



Bringing Psychedelics Under Control

Legal Regulation as a Pathway to Safety and Wider Access

Scott Bernstein

Introduction

North America is in crisis. Each day, around 260 people die from drug overdose, totaling over 300,000 lives lost over the past three years¹. These deaths are the product of unsafe conditions imposed by a lack of regulation and oversight in the illegal drug market, a fact exacerbated by years of overprescribing of opioids to consumers who now turn to alternate sources. As a result of punitive drug policies that leave non-medical substance use unregulated, there is a thriving illegal drug market where the quality, content and potency of products are largely unknown to consumers, but often are filling in a very present demand for access. With psychedelics, a complex informal system of underground practice and access has been instrumental in advancing the learning and acceptance of psychedelics for growth, spirituality, and wellness, while presenting some infrequent but important challenges around ethics and safety that can emerge because of the unregulated nature of the work.

Within the whole spectrum of substances, overdose deaths are only one facet demonstrating the failure of current policies. Drug law enforcement and supply reduction-focused policies—often referred to as “prohibition”—contribute to the proliferation of organized crime, money laundering, violence, infectious disease, stigma, and other well-documented social and individual harms². It is widely acknowledged that these policies perpetuate legacies of racism and classism that emerged over a century ago³.

An alternative approach is the legal regulation of drugs, an idea that seems novel at the outset, but is based on well-established tools employed by the regulatory state to minimize risk to consumers in activities ranging from driving to skydiving to alcohol.

¹ Current Data. Song For Charlie. (n.d.). Retrieved August 23, 2022, from https://www.song-forcharlie.org/data?gclid=Cj0KCQjwxlOXBhCrARIsAL1QFCYPzQAFXR-oEA5ynPdC-88GAqFZI9c-7LfgwGhviGVRvbDL5IMsWLcaAlcMEALw_wcB

² Boyd, S., Carter, C. I., & MacPherson, D. (2016). *More Harm Than Good: Drug Policy in Canada*. Black Point, N.S.: Fernwood Publishing.

³ Boyd, S., MacPherson, D., & Vancouver Area Network of Drug Users. (2018). The Harms of Drug Prohibition: Ongoing Resistance in Vancouver's Downtown Eastside. *BC Studies*, 200, 87–96.

As clinical trials for psychedelic substances proliferate, the practicality of envisioning what legal regulation would look like is no longer an exercise of speculating about an uncertain future. Although psychedelic possession, production and distribution remain under the umbrella of prohibition in most places, several jurisdictions globally have to date decriminalized one or more psychedelic substances, including Denver, Colorado; Santa Cruz and Oakland, California; Washington D.C.; Somerville and Cambridge, Massachusetts; Seattle, Washington; Ann Arbor, Michigan; Detroit, Michigan⁴; Oregon; and British Columbia, Canada⁵. In 2020, the state of Oregon passed Measure 109, which started on a path to legally regulated psilocybin for mental health treatment in supervised settings that will be in place around mid-2023⁶, and about 12 states have similar proposals in development that would decriminalize or legally regulate psychedelics. Additionally, both the United States and Canada have mechanisms for legally obtaining some psychedelic substances before completion of ongoing clinical trials for serious illness. Decriminalization is different from legal regulation, however. Broadly speaking, the former removes criminal penalties for certain activities (e.g., possession of substances) while the latter establishes a comprehensive system controlling all aspects of the market – from production to consumption – through a set of regulatory rules or “levers.”

In 2017, I began work on the Regulation Project, a collaboration for fostering discussions about the mechanics, benefits, and risks of legally regulated drugs⁷. This project was intended to move the discussion beyond whether drugs should be legalized and towards *how* a government might structure legalization. It is now a collaborative effort among 11 organizations from three countries. The organizations involved advocate for an approach to legal regulation that supports not only public health and human rights goals, but social justice as well.

Regulation of any activity or thing presents opportunities for governments to shape the regulatory environment through various levers, such as rules or requirements that shape the market and consumer experience. With mind-altering substances (i.e., “drugs”) there have been over a hundred such levers identified⁸. For simplicity, we can focus on five drug-specific regulatory choices that directly affect (either mitigate or exacerbate) the risks of taking drugs, and would shape the “front end” or consumer experience of a legally regulated market: (1) who has access to the drug; (2) what must a person do to access the drug; (3) where can a person obtain the drug; (4) what quantity of the drug could someone get; and (5) where can the drug be consumed. For our work with public engagement on legal regulation, these five were modified into a collaborative, role playing game format to further discussion about what people would like to see in a regulated market⁹. For each of these questions, we

presented a spectrum of choices from minimal or no restrictions to tight restrictions and presented how each would affect public health or the human rights of drug consumers. Here is a brief overview of the spectrum of choices within each area.

Who has access to the drug?

The spectrum on this issue includes open access—to anyone of legal age—on the one end and medicalized access—to someone with a diagnosed condition—on the other. Open access helps move the largest segment of people into the legal market and mirrors regulations for alcohol, tobacco, and non-medical cannabis. However, the relative lack of barriers risks increasing demand. For the majority of people who consume drugs for non-medical reasons, a medicalized system remains out of reach, and they could turn to the unregulated market.

What must a person do to access the drug?

On the most lenient end, there may be no requirements other than proof of legal age. Beyond that, a regulated system may require registration in a program; training and licensing in safer use, alternatives, available mental health and dependence resources, and/or risks of use; or other strategies aimed at educating and monitoring substance use. Training programs could train “facilitators” who supervise drug consumption and intervene if necessary. A system of registration and/or licensing raises issues of privacy and security of personal information, creating potential barriers.

⁴ *Psychedelics Legalization & Decriminalization tracker*. Psychedelic Alpha. (n.d.). Retrieved August 23, 2022, from <https://psychedelicalpha.com/data/psychedelic-laws>

⁵ Addictions, M. H. and. (2022, May 31). B.C. receives exemption to decriminalize possession of some illegal drugs for personal use. Retrieved August 23, 2022, from <https://news.gov.bc.ca/releases/2022MMHA0029-000850>

⁶ Feuer, W. (2020, November 6). Oregon becomes first state to legalize magic mushrooms as more states ease drug laws in ‘psychedelic renaissance’. CNBC. Retrieved August 23, 2022, from <https://www.cnbc.com/2020/11/04/oregon-becomes-first-state-to-legalize-magic-mushrooms-as-more-states-ease-drug-laws.html>.

⁷ Bernstein, Scott & Amirkhani, Emily & Werb, Dan & MacPherson, Donald. (2020). The regulation project: Tools for engaging the public in the legal regulation of drugs. International Journal of Drug Policy. 86. 102949. 10.1016/j.drugpo.2020.102949.

⁸ Emerson, B. & Haden, Mark. (2016). Public Health and the Harm Reduction Approach to Illegal Psychoactive Substances. 10.1016/B978-0-12-803678-5.00510-5.

⁹ *A new vision for drug policy—home*. Regulation Project. (2022, July 28). Retrieved August 23, 2022, from <https://regulationproject.org/>

Scott Bernstein is a Vancouver-based lawyer who served as the Executive Director of MAPS Canada from 2021-2022 and conceived of the Canadian Psychedelic Summit, a three-year project to create a vision for psychedelics in Canada based on equity, fairness, and inclusion. Prior to that, Scott worked as Director of Policy with Canadian Drug Policy Coalition, where he led the organization's work on decriminalization and the legal regulation of drugs, including founding the Regulation Project. Through his own legal practice and with Vancouver-based Pivot Legal Society, Scott litigated cases advancing human rights of people who use drugs, including fighting for access to prescription heroin treatment, and defending Insite, North America's first sanctioned injection site at all levels of court. Previously, Scott was a program officer with the Global Drug Policy Program of Open Society Foundations in New York, where he supported a global collection of organizations advocating for drug policy reform at the United Nations and a nascent drug policy movement in Africa. Scott has an M.Sc. from the University of Wisconsin and a J.D. from the University of British Columbia.

Where can a person obtain the drug?

Substances with minimal risks may be distributed in restaurants or cafés, in corner stores, or on pharmacy shelves. Substances with more documented potential risks might be obtained through pharmacists, supervised consumption sites, or secure 24/7 dispensing machines requiring ID (biometric or otherwise). This would follow registration in a program or with a physician's oversight. Models such as compassion clubs, where consumers cooperatively manage distribution of supply, should also be considered. Psychedelics might be restricted to use within a therapist's office or in a sanctioned ceremonial setting. These choices can balance autonomy of the consumer with the public health need to mandate or encourage contact with health professionals before or during drug consumption.

What quantity of the drug could someone get?

Public health strategies suggest reasonable limits should be placed on how much of a riskier substance can be obtained in order to prevent diversion to unauthorized users and reduce the potential for excessive use¹⁰ (Rolles & McClure, 2009). Since drug consumption (like most products) is governed by supply and demand dynamics, it is reasonable to expect any unmet need will be addressed through the unregulated market. This will lead to increased risk to consumers. However, over a century of prohibitionary policies have taught us that the appropriate response is not criminalization of those who utilize the unregulated market, but rather better adjustments of the regulations. Limits—tighter or looser—can help to attract consumers to less risky substances, for example.

Where can the drug be consumed?

On the most lenient end of the spectrum, the answer is anywhere that is allowed by law and local ordinances. Given a choice, people choose to consume drugs in a variety of environments. With alcohol, tobacco and cannabis, there are restrictions prohibiting public consumption which would likely apply to other substances, including psychedelics, in a regulated system.

To increase control and safety of consumption, the regulated system may require a licensed facilitator be present, consumption be witnessed at a pharmacy or distribution centre, or that drugs be consumed at a designated consumption venue. These could include medically-supervised sites or merely a licensed venue (as a bar is for alcohol). As with other controls, increased monitoring correlates with increased barriers that could dissuade consumers from participating in the legal system.

Models under consideration

Most of the proposed models for accessing psychedelics that will be realized in the short-term lean towards a more restricted approach rather than a liberalized one. To date, no jurisdiction has considered a plan that would allow for access to legally produced psychedelics through a model similar to alcohol or tobacco. Following successful clinical trials, patients diagnosed with certain mental health issues will be able

¹⁰ Rolles, S., & McClure, C. (2009). After the war on drugs: blueprint for regulation. Bristol: Transform Drug Policy Foundation.

to access MDMA or psilocybin administered by licensed health care providers in traditional therapeutic settings. Dosage will be guided by clinical trial protocols that will be coded into the drug's governmental approval. Therapeutic sessions involving the drugs will most likely be bookended by preparation and integration sessions. Oregon's plan for legal regulation of psilocybin will allow clients to access psilocybin through licensed service centers staffed by licensed and trained facilitators without a diagnosis. Service centers will provide substances to be consumed onsite that are manufactured under strict control. Dosage limits are still under consideration, but there will likely be limits and guidelines to how much psilocybin is allowed, as well as mandated preparation and integration sessions. For access to psychedelics for religious purposes (e.g., ayahuasca) that have been sanctioned through court action, participation in these ceremonies is restricted to members of the religious group. Recently, Washington State had a bill come up for consideration that was not approved and will be resubmitted. It aimed to improve Oregon's Measure 109, and specifically would allow for at-home administration of psilocybin for those not physically able to travel to a facility¹¹, which would expand where psilocybin could be legally consumed under that plan.

Conclusion

With the legal regulation of psychedelics becoming an emerging reality, it's important to consider what our choices could and should be with respect to responsible adult use. The choices that governments make about how psychedelic substances are regulated will shape future access and use of psychedelics for medical and non-medical purposes. Arguably, it is long overdue to move beyond the question of whether we should legalize drugs, towards how we should legalize them. Unless we are able to decide on regulatory safeguards for production, distribution, and consumption of currently illegal drugs, we will continue to face challenges to public health, human rights, and safety that are inherent in an unregulated market. While initial proposals for legal regulation of psychedelics lean more towards the "control" aspect of the spectrum, these policy changes are still quite new. Over time, we can expect some loosening of access and regulation around psychedelics, particularly those with the lowest risk profile.

Sadly, for drug policy issues, perceptions and dialogue about drug use among the greater public continue to be dominated by morality, stigma, and myths about drugs. Turning the tide requires engagement with the public in a non-threatening and purposeful way: introducing people to other perspectives, unpacking the values and beliefs behind opinions, and asking them to compromise on solutions that they can tolerate.

¹¹ Frost, A. (2022, June 16). *Oregon psilocybin rules shape who can provide and access care*. opb. Retrieved August 23, 2022, from <https://www.opb.org/article/2022/06/09/oregon-psilocybin-rules-shape-who-can-provide-and-access-care>

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