enacted in California, Colorado, and other states remain the current model for medical marijuana use in 2024. However, with the recent announcement of potential DEA rescheduling of marijuana, state regulation of medical marijuana could face new challenges and undergo change.¹³⁵

State laws regulating the medical use of psychedelics have taken an approach that departs significantly from that of medical marijuana. This

123. HEALTH & SAFETY § 11362.765.

124. *See id.* § 11362.715.

125. CAL. BUS. & PROF. CODE § 26000–26325 (2024); Medical Marijuana, ch. 688 (A.B. 243), 2015 Cal. Legis. Serv. (West); Medical Marijuana, ch. 689 (A.B. 266), 2015 Cal. Legis. Serv. (West); Medical Marijuana, S.B. 643, ch. 719, 2015 Cal. Legis. Serv. (West).

126. Medical Marijuana, ch. 689 (A.B. 266), 2015 Cal. Legis. Serv. (West).

127. *Id.*

128. *Id.*

129. COLO. CONST. art. XVIII, § 14.

130. *Id.*

131. *Id.*

132. LEGIS. COUNCIL STAFF, MARIJUANA HANDBOOK 48 (2024), https://leg.colorado.gov/sites/default/files/marijuana_handbook_2024.pdf [<https://perma.cc/LZG7-9A95>].

133. COLO. REV. STAT. ANN. §§ 12-43.3-101–106 (West 2018) (repealed and relocated to COLO. CONST. art. XVIII, § 16 (West, Westlaw through Nov. 2023 amendments)).

134. *Id.*

135. *See* Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 99 (proposed May 21, 2024).

modified approach, described further below, is called “supported medical use.”¹³⁶ Some stakeholders refer to supported medical use as “psychedelic therapy” or “psychedelic-assisted therapy.”¹³⁷ Others claim those terms are misnomers.¹³⁸ Regardless of terminology, long before states enacted laws for the medical use of psychedelics, they enacted laws to regulate the recreational or “adult use” of marijuana, which the next section describes as independent adult use legislation.

D. Independent Adult Use

Another common type of state drug legislation is independent adult use (sometimes called “adult” or “recreational” use).¹³⁹ Independent adult use laws regulate over-the-counter drug sales without requiring consumers to have medical diagnoses, prescriptions, or physician recommendations.¹⁴⁰ State adult use marijuana laws are one example. These laws typically restrict marijuana sales to licensed facilities called dispensaries, which are heavily regulated.¹⁴¹ State drug laws often allow local jurisdictions to impose significant time, place, and manner restrictions on dispensaries, which may limit where facilities can be located, their hours of operation, or the signage and lighting they can use.¹⁴² In these respects, adult use marijuana laws resemble state laws governing liquor stores and tobacco retailers, which are other examples of independent adult use legislation.¹⁴³ In some states, the same agencies regulate alcohol and marijuana.¹⁴⁴ Although several states

136. See *infra* Part I.D.

137. See, e.g., Guy M. Goodwin, Ekaterina Malievskaia, Gregory A. Fonzo & Charles B. Nemeroff, *Must Psilocybin Always “Assist Psychotherapy”?*, 181 AM. J. PSYCHIATRY 20, 20 (2024).

138. *Id.*

139. See, e.g., *Adult Use Cannabis in Connecticut*, CT.GOV, https://portal.ct.gov/dcp/drug-control-division/drug-control/adult-use-cannabis?language=en_US [https://perma.cc/RZZ9-MVCR] (last visited Oct. 12, 2024); see also Jordan Nathaniel Fenster, *Is Recreational Cannabis Killing Connecticut’s Medical Program?*, CT INSIDER (Oct. 30, 2023, 1:11 PM), <https://www.ctinsider.com/cannabis/article/ct-recreational-cannabis-medical-marijuana-program-18450353.php> [https://perma.cc/Y5AG-7NAQ].

140. See *What Is the Difference Between the Medical Marijuana Program and the Adult-Use Cannabis Program*, CT.GOV (Nov. 1, 2023), https://portal.ct.gov/cannabis/knowledge-base/articles/difference-between-the-medical-marijuana-program-and-the-adult-use-cannabis-program?language=en_US [https://perma.cc/7WD6-7SB4].

141. See, e.g., *Where Can I Buy Cannabis in Connecticut?*, CT.GOV, https://portal.ct.gov/cannabis/knowledge-base/articles/where-can-i-buy-cannabis-in-connecticut?language=en_US [https://perma.cc/5X44-V9B5].

142. See, e.g., MASS. GEN. LAWS ANN. ch. 94G, § 3 (2023); see also *Adult Use Marijuana*, CITY OF WORCESTER, <https://www.worcesterma.gov/planning-regulatory/planning-initiative/s/marijuana-regulations> [https://perma.cc/D2TC-KD7N] (last visited Oct. 12, 2024).

143. See, e.g., OR. REV. STAT. § 471.164 (West 2023); see *Restricting Tobacco Advertising*, PUB. HEALTH L. CTR. AT MITCHELL HAMLINE SCH. OF L. (Aug. 2022), <https://publichealthlawcenter.org/sites/default/files/resources/Restricting-Tobacco-Advertising.pdf> [https://perma.cc/834L-XXS6] (last visited Oct. 12, 2024).

144. See, e.g., *Oregon Liquor and Cannabis Commission*, OREGON.GOV, <https://www.oregon.gov/olcc/pages/default.aspx> [https://perma.cc/PQJ6-2R9T] (last visited Oct. 12, 2024).

have banned kratom or prohibited selling it to minors,¹⁴⁵ others have enacted independent adult use laws to regulate kratom production, testing, labeling, advertising, and sales.¹⁴⁶

After purchasing independent adult use products, consumers are typically required to consume them off-site.¹⁴⁷ When enacting adult use legislation, states often prohibit public consumption of regulated drug products.¹⁴⁸ In some states, adult use marijuana regulation overlaps with medical marijuana use legislation.¹⁴⁹ The same facilities might sell marijuana to medical use patients and adult use consumers.¹⁵⁰ In some states, patients have complained that the arrival of adult use marijuana regulation has negatively impacted their medical use markets.¹⁵¹ Dispensaries started catering to the larger and more lucrative adult use markets, and some states have scaled back the benefits once provided to medical marijuana patients, such as affordable pricing and the availability of specialized products.¹⁵² In Connecticut, some medical marijuana patients report that only certain hybrid dispensaries can sell marijuana for both medical and adult use, which they believe inhibits competition and enhances the market position of some medical dispensaries.¹⁵³ Connecticut recently hired the nation's first medical marijuana patient ombudsperson to advocate for medical marijuana patients in the state.¹⁵⁴

II. SUPERVISED DRUG USE

A. Supported Adult Use

Another type of state drug law called supported adult use derives its name from adult use legislation, with which it shares similarities.¹⁵⁵ Under both legal models, consumers can purchase regulated drug products for any reason, and without medical diagnoses or prescriptions.¹⁵⁶ However, while adult use drug laws allow consumers to purchase drugs for consumption off-site, supported adult use requires people to consume drug products

145. See HEFLIN, *supra* note 35, at 2–3.

146. *Id.* at 3–4.

147. See OR. ADMIN. R. 845-025-1230 (2023).

148. *Id.*

149. Rosalie Liccardo Pacula & Rosanna Smart, *Medical Marijuana and Marijuana Legislation*, 13 ANN. REV. CLINICAL PSYCH. 397, 398 (2017).

150. See *Adult Use Cannabis in Connecticut*, *supra* note 139 (listing Connecticut's licensed hybrid dispensaries).

151. Associated Press, *Broad Legalization Cuts into Medical Marijuana, Analysis Shows*, CHI. TRIB. (Aug. 22, 2019, 4:13 PM), <https://www.chicagotribune.com/2019/06/11/broad-legalization-cuts-into-medical-marijuana-analysis-shows/> [<https://perma.cc/WJH5-CJJ9>].

152. See *Adult Use Cannabis in Connecticut*, *supra* note 139.

153. See *id.* (listing Connecticut's licensed medical, adult use, and hybrid dispensaries); see also Fenster, *supra* note 139.

154. Brian Scott-Smith, *Connecticut Names Nation's First Cannabis Ombudsperson*, WSHU (May 27, 2024, 5:01 PM), <https://www.wshu.org/connecticut-news/2024-05-27/connecticut-cannabis-ombudsperson> [<https://perma.cc/TTW5-Z2PS>].

155. See Marks, *supra* note 12, at 3.

156. See *id.*

on-site where they must remain, with support from individuals called facilitators, until the drug effects diminish.¹⁵⁷ Further, unlike adult use marijuana legislation, which merely requires that consumers show proof of legal age, supported adult use might require some form of safety screening prior to purchase and consumption.¹⁵⁸

On November 3, 2020, the day that Oregon voters decriminalized many controlled substances by approving Measure 110, voters also approved ballot Measure 109, the Oregon Psilocybin Services Act.¹⁵⁹ Measure 109 legalized the supported adult use of psilocybin products.¹⁶⁰ To that end, it established a regulated system for product manufacturing, laboratory testing, sale, and facilitator-supervised consumption at licensed psilocybin service centers.¹⁶¹ Oregon facilitators must complete a state-approved training program, consisting of 160 hours of instruction, and pass a licensing exam administered by the Oregon Health Authority (OHA).¹⁶² Further, Oregon facilitators can provide their services only at licensed facilities called psilocybin service centers.¹⁶³

Oregon's psilocybin services include three elements or phases, which are borrowed from psychedelic clinical trials.¹⁶⁴ The first phase is a required preparation session.¹⁶⁵ Preparation is followed by an administration session, where clients consume psilocybin.¹⁶⁶ The third phase is an optional integration session that facilitators must offer to clients.¹⁶⁷ In psychedelic clinical trials, integration is intended to help clients process their psychedelic experience and integrate it into their lives.¹⁶⁸ Integration is arguably the component of psilocybin services that most closely resembles psychotherapy.¹⁶⁹ However, Oregon law prohibits facilitators from

157. *Id.*

158. *See, e.g.*, OR. REV. STAT. ANN. § 430.389 (West 2021).

159. *Id.* § 475A (West 2020); Marks, *supra* note 12, at 3.

160. Mason Marks, *State-Regulated Psychedelics on a Collision Course with FDA*, 330 JAMA 2337, 2337 (2023).

161. *See* Marks, *supra* note 12, at 3–4.

162. OR. ADMIN. R. 333-333-3050 (2022); *id.* 333-333-3070 (2023); *id.* 333-333-3090; *see also Oregon Psilocybin Services – Facilitator License*, OR. HEALTH AUTH., <https://www.oregon.gov/oha/ph/preventionwellness/pages/psilocybin-license-facilitator.aspx> [<https://perma.cc/82AU-YXT6>] (last visited Oct. 12, 2024).

163. *See* Marks, *supra* note 12, at 4.

164. OR. ADMIN. R. 333-333-1010 (2023); *id.* 333-333-5000; *id.* 333-333-5200; *id.* 333-333-5260; *see also* ATHEIR I. ABBAS, ANGELA CARTER, THOMAS JEANNE, RACHEL KNOX, P. TODD KORTHUIS, ALI HAMADE, CHRISTOPHER STAUFFER & JESSIE UEHLING, OREGON PSILOCYBIN ADVISORY BOARD RAPID EVIDENCE REVIEW AND RECOMMENDATIONS 6, 7, 9, 20, 25 (2021), https://www.oregon.gov/oha/PH/PREVENTIONWELLNESS/Documents/Psilocybin%20evidence%20report%20to%20OHA%206-30-21_Submitted.pdf [<https://perma.cc/SD9H-2YV6>].

165. OR. ADMIN. R. 333-333-5000.

166. *Id.* 333-333-5200.

167. *Id.* 333-333-5260.

168. *See* Grace Brown, *Psychedelic Therapy is Here. Just Don't Call It Therapy*, WIRED (June 15, 2023, 8:00 AM), <https://www.wired.com/story/oregon-psychedelics-psilocybin-rollout/> [<https://perma.cc/M7QH-LRG4>].

169. *See id.*

practicing psychotherapy or exercising the privileges of any licensed health profession while providing psilocybin services.¹⁷⁰

In drafting rules to implement Measure 109, the OHA created additional legal boundaries between psilocybin services and conventional healthcare systems and professions. For example, OHA rules prohibit facilitators and service centers from making misleading health claims that are unsupported by medical consensus,¹⁷¹ diagnosing or treating health conditions,¹⁷² or operating within licensed healthcare facilities.¹⁷³ During the state-mandated informed consent process, facilitators must inform clients that the FDA has not approved psilocybin, the substance is federally illegal, and the services facilitators provide are not intended to treat health conditions.¹⁷⁴ These legal barriers arguably protect psilocybin consumers from being misled about the services they receive in Oregon.¹⁷⁵ However, despite these limitations, some psilocybin business operators offer their services as medical treatments, and many clients reportedly seek psilocybin services to treat health conditions.¹⁷⁶

B. Supported Medical Use

Supported medical use is a variation of independent medical use legislation. Instead of consuming drugs independently, patients must consume substances under the supervision of licensed healthcare professionals, such as doctors, therapists, or nurse practitioners.¹⁷⁷ In this respect, supported medical use is comparable to supported adult use legislation, while lacking its restrictions on making health-related claims and providing medical treatment.¹⁷⁸ As with medical use legislation, patients in supported medical use programs may be required to undergo medical assessment prior to receiving treatment.¹⁷⁹ However, there are significant differences between existing independent medical use regulations, exemplified by state medical marijuana laws, and supported medical use programs, represented by emerging state psychedelic laws.

In state medical marijuana programs, healthcare professionals play peripheral roles.¹⁸⁰ Instead of writing marijuana prescriptions, they make recommendations, which the U.S. Court of Appeals for the Ninth Circuit found to be protected speech under the First Amendment.¹⁸¹ Healthcare

170. OR. ADMIN. R. 333-333-5130 (2022); *see also* Marks, *supra* note 160, at 2337.

171. OR. ADMIN. R. 333-333-6040 (2023).

172. *Id.* 333-333-5130 (2022).

173. *Id.* 333-333-4300 (2023).

174. *Id.* 333-333-5040.

175. *See* Marks, *supra* note 160, at 2337.

176. *See* Grant Stringer, *Oregon's Legal Psilocybin Clinics Draw Hundreds – Mostly from Out of State*, WASH. STATE STANDARD (Nov. 28, 2023, 2:41 PM), <https://washingtonstatestandard.com/2023/11/28/oregons-legal-psilocybin-clinics-draw-hundreds-mostly-from-out-of-state/> [https://perma.cc/W95W-FF76].

177. Marks, *supra* note 12, at 3.

178. *See id.*

179. *See* COLO. CODE REGS. §§ 755-2.2(A)(6), 2.5(A)(3) (2024).

180. *See supra* Part I.C.

181. *See* Conant v. Walters, 309 F.3d 629, 639 (9th Cir. 2002).

professionals do not typically see or touch marijuana. They are not present when patients ingest the substance or experience its effects. Moreover, healthcare facilities that receive Medicaid funds typically prohibit people from bringing Schedule I controlled substances on-site because the facilities could risk losing federal funding.¹⁸² Instead of obtaining medical marijuana from pharmacies as they do FDA-approved medications, patients obtain medical marijuana from dispensaries located outside the conventional healthcare system.¹⁸³ In other words, state medical marijuana programs put significant space between medical marijuana businesses and conventional healthcare entities.

Compared to independent medical use frameworks, supported medical use legislation is more hands on, often both figuratively and literally. Colorado's supported medical use regulations allow healthcare professionals to touch patients' hands, feet, or shoulders while patients experience the effects of psychedelic substances.¹⁸⁴ State regulators adopted these rules in 2024, after Colorado voters enacted the Natural Medicine Health Act¹⁸⁵ (NMHA) in 2022 by approving Proposition 122.¹⁸⁶ Six months after voters approved it, Colorado lawmakers amended the NMHA by enacting Senate Bill 23-290 (S.B. 23-290).¹⁸⁷ The amendment introduced the concept of a tiered system of licensure for psychedelic facilitators.¹⁸⁸ Regulators implemented a two-tiered system, where individuals with "facilitator" licenses are subject to practice limitations like those imposed on Oregon psilocybin facilitators. In other words, they cannot diagnose or treat medical conditions. Meanwhile, those with "clinical facilitator" licenses are permitted to diagnose and treat health conditions while providing psychedelic services (called natural medicine services in Colorado).¹⁸⁹ To become clinical facilitators, candidates must hold an active Colorado license in another profession that allows them to diagnose and treat physical or behavioral health conditions.¹⁹⁰

Colorado regulations for clinical facilitators lack the boundaries separating psychedelics from conventional healthcare that characterize Oregon's psilocybin program.¹⁹¹ Unlike Oregon rules, which require facilitators to inform clients that psilocybin services are not FDA approved or intended to diagnose or treat health conditions,¹⁹² Colorado regulations allow facilitators

182. See Marks, *supra* note 160, at 2338.

183. See *Where Can I Buy Cannabis in Connecticut?*, *supra* note 141.

184. COLO. CODE REGS. § 755-6.6(B) (2024).

185. COLO. REV. STAT. § 12-170-101–115 (2022).

186. See COL. PROPOSITION 122: ACCESS TO NATURAL PSYCHEDELIC SUBSTANCES (2022), https://leg.colorado.gov/sites/default/files/images/2021-2022_58vbb.pdf [<https://perma.cc/P4C9-N79E>]; COLO. CODE REGS. § 755-6.6(B) (2024); see also *Welcome to the Natural Medicine Program*, COLO. DEP'T OF REGUL. AGENCIES, <https://dpo.colorado.gov/NaturalMedicine> [<https://perma.cc/ZV2Y-YJ4K>] (last visited Oct. 12, 2024).

187. S.B. 23-290, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023).

188. See *id.* § 4(II)(B).

189. COLO. CODE REGS. §§ 755-2.2, 2.5 (2024).

190. *Id.* § 755-2.5(A)(1).

191. Compare *id.* § 775-2.5, and COLO. REV. STAT. ANN. § 12-170-105 (2024), with *supra* notes 165–73 and accompanying text.

192. OR. ADMIN. R. 333-333-5040 (2023).

to make medical claims about psychedelic services if they do not make false, deceptive, or misleading statements.¹⁹³ The differences also extend to facility regulations. Instead of maintaining separation between licensed healthcare facilities and psychedelic service centers (called healing centers in Colorado),¹⁹⁴ Colorado state regulators drafted rules that allow facilitators to hold administration sessions within licensed healthcare facilities.¹⁹⁵

Utah was the second state to enact supported medical use legislation when lawmakers enacted Senate Bill 266¹⁹⁶ (S.B. 266), the Medical Use Amendments, in 2024.¹⁹⁷ It remains unclear what S.B. 266 could achieve. The law grants the state's two largest hospital systems, Intermountain Health and University of Utah Health, the ability to administer psilocybin and MDMA to patients after developing guidelines for supported medical use.¹⁹⁸ However, unlike most psychedelic legalization bills, it includes no means for psychedelic product manufacturing, laboratory testing, or distribution.¹⁹⁹

C. Social Consumption

At least twelve states have legalized the social consumption of marijuana in designated facilities, which are sometimes called marijuana (or cannabis) consumption lounges.²⁰⁰ In 2019, California opened the first marijuana social consumption site in the United States.²⁰¹ This phenomenon draws inspiration from the marijuana coffee shops of the Netherlands.²⁰² Laws governing cigar bars, conventional bars, and restaurants that serve alcohol are other examples social consumption legislation. Proponents of marijuana social consumption laws claim they create safe spaces for people to consume a regulated substance.²⁰³

State laws differ in how they regulate marijuana social consumption sites. Some allow food to be sold whereas others do not.²⁰⁴ New Jersey rules allow patrons to bring their own food, or have it delivered from outside businesses.²⁰⁵ Most state marijuana social consumption laws prohibit the

193. See COLO. CODE REGS. §§ 755-6.5, 7.3, 7.4 (2024).

194. See *id.* § 775-2.1(G)(5).

195. See *id.* § 755-6.16(K)(2).

196. UTAH CODE ANN. § 58-37-3.5 (West 2024).

197. See *id.*

198. *Id.*

199. *Id.*

200. *State-by-State On-Site Consumption Laws*, *supra* note 18.

201. Soumya Karlamangla, *A Growing Number of California Cities Are Opening Weed Cafes*, N.Y. TIMES (June 21, 2022), <https://www.nytimes.com/2022/06/21/us/california-weed-cafes.html> [https://perma.cc/Q4XX-FQA6].

202. See *id.*

203. See, e.g., Red Rodriguez, *How Cannabis Consumption Lounges Create Safe Spaces for BIPOC Consumers*, ROLLING STONE (June 13, 2022), <https://www.rollingstone.com/culture-council/articles/how-cannabis-consumption-lounges-create-safe-spaces-bipoc-consumers-1365058/> [https://perma.cc/NS2N-XZGR].

204. See *State-by-State On-Site Consumption*, *supra* note 18.

205. Sophie Nieto-Munoz, *Cannabis Consumption Lounges Will Create 'Safe Spaces' to Consume, Business Owners Say*, N.J. MONITOR (Jan. 23, 2024, 7:04 AM), <https://newj>

sale and consumption of alcohol alongside marijuana products.²⁰⁶ States also limit the quantities of marijuana that can be sold. For instance, Massachusetts restricts sales to amounts that can be consumed on-site; specifically, consumers can purchase no more than twenty milligrams of delta-9-tetrahydrocannabinol (THC) per day.²⁰⁷

D. Safe Consumption

Several U.S. cities have opened safe drug consumption sites (sometimes called safe injection sites, safe injection facilities, or overdose prevention centers).²⁰⁸ In these controlled settings, people who consume drugs, which they provide for themselves, are given access to clean medical supplies, healthcare professional support and advice, and other resources such as access to drug treatment programs and related services.²⁰⁹

Rhode Island was the first state to legalize a safe consumption site when Governor Daniel J. McKee signed a law to create a two-year pilot program.²¹⁰ Lawmakers in other states have attempted to enact similar legislation and failed.²¹¹ In 2024, the Vermont House and Senate approved a safe consumption site bill.²¹² Governor Phil Scott vetoed the bill after indicating that he might.²¹³ However, lawmakers overturned his veto.²¹⁴

erseysmonitor.com/2024/01/23/cannabis-consumption-lounges-will-create-safe-spaces-to-consume-business-owners-say/ [https://perma.cc/5BKZ-U3BV].

206. See *State-by-State On-Site Consumption*, *supra* note 18.

207. *Massachusetts Marijuana Social Consumption Establishment License*, MASS. CANNABIS INFO., <https://massachusettscannabis.org/licensing/social-consumption-establishment#> [https://perma.cc/R9L9-JVTV] (last visited Oct. 12, 2024).

208. Noah Weiland, *To Combat the Opioid Epidemic, Cities Ponder Facilities for Drug Use*, N.Y. TIMES (Oct. 20, 2023), <https://www.nytimes.com/2023/10/20/health/opioids-drug-consumption-sites.html> [https://perma.cc/ZF4L-D56D].

209. *Id.*

210. Katie Mulvaney, *RI Gov. McKee Signs Legislation Allowing Safe-Injection Sites into Law*, PROVIDENCE J. (July 7, 2021, 4:48 PM), <https://www.providencejournal.com/story/news/2021/07/07/gov-mckee-signs-legislation-allowing-safe-injection-sites-into-law/7891057002/> [https://perma.cc/C659-L4BS].

211. *Pennsylvania Senate Votes to Ban Injection Sites*, AP NEWS (May 1, 2023, 5:50 PM), <https://apnews.com/article/opioid-heroin-safe-injection-sites-pennsylvania-drugs-3c94134829464b858e02e3799ac3ae2b> [https://perma.cc/DFJ4-8S2T] (“Rhode Island and New York City have allowed their use while the governors of California and Vermont each vetoed safe injection sites bill [sic] last summer.”).

212. Bob Kinzel, *Vermont Lawmakers Agree on Safe Injection Site Legislation. Gov. Scott May Veto*, VT. PUB. (May 2, 2024, 5:01 PM), <https://www.vermontpublic.org/local-news/2024-05-02/vermont-lawmakers-agree-harm-reduction-center-legislation-scott-undecided> [https://perma.cc/NZ8S-JUYD].

213. Lisa Rathke, *Vermont Legislature Overrides Governor, Passing Overdose Prevention, Renewable Energy, Tax Measures*, AP NEWS (June 17, 2024, 6:15 PM), <https://apnews.com/article/vetoes-vermont-data-privacy-renewable-energy-pesticides-8c5c640040bb4a6d8b5ebf0f7bb536ef> [https://perma.cc/PKU2-73RJ]; Bob Kinzel, *Vermont Lawmakers Agree on Safe Injection Site Legislation. Gov. Scott May Veto*, VT. PUB. (May 2, 2024, 5:01 PM), <https://www.vermontpublic.org/local-news/2024-05-02/vermont-lawmakers-agree-harm-reduction-center-legislation-scott-undecided> [https://perma.cc/NZ8S-JUYD].

214. Rathke, *supra* note 213.

Functionally, there is some overlap between the operation of social consumption sites and safe consumption sites. They both aim to create safe environments in which people can openly use drugs. However, there are several distinctions. Social consumption sites sell drug products for on-site consumption²¹⁵ whereas safe consumption sites are spaces where people consume drugs that they provide for themselves.²¹⁶ Social consumption sites or lounges are usually commercial for-profit enterprises, whereas safe consumption sites are operated as nonprofit organizations.²¹⁷ Another distinction is that social consumption sites allow people to consume substances that states have legalized, and which have gained some degree of social acceptance, such as marijuana or psilocybin, in response to shifting laws and social attitudes.²¹⁸ In contrast, safe consumption sites allow people to consume state-prohibited substances that are less socially accepted, such as cocaine and heroin.²¹⁹

E. Clinical Research

Some states have enacted laws to fund drug research, which is often hindered by a substance's federal legal status. For instance, the Schedule I status of marijuana and psychedelics has historically made it more difficult for scientists to fund and initiate related research programs.²²⁰

Connecticut,²²¹ Texas,²²² and Washington²²³ have enacted legislation to fund FDA-sanctioned clinical trials of psychedelic drugs. Their clinical research laws are geared less toward increasing access to psychedelics and

215. See *supra* Part II.C.

216. See Weiland, *supra* note 208 and accompanying text.

217. See, e.g., Chris Casachia, *California Cannabis Consumption Lounges Poised for Takeoff*, MJBIZ (Aug. 2, 2022), <https://mjbizdaily.com/california-cannabis-consumption-lounges-poised-for-takeoff/> [<https://perma.cc/EL5R-LMDB>] (describing the emerging marijuana consumption lounge model which industry stakeholders hope will generate additional revenue); see Sharon Otterman, *Federal Officials May Shut Down Overdose Prevention Centers in Manhattan*, N.Y. TIMES (Aug. 8, 2023), <https://www.nytimes.com/2023/08/08/nyregion/drug-overdoses-supervised-consumption-nyc.html> [<https://perma.cc/TRN4-T2ZJ>] (describing the safe injection site OnPoint NYC as a small nonprofit); see also Anna Betts, *Providence Officials Approve Overdose Prevention Center*, N.Y. TIMES (Feb. 4, 2024), <https://www.nytimes.com/2024/02/04/us/ri-opiod-safe-injection-site.html> [<https://perma.cc/8AVT-ME3J>] (reporting that a nonprofit organization will run Rhode Island's safe consumption site).

218. See *supra* Part I.C.

219. See Weiland, *supra* note 208.

220. See, e.g., Mason Marks & Carmel Shachar, *Drug Scheduling Limits Access to Essential Medicines and Should Be Reformed*, 29 NATURE MED. 294, 294–95 (2023).

221. CONN. GEN. STAT. ANN. § 17a-484g(b) (West 2022).

222. H.B. 1802, 87th Leg. Sess., Reg. Sess. (Tex. 2021); Patrick Svitek, *Rick Perry Returns to the Texas Capitol to Study of Psychedelic Drugs for PTSD in Veterans*, TEX. TRIB. (Apr. 13, 2021, 8:00 PM), <https://www.texastribune.org/2021/04/13/veterans-ptsd-psychedelics-texas/> [<https://perma.cc/3H3G-QHDG>].

223. S.B. 5263, 68th Leg., 2023 Reg. Sess. (Wash. 2023); Howard Mulligan & Adam Koscielski, *Washington Psilocybin Services Act: A Magical Legislative Solution for Promoting Benefits of Psychedelic Drugs*, REUTERS (Aug. 11, 2023, 12:57 PM), <https://www.reuters.com/legal/litigation/washington-psilocybin-services-act-magical-legislative-solution-promoting-2023-08-11/> [<https://perma.cc/8KJJ-N2MH>].

more toward advancing research that generates evidence regarding their safety and efficacy.²²⁴ In 2021, Texas was the first state to enact a clinical research bill.²²⁵ With support from former Governor Rick Perry,²²⁶ the state funded psilocybin research involving veterans with post-traumatic stress disorder at Baylor College of Medicine and the Michael E. DeBakey Department of Veterans Affairs Medical Center in Houston.²²⁷ In 2022, Connecticut enacted House Bill 5396, a bill that would have allowed veterans and first responders to access psilocybin and MDMA through the FDA's expanded access program,²²⁸ which is intended to provide people with serious or life-threatening conditions access to experimental treatments prior to FDA approval.²²⁹ However, lawmakers amended the bill, transforming it into a clinical research bill that funds psychedelic research.²³⁰

In 2023, Arizona's Department of Health Services solicited grant applications for funding to support clinical trials using naturally produced, whole psilocybin mushroom products.²³¹ The state legislature would appropriate up to \$5 million to support phase one through three clinical trials, which had to be capable of obtaining permission from the FDA and DEA to evaluate the mushroom products for the treatment of certain medical conditions.²³² Grant applicants were instructed to prioritize treating veterans, frontline healthcare workers, first responders, and people from underserved communities.²³³ In February of 2024, the Arizona Department of Health Services signed grant agreements with two recipients.²³⁴ The Scottsdale Institute would receive \$2,749,114,²³⁵ and the University of Arizona would receive \$975,739.²³⁶ According to a press release shared with the author on May 27, 2024, by Dr. Sue Sisley, "[t]he state of Arizona is on the cusp of

224. *See id.*

225. Marks, *supra* note 12, at 4.

226. Svitek, *supra* note 222.

227. *See* Sara Willa Ernst, *Psychedelic Research Is on the Horizon for Texas Veterans with PTSD*, HOUS. PUB. MEDIA (Nov. 11, 2021, 8:26 AM), <https://www.houstonpublicmedia.org/articles/news/in-depth/2021/11/11/413205/psychedelic-therapy-research-on-the-horizon-for-texas-veterans-with-ptsd/> [<https://perma.cc/2WA3-NCRK>].

228. H.B. 5396, 2022 Gen. Assemb., Feb. Sess. (Conn. 2022).

229. *See Expanded Access*, FDA (2024), <https://www.fda.gov/news-events/public-health-focus/expanded-access> [<https://perma.cc/QS27-X3LN>].

230. CONN. GEN. STAT. ANN. § 17a-484g(b) (West 2022); H.B. 5396 2022 Gen. Assemb., Feb. Sess. (Conn. 2022); CONN. GEN. STAT. ANN. § 17a-459 (West 2024).

231. *Research Grants - Psilocybin Research Clinical Trials Grant Program*, ARIZ. DEPT. OF HEALTH SERVS., <https://www.azdhs.gov/biomedical/#research-grants-psilocybin-research> [<https://perma.cc/KGE8-6HE5>] (last visited Oct. 12, 2024).

232. *Id.*

233. *Id.*

234. ARIZ. DEP'T OF HEALTH SERVS., GRANT OFFER AND ACCEPTANCE GRANT NO. RFGA2024-014-01 (2024) [hereinafter GRANT NO. RFGA2024-014-01], <https://www.azdhs.gov/documents/biomedical/scottsdale-research-institute-rfga2024-014-01-executed-contract.pdf> [<https://perma.cc/5E9G-LVKP>]; ARIZ. DEP'T OF HEALTH SERVS., GRANT OFFER AND ACCEPTANCE GRANT NO. RFGA2024-014-02 (2024) [hereinafter GRANT NO. RFGA2024-014-02], <https://www.azdhs.gov/documents/biomedical/u-of-a-rfga2024-014-02-executed-contract.pdf> [<https://perma.cc/38E9-ZE6Z>].

235. GRANT NO. RFGA2024-014-01, *supra* note 234.

236. GRANT NO. RFGA2024-014-02, *supra* note 234.

becoming a world leader in conducting first ever studies of natural psilocybin mushrooms in FDA controlled trials.”²³⁷

Compared to medical and supported adult use laws, clinical research bills may have greater potential to generate useful scientific insights because they use standardized treatment protocols and include more narrowly defined patient populations.²³⁸ Clinical research bills also pose no conflicts with federal laws because they leverage existing federal regulations, including FDA rules regarding clinical trials.²³⁹

F. Religious Use

A variety of groups use psychedelics for religious purposes, including Native American churches, other Indigenous communities, and churches that blend psychedelics with aspects of Christianity, Judaism, or other faiths.²⁴⁰ The religious use of psychedelics typically occurs in communal settings.²⁴¹ Independent use of drugs for religious purposes is possible. Nevertheless, because the law tends to frame religion as an organized, communal activity with oversight from religious leaders, this Essay categorizes religious use as a form of supervised drug use.

Some states have legal protections for religious practices that, while not drafted specifically for psychedelic churches, can potentially impact these communities. Any branch of state government can implement legal protections for religious communities that utilize psychedelics. In the 2020 case, *New Hampshire v. Mack*,²⁴² New Hampshire’s Supreme Court interpreted the state’s Constitution to protect the religious use of psilocybin-producing mushrooms.²⁴³ Oregon’s H.B. 4002, which repealed Measure 110, retained the measure’s exemption from criminal laws for bona fide religious uses of peyote cactus.²⁴⁴ The fact that Measure 110 decriminalized bona fide religious use of peyote appears to have escaped the notice of reporters, religious communities, and drug policy reform advocates. More than twenty states have their own versions of the federal Religious Freedom Restoration Act²⁴⁵ (RFRA), sometimes called “mini-RFRAs.”²⁴⁶

During the rulemaking process to implement Oregon’s Measure 109, the OHA and Oregon Department of Justice (“Oregon DOJ”) raised constitutional concerns regarding a request that OHA create a parallel

237. Email from Dr. Sue Sisley to author (May 27, 2024, 10:01 PM) (on file with author).

238. Marks, *supra* note 12, at 4.

239. *See id.* at 2–3; *see also* Marks, *supra* note 160, at 2337.

240. *Psychedelics (Entheogens) and Spirituality*, UC BERKELEY CTR. FOR THE SCI. OF PSYCHEDELICS, <https://psychedelics.berkeley.edu/religion-spirituality/> [<https://perma.cc/PU79-VKFK>] (last visited Oct. 12, 2024).

241. *See id.*

242. 173 N.H. 793 (2020).

243. *Id.* at 817–18.

244. *See* Relating to the Addiction Crisis in This State; Declaring an Emergency, H.B. 4002, ch. 70, § 28(4)(a)–(b), 82 Or. Leg. Assemb., 2024 Reg. Sess. (Or. 2024).

245. 42 U.S.C. §§ 1988, 2000bb.

246. Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 417 (2016).

facilitator licensing track for spiritual and religious organizations.²⁴⁷ Specifically, the Oregon DOJ believed the Oregon constitutional equivalent of the Establishment Clause of the federal First Amendment constrained the OHA's regulatory authority.²⁴⁸ Despite the OHA's prohibition on medical psilocybin use, the agency drew inspiration for its rules almost entirely from secular medical contexts such as FDA-sanctioned clinical trials.²⁴⁹

The Oregon Psilocybin Advisory Board's (OPAB) rapid evidence review omitted information regarding religious and Indigenous uses of psilocybin.²⁵⁰ Further, most participants on the OPAB were medical professionals.²⁵¹ The fifteen-member board included five doctors, two nurses, a public health official, a licensed psychologist, and an addiction medicine specialist.²⁵² None claimed to represent spiritual or religious perspectives.²⁵³ When asked whether the OHA considered adding people with spiritual or religious experience with psilocybin to the OPAB, an OHA official said he did not remember because "[t]hat was over a year ago, and [we received over] two hundred or so applications."²⁵⁴

Citing the long history of psilocybin use by Indigenous communities, some Oregon activists argued that the OHA should create parallel rules, drafted by attorney Jon Dennis, to accommodate spiritual or religious groups.²⁵⁵ In a public comment session prior the OHA's final rulemaking, speakers expressed concerns that corporate interests had influenced the rulemaking process to the exclusion of spiritual and religious communities.²⁵⁶ One commentator told OHA officials, "[a]s a founder of a sacred mushroom church, I've been following this for several months. . . ."²⁵⁷ Another said they "found it extremely problematic that the religious organizations are being treated the same as therapeutic organizations," and that it was "kind of offensive to [them] that [they] [were] subject to medical protocols and regulations when the medical establishment got the mushrooms from the spiritual practitioners."²⁵⁸ Two subcommittees of the OPAB approved the proposed framework for discussion by the full board, and the matter was

247. See Memorandum from Shannon K. O'Fallon, Senior Assistant Att'y Gen., Health and Hum. Servs. Section, to Patrick M. Allen, Dir., Or. Health Auth., Rachael Banks, Public Health Dir., Or. Health Auth., and Leann Johnson, Off. of Equity and Inclusion Div. Dir., Or. Health Auth. 10 (May 25, 2022), <https://www.oregon.gov/oha/PH/PREVENTIONWEL/INESS/Documents/Legal-Memorandum.pdf> [<https://perma.cc/KNR2-WWBG>].

248. *Id.*

249. See *ABBAS ET AL.*, *supra* note 164, at 3.

250. See *id.* at 4.

251. Mason Marks, *Oregon Officials' Rejection of Rules for Spiritual and Religious Psilocybin Use Called into Question*, MARIJUANA MOMENT (June 1, 2022), <https://www.marijuanamoment.net/oregon-officials-rejection-of-rules-for-spiritual-and-religious-psilocybin-use-called-into-question/> [<https://perma.cc/XA49-DK2R>].

252. OR. REV. STAT. § 475A.225 (West 2023).

253. See *id.*

254. Marks, *supra* note 251.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

placed on the schedule for an upcoming meeting.²⁵⁹ However, before the board could discuss the matter, the OHA called its first closed-door executive session with the Oregon DOJ, which advises the OHA on legal matters.²⁶⁰

Following the executive session, the Oregon DOJ published a letter including a question ostensibly posed by the OHA: “Can OHA adopt rules with different or less restrictive standards for entheogenic practitioner licensees?”²⁶¹ The letter stated, “Short Answer: No. Making less restrictive standards for entheogenic practitioners would likely violate the establishment clause protections of the Oregon and United States constitution. Applying fewer restrictions on entheogenic practitioners would likely be viewed as granting a privilege to religion that is not available on a secular basis.”²⁶²

“The proposal is clearly intended to permit an entheogenic practitioner to comply with less stringent standards than would be applicable to a licensee without entheogenic privileges,” wrote Oregon DOJ attorneys.²⁶³ They claimed the entheogenic framework would fail the test adopted in *Lemon v. Kurtzman*²⁶⁴ for determining whether government actions violate the Establishment Clause.²⁶⁵ Under the *Lemon* test, “(1) the law must ‘reflect a clearly secular legislative purpose’; (2) it must ‘have a primary effect that neither advances nor inhibits religion’ (as distinguished from an ‘incidental’ effect); and (3) it must ‘avoid excessive governmental [sic] entanglement with religion.’”²⁶⁶

Citing a 1976 Oregon case *Eugene Sand & Gravel, Inc. v. City of Eugene*,²⁶⁷ which adopted the federal *Lemon* test, the Oregon DOJ concluded that the entheogenic proposal likely violated the Establishment Clause.²⁶⁸ It failed the test’s first prong because it lacked a secular purpose, and because its purpose was clearly to benefit entheogenic practitioners, the Oregon DOJ claimed.²⁶⁹ Further, it failed the second prong because its main effect was to advance religion because entheogenic practitioners would be subject to less regulation than “regular,” secular licensees.²⁷⁰ “Because the proposal clearly fails the first two *Lemon* tests, a court would likely find the proposal violates the Establishment clause.”²⁷¹

259. *Id.*

260. *Id.*

261. Memorandum from Shannon K. O’Fallon to Patrick M. Allen et al., *supra* note 247, at 2.

262. *Id.* (emphasis omitted).

263. *Id.* at 8.

264. 403 U.S. 602, 612–13 (1971).

265. Memorandum from Shannon K. O’Fallon to Patrick M. Allen et al., *supra* note 247, at 10.

266. *Id.* (quoting *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007, 1012–13 (1976) (en banc)).

267. 558 P.2d 338 (Or. 1976).

268. Memorandum from Shannon K. O’Fallon to Patrick M. Allen et al., *supra* note 247, at 10.

269. *Id.*

270. *Id.*

271. *Id.*

“We can point to nothing in the U.S. Constitution, Oregon Constitution, or state statutes that would compel OHA to treat applications from religious or entheogenic organizations differently than those from ‘secular’ applicants,” wrote the Oregon DOJ.²⁷² “In fact, doing so would raise questions of whether the religious or entheogenic organizations were receiving preferential treatment as explained above.”²⁷³

Historically, justices who adopted a strict separationist theory of the Establishment Clause favored the *Lemon* test.²⁷⁴ Similarly, judges endorsing neutrality theory often embraced it.²⁷⁵ However, justices who viewed the Establishment Clause through an accommodationist lens have long urged the Court to overrule the *Lemon* test.²⁷⁶ One month after the Oregon DOJ published its letter, the U.S. Supreme Court, in *Kennedy v. Bremerton School District*,²⁷⁷ declared that the *Lemon* test and related offshoots were no longer the legal standard.²⁷⁸ But the *Lemon* test was likely dying long before then.²⁷⁹ In *Kennedy*, Justice Gorsuch cited *American Legion v. American Humanist Association*²⁸⁰ and *Town of Greece v. Galloway*²⁸¹ arguing that “this Court long ago abandoned *Lemon* and its endorsement test offshoot.”²⁸² Further, this “Court has explained that these tests ‘invited chaos’ in lower courts, led to ‘differing results’ in materially identical cases, and created a ‘minefield’ for legislators.”²⁸³ “In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”²⁸⁴

Colorado’s S.B. 23-290 created an exemption from facilitator licensing requirements for people who facilitate bona fide Indigenous or religious ceremonies involving the psychedelics encompassed by S.B. 23-290 and the NMHA.²⁸⁵ This provision may create a different type of Establishment Clause problem. Colorado regulators have put themselves in the unenviable position of having to determine what constitutes bona fide Indigenous or religious use. For example, they risk failing to accommodate some Indigenous or religious communities, which might violate the Establishment Clause. Alternatively, they might privilege some Indigenous or religious

272. *Id.* at 11.

273. *Id.*

274. See *The Lemon Test*, PEW RSCH. CTR. (May 14, 2009), <https://www.pewresearch.org/religion/2009/05/14/shifting-boundaries6/> [<https://perma.cc/EQR4-KNDV>].

275. See VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10315, NO MORE *LEMON* LAW?: SUPREME COURT RETHINKS RELIGIOUS ESTABLISHMENT ANALYSIS 2 (2019), <https://crsreport.s.congress.gov/product/pdf/LSB/LSB10315> [<https://perma.cc/PE9Y-GJBR>].

276. *Id.* at 5.

277. 142 S. Ct. 2407 (2022).

278. *Id.* at 2414.

279. See BRANNON, *supra* note 275, at 2.

280. 139 S. Ct. 2067 (2019).

281. 572 U.S. 565 (2014).

282. *Kennedy*, 142 S. Ct. at 2427 (citing *Town of Greece*, 572 U.S. at 576).

283. *Id.* (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768–69 n.3 (1995)).

284. *Id.* at 2414 (quoting *Town of Greece*, 572 U.S. at 576).

285. S.B. 23-290, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023).

communities over others. So far, Colorado regulators appear to be interpreting the term bona fide Indigenous or religious ceremonies to apply to Native American and other Indigenous groups, while potentially excluding non-Indigenous religious communities.

III. POLICY AND PROCEDURE

A. Policy Analysis

Instead of funding research, reducing criminal penalties, or expanding access to controlled substances, one category of psychedelic law merely creates task forces or work groups to study the feasibility of future psychedelics legislation. States that have enacted policy analysis legislation include Alaska,²⁸⁶ Arizona,²⁸⁷ Connecticut,²⁸⁸ Hawaii,²⁸⁹ Maryland,²⁹⁰ Minnesota,²⁹¹ Utah,²⁹² Vermont,²⁹³ and Washington.²⁹⁴ With so many states adopting policy analysis legislation, it is the fastest growing state-level approach to drug legislation, and aside from state marijuana legalization, the most prevalent. Clinical research may be a close second for the fastest emerging and most prevalent type of state drug law reform.

In 2022, the Washington state legislature considered a bill, Senate Bill 5660 (S.B. 5660), which, like Oregon's Measure 109, would have allowed supported adult use of psilocybin.²⁹⁵ However, lawmakers gutted the bill,

286. Rachel Cassandra, *Alaska Legislature Psychedelic Task Force for FDA-Approved Therapies*, ALASKA PUB. MEDIA (May 17, 2024), <https://alaskapublic.org/2024/05/17/alaska-legislature-establishes-psychedelic-task-force-for-fda-approved-therapies/> [<https://perma.cc/96FK-QKAX>].

287. H.B. 2486, 56th Leg., 1st Reg. Sess. (Ariz. 2023); Noah Cullen, 'Science Over Politics': State Budget Extends Psilocybin Study Funding, PHOENIX NEW TIMES (June 21, 2024), <https://www.phoenixnewtimes.com/marijuana/arizona-budget-preserves-psilocybin-mushroom-study-funding-19275133> [<https://perma.cc/9HBH-GC3R>] (reporting that on the same day that Arizona Governor Katie Hobbs signed a state budget allocating funds for psilocybin research, she vetoed Senate Bill 1570, which would have legalized supervised medical use of psilocybin).

288. An Act Concerning Various Revisions To The Public Health Statutes, S.B. 1083, Gen. Assemb., Jan. Sess. (Conn. 2021).

289. S.B. 3160, 31st Leg., Reg. Sess. (Haw. 2022).

290. Jelena Martinovic, *Gov. Wes Moore Green-Lights Maryland's Psychedelics Task Force Bill*, BENZINGA (May 17, 2024, 10:58 AM), <https://www.benzinga.com/markets/cannabis/24/05/38896157/gov-wes-moore-green-lights-marylands-psychedelics-task-force-bill> [<https://perma.cc/K6QZ-XKTC>].

291. 2023 Minn. Laws 190.

292. H.B. 167, 2022 Gen. Sess. (Utah 2022).

293. *Scott Signs Public Safety Reform Bills, Magic Mushroom Study Into Law*, WCAX (May 29, 2024, 5:48 PM), <https://www.wcax.com/2024/05/29/scott-signs-public-safety-reform-bill-into-law/> [<https://perma.cc/2MGZ-XPPE>].

294. S.B. 5263, 68th Leg., 2023 Reg. Sess. (Wash. 2023).

295. Esmey Jimenez, *Research Shows Psychedelic Mushrooms Can Help Treat Depression. Is Legalization on the Horizon for Washington?*, SEATTLE TIMES (Jan. 23, 2022, 6:00 AM), <https://www.seattletimes.com/seattle-news/mental-health/research-shows-psychedelic-mushrooms-can-help-treat-depression-is-legalization-on-the-horizon-for-washington/> [<https://perma.cc/AW8K-3EEZ>] (reporting on Washington state's shift from a supported adult

rendering it a policy analysis bill that established the Washington Psilocybin Stakeholder Workgroup.²⁹⁶ A 2023 Vermont proposal to decriminalize psilocybin possession and establish a working group to discuss legalizing supported adult use had a similar fate.²⁹⁷ When lawmakers enacted the bill in 2024, they had removed its decriminalization provisions.²⁹⁸ Governor Scott signed the Vermont policy analysis bill while simultaneously vetoing a bill to support safe consumption sites.²⁹⁹ In 2023, Minnesota formed its Psychedelic Medicine Task Force, which has a unique mandate.³⁰⁰ Lawmakers required the task force to study federal laws and determine how Minnesota might enact legislation that maintains state autonomy regarding psychedelics while minimizing conflicts with federal law.³⁰¹

If lawmakers use drug policy analysis bills effectively, they could produce thoughtful discussion of drug policy and inform subsequent legislation. However, the working groups created through policy analysis laws may serve largely symbolic roles. Some state lawmakers have disregarded their working groups' recommendations. Funded by \$200,000,³⁰² the Washington Psilocybin Stakeholder Workgroup met for six months to discuss and debate S.B. 5660, the state's previously proposed supported adult use legislation.³⁰³ On December 1, 2022, the workgroup sent a 103-page report to state lawmakers with recommendations for improving and implementing S.B. 5660.³⁰⁴ However, instead of following the workgroup's advice, and enacting S.B. 5660 with amendments, lawmakers enacted a clinical research bill to fund psilocybin trials at the University of Washington.³⁰⁵

use bill to a clinical research bill which funded clinical research that some have referred to as a pilot program).

296. Esmey Jimenez, *WA Bill to Legalize Psychedelic Stalls, but Pilot Program Still Possible*, SEATTLE TIMES (Mar. 31, 2023, 6:00 AM), <https://www.seattletimes.com/seattle-news/mental-health/wa-bill-to-legalize-psychedelics-stalls-but-pilot-program-still-possible/> [https://perma.cc/Y395-DVDQ]. See generally WASH. PSILOCYBIN STAKEHOLDER WORKGROUP, WASH. STATE HEALTH CARE AUTH., PRELIMINARY REPORT (2022), <https://www.hca.wa.gov/assets/program/psilocybin-workgroup-leg-report-2022.pdf> [https://perma.cc/B3DE-RFZL].

297. S. 114, 2023 Gen. Assemb., Reg. Sess. (Vt. 2023).

298. *Id.*

299. *Scott Signs Public Safety Reform Bills, Magic Mushroom Study Into Law*, *supra* note 293; Peter D'Auria, *Gov. Phil Scott Vetoes Overdose Prevention Center Bill*, VTDIGGER (May 30, 2024, 8:34 PM), <https://vtdigger.org/2024/05/30/gov-phil-scott-vetoes-overdose-prevention-center-bill/> [https://perma.cc/RX8T-VRQB].

300. 2023 Minn. Laws 190.

301. *Id.* at 191.

302. Kyle Jaeger, *Washington State Legislature Approves \$200,000 in Psilocybin Research Funding in Budget*, MARIJUANA MOMENT (Mar. 11, 2022), <https://www.marijuana-moment.net/washington-state-legislature-approves-200000-in-psilocybin-research-funding-in-budget/> [https://perma.cc/6ZGA-3BYB].

303. See *Psilocybin Work Group*, WASH. HEALTH CARE AUTH., <https://www.hca.wa.gov/about-hca/programs-and-initiatives/clinical-collaboration-and-initiatives/psilocybin-work-group> [https://perma.cc/7YZ4-LUXA] (last visited Oct. 12, 2024).

304. See generally WASH. PSILOCYBIN STAKEHOLDER WORKGROUP, *supra* note 296.

305. See S.B. 5263, 68th Leg., 2023 Reg. Sess. (Wash. 2023).

In 2024, the Utah Mental Illness Psychotherapy Drug Task Force saw a similar outcome. It delivered its recommendations to the state legislature in October of 2022.³⁰⁶ The task force recommended that “Utah not proceed with the creation of any psychedelic-assisted psychotherapy program ahead of FDA approval. This is the most conservative course of action to ensure the safety of citizens of Utah while minimizing regulatory burdens and cost.”³⁰⁷ Instead of following this recommendation, lawmakers enacted Utah Senate Bill 266 (S.B. 266), also known as the Medical Amendment Act,³⁰⁸ which reportedly legalized supported medical use of psilocybin and MDMA.³⁰⁹ However, as discussed above, Utah’s legislation may instead act as a trigger law, preparing the state for potential FDA approval of these substances.³¹⁰

In a letter in which he vetoed several bills, Utah Governor Spencer J. Cox said he would allow S.B. 266 to become law without his signature due to overwhelming legislative support for the bill.³¹¹ However, Governor Cox expressed disappointment that lawmakers had failed to follow the advice of their own task force.³¹² “I am generally supportive of scientific efforts to discover the benefits of new substances that can relieve suffering,” said Governor Cox.³¹³ “However, we have a task force that was set up specifically to advise the Legislature on the best way to study Psilocybin and I’m disappointed that their input was ignored.”³¹⁴

B. Trigger Laws

Several states have enacted laws that will immediately allow doctors to prescribe certain drugs if the FDA approves them and the DEA subsequently reschedules them. These laws focus on psychedelics that are currently under clinical investigation, such as psilocybin and MDMA. For example, in 2023, California enacted Assembly Bill 1021, which states that “if the federal government reschedules any Schedule I drug under the Controlled Substances Act (CSA), California health professionals will automatically be able to legally prescribe and dispense it.”³¹⁵ In 2022, Colorado lawmakers

306. UTAH MENTAL ILLNESS PSYCHOTHERAPY DRUG TASK FORCE, REPORT TO THE UTAH LEGISLATURE 33 (2022), <https://le.utah.gov/interim/2022/pdf/00004231.pdf> [<https://perma.cc/YQ3V-ZMF3>].

307. *Id.*

308. UTAH CODE ANN. § 58-37-3.5 (West 2024).

309. *Id.*

310. *See* UTAH MENTAL ILLNESS PSYCHOTHERAPY DRUG TASK FORCE, *supra* note 306, at 33.

311. Letter from Spencer J. Cox, Utah Gov., to Stuart Adams, Pres., Utah Senate, and Mike Schultz, Speaker, Utah House of Reps. 4 (Mar. 21, 2024), <https://le.utah.gov/~2024/veto/VetoLetter.pdf> [<https://perma.cc/AF7T-NMSV>].

312. *See id.*

313. *Id.*

314. *Id.*

315. A.B. 1021, 2023 Reg. Sess. (CA 2023); *see* Press Release, Off. of Gov. Gavin Newsom, Governor Newsom Issues Legislative Update 9.30.23, <https://www.gov.ca.gov/2023/09/30/governor-newsom-issues-legislative-update-9-30-23/> [<https://perma.cc/GM6K-WL8X>] (last visited Oct. 12, 2024).

enacted House Bill 22-1344, which amended the state's controlled substances law to exempt medically prescribed MDMA if the FDA approves it and the DEA reschedules it.³¹⁶ Further, the law will automatically update Colorado's control of MDMA to mirror federal control under the CSA.³¹⁷ As discussed above, Utah's Medical Amendments Act may effectively act as a trigger law for MDMA and psilocybin treatments.³¹⁸

Though trigger laws might speed up state availability of drugs after FDA approval and federal rescheduling, they arguably accomplish little that would otherwise not be achieved. Most states will update their controlled substance regulations after the DEA reschedules a newly approved medication. However, that might not always be the case. As illustrated by Louisiana's proposal to criminalize medications used in reproductive care, states might choose not to mirror federal drug regulations, even when drugs are FDA approved.³¹⁹ However, as illustrated by the attempted Massachusetts Zohydro ER ban, courts could overturn those prohibitions.³²⁰

C. Food Laws

In November of 2021, Maine voters approved a ballot initiative to create a right to food within the state's constitution;³²¹ 61 percent of the electorate voted yes.³²² The text of the amendment describes "a natural, inherent and unalienable right" of all individuals "to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being."³²³ This liberty is subject to certain limitations. Specifically, the amendment protects the right to food "as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food."³²⁴ However, the amendment contains no limits regarding illegal substance or potential conflicts with federal law. Further, the permitted uses of food are ostensibly broad, including not only nourishment and sustenance, but also bodily health and well-being.³²⁵

Though popular with voters, Maine's right to food was controversial. Critics worried it would undermine state and federal food regulations that protect consumers.³²⁶ Proponents claimed that it would allow people to grow

316. See H.B. 22-1344, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022).

317. *Id.* § 2.

318. See *supra* Part III.B.

319. See *supra* notes 47–51 and accompanying text.

320. See *supra* notes 52–57 and accompanying text.

321. *Maine's New 'Right to Food'*, ME. MUN. ASS'N, <https://www.memun.org/Training/maines-new-right-to-food> [<https://perma.cc/E3JJ-Y2Q6>] (last visited Oct. 12, 2024).

322. *Id.*

323. H.P. 61, 130th Leg., 1st Reg. Sess. (Me. 2021).

324. *Id.*

325. *Id.*

326. Taylor Telford, *Maine Just Voted to Become the First 'Right to Food' State. What Does that Mean?*, WASH. POST (Nov. 3, 2023, 5:45 PM), <https://www.washingtonpost.com/business/2021/11/03/maine-right-to-food/> [<https://perma.cc/6U94-9CQF>].

food for themselves without unnecessary state interference.³²⁷ In 2023, lawmakers considered a bill to recognize marijuana as food under the constitutional amendment.³²⁸ Its chief proponent, the mother of a child with severe epilepsy, claimed medical marijuana significantly reduced her child's symptoms.³²⁹ However, she said Maine's increasingly overregulated commercial market threatened their access to the marijuana.³³⁰ She wrote the legislative proposal to protect marijuana access under Maine's constitutional right to food and ensure her daughter and other people could grow marijuana at home.³³¹ Opponents included state marijuana regulator John Hudak, who directs Maine's Office of Cannabis Policy.³³² He claimed the bill would hurt licensed marijuana businesses.³³³

Maine lawmakers have not adopted the proposal to codify the interpretation that marijuana is a food under the state constitution's right to food.³³⁴ However, that does not preclude the possibility that Maine's constitutional right to food encompasses marijuana and other psychoactive plants or fungi. For instance, mushrooms are conventionally considered food, and defendants could raise the right to food as a defense against criminal prosecution for growing, raising, harvesting, producing, or consuming psilocybin-producing mushrooms. Similarly, other psychoactive plants, such as kratom, might fall within the right if people do not breach its limits by trespassing, stealing, poaching, or otherwise abusing public lands, natural resources, or private property rights.

One legal challenge that invoked the right to food has already failed. Instead of involving psychoactive plants or fungi, the case involved Maine's Sunday hunting ban, which originated in 1840.³³⁵ Plaintiffs argued that the ban violated the new constitutional right to food.³³⁶ Maine's Supreme Judicial Court agreed with the plaintiffs that the amendment's use of the word "harvest" included hunting.³³⁷ However, the court pointed to limits of the right to food, specifically, the exception for poaching during the harvesting

327. *Id.*

328. S.P. 673, 131st Leg., 1st Spec. Sess. (Me. 2023).

329. Vivien Leigh, *Bill Would Recognize Pot, Hemp as Food Under the 'Right to Food' Amendment*, NEWS CTR. ME. (Apr. 27, 2023, 3:57 PM), <https://www.newscentermaine.com/article/news/health/bill-would-recognize-pot-hemp-as-food-under-right-to-food-amendment-politics/97-485bc174-fcaa-40c4-82f6-5299921e886d> [<https://perma.cc/HZ9B-RC8T>].

330. *Id.*

331. *See id.*

332. *Id.*

333. *See id.*

334. S.P. 673, 131st Leg., 1st Spec. Sess. (Me. 2023); *see* 128th Maine Legislature, Second Special Session, MAINE LEGISLATURE, https://legislature.maine.gov/legis/bills/display_paper.asp?paper=HP1060&PID=undefined&snum=128 [<https://perma.cc/87D5-L8P7>].

335. Martha F. Davis, *Maine High Court Upholds Centuries-Old Sunday Hunting Ban*, STATE CT. REP. (Apr. 10, 2024), <https://statecourtreport.org/our-work/analysis-opinion/maine-high-court-upholds-centuries-old-sunday-hunting-ban> [<https://perma.cc/6KDY-VAB4>].

336. *Id.*

337. *Id.*

of food.³³⁸ The court turned to modern dictionaries to define poaching, concluding it means “to take game or fish illegally” or by using “illegal methods.”³³⁹ Because hunting on Sundays was illegal under state law, it constituted poaching under the state constitution, and the Sunday hunting ban did not violate the right to food.³⁴⁰ In this manner, Maine’s Supreme Judicial Court created a work-around for the constitutional amendment’s lack of a limitation regarding violations of state law.³⁴¹

The illegality of growing certain psychoactive substances would likely also be a factor in any cases regarding a perceived right to grow marijuana, psilocybin mushrooms, or other psychoactive plants. However, because the term poaching typically applies to animals, for example, fish or game rather than plants or fungi, it is less likely that psychoactive plants or fungi could be considered poached. Accordingly, courts might have more difficulty using the illegal status of psychoactive plants or fungi to deny individuals the ability to harvest them under the constitutional right to food. Nevertheless, the right’s other limitations, such as the abuse of natural resources, could potentially exclude psychoactive plants that are at risk of becoming endangered, or where use would require exploiting the natural resources of Indigenous communities.

Some state drug laws have framed psilocybin mushrooms and related products as agricultural food products. However, in contrast to Maine’s constitutional amendment, which creates a negative right to grow one’s own food, those laws imposed complex regulations on psilocybin mushrooms. For instance, the Oregon Psilocybin Services Act³⁴² requires licensure of psilocybin extract manufacturers as food establishments by the state Department of Agriculture.³⁴³ In this case, defining psilocybin mushrooms as food products has little or no effect on individuals’ right to access those products.

Though Maine’s constitutional right to food remains new, it opens the door to a new type of state drug law, which classifies drug-producing plants and fungi as foods to which people have inalienable rights.

CONCLUSION

Since the early twentieth century, states have enacted drug laws that often diverge from federal drug legislation. This Essay categorized thirteen types of state drug laws into a typology, which can be subdivided into three general categories, including drug laws that regulate the independent use of drugs, laws that regulate the supervised use of drugs, and laws that govern planning or procedural aspects of drug policy. One can identify trends and phases in the history of state drug legislation. For instance, during the first two-thirds

338. *Id.*

339. *Id.*

340. *Id.*

341. *See id.*

342. OR. REV. STAT. ANN. § 475A (West 2024).

343. OR. ADMIN. R. 333-333-2060 (2023).

of the twentieth century, the general trend was for states to criminalize drugs, including marijuana and psychedelics, often before the federal government took similar action. In the latter third of the twentieth century, many states started decriminalizing marijuana, and in the early twenty-first century, marijuana decriminalization was supplemented—and to some extent replaced—by marijuana legalization. In the third decade of the twenty-first century, states experimented with decriminalizing psychedelics and other drugs, including heroin, cocaine, and methamphetamine. However, that trend may be starting to slow, and even reverse, following a political and legal backlash in Oregon. Meanwhile, other states are making progress with laws that regulate social drug consumption lounges and safe drug consumption sites. However, policy analysis laws that establish working groups, and clinical research laws that support state funded clinical trials, have increased in popularity to become the fastest growing and most prevalent types of state drug legislation.