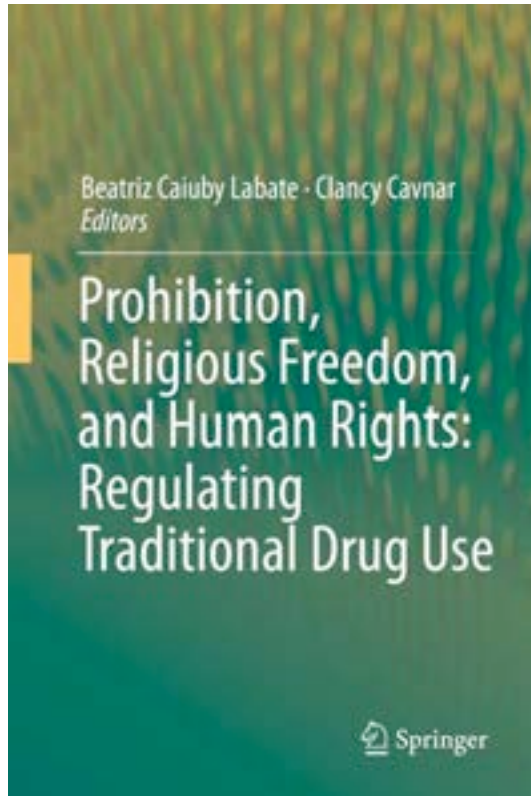


## Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use

Co-edited by Beatriz Labate and Clancy Cavnar



*Summary:* This book addresses the use and regulation of traditional drugs such as peyote, ayahuasca, coca leaf, cannabis, khat and *Salvia divinorum*. The uses of these substances can often be found at the intersection of diverse areas of life, including politics, medicine, shamanism, religion, aesthetics, knowledge transmission, socialization, and celebration. The collection analyzes how some of these psychoactive plants have been progressively incorporated and regulated in developed Western societies by both national legislation and by the United Nations Drug Conventions. It focuses mainly, but not only, on the debates in court cases around the world involving the claim of religious use and the legal definitions of “religion.” It further touches upon issues of human rights and cognitive liberty as they relate to the consumption of drugs. While this collection emphasizes certain uses of psychoactive substances in different cultures and historical periods, it is also useful for thinking about the consumption of drugs in general in contemporary societies. The cultural and informal controls discussed here represent alternatives to the current merely prohibitionist policies, which are linked to the spread of illicit and violent markets. By addressing the disputes involved in the regulation of traditional drug use, this volume reflects on notions such as origin, place, authenticity, and tradition, thereby relating drug policy to broader social science debates.

*Co-editors biographies:*

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

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

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## **1. Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws**

Luciana Boiteux, Luciana Peluzio Chernicharo and Camila Souza Alves

This article will address possible conflicts between the UN Drug Conventions and Human Rights treaties, specifically in regard to countries committing human rights violations in applying drug laws. Considering that Human Rights are at the core of the UN System and, together with Development and Peace and Security, represent one of the three pillars of the United Nations enshrined in the UN Charter, it is preposterous that drug policies applied by UN Members violate the individual and social rights provided for in many international instruments that are assumed to be binding to State's interventions. Nevertheless, there are many examples of human rights violations, such as the death penalty for drug offenses, inhumane treatment imposed on drug addicts, violations of individual guarantees in criminal

cases involving drugs, and the prohibition of substances such as the coca leaf, traditionally consumed in the Andes in South America, that will be examined in this chapter.

## **2. Coca in Debate: The Contradiction and Conflict between the UN Drug Conventions and the Real World**

Pien Metaal

The traditional use of coca leaf is surrounded by contradictions in terms of the control mechanisms of the international drug conventions. The 1961 Convention establishes the leaf as a controlled substance in the body of its articles and in its schedules of dangerous drugs, and the 1988 Convention establishes its traditional use as permitted “where historical evidence exists.” The use of the leaf is present in a variety of contexts around the world, but mainly in the Andean Amazon region. This chapter will tell the on-going story of the long road toward international acceptance of the tradition of chewing coca leaf, which is paved with confusion, contradictions, and cultural richness. Several countries in South America have a legal base that allows for traditional use; still the international drug treaties do not recognize these, and attempts for change are blamed to “threatened the integrity of the global drug control system.” This chapter tells the story of how the coca plant and its traditional uses have reached the status of public enemy.

## **3. Marijuana and Religious Freedom in the United States**

Mark R. Brown

Beginning with state laws that criminalized marijuana's use, and national laws that imposed taxes on transfers, the use of marijuana in the United States has long fallen under governmental control. In the 1960s and 1970s, regulation of marijuana intensified, with President Nixon going so far as to declare a "war on drugs." Unlike peyote, which likewise experienced a lengthy history of criminalization at the local level, marijuana has been unable to find shelter from American drug laws under the First Amendment to the United States Constitution. The First Amendment broadly protects the "free exercise" of religion. This protection has been extended to Native American's use of peyote, but courts and legislatures in the United States have steadfastly refused to extend similar protection to marijuana use--regardless of the group. Why this has happened is unclear, though the demonization of marijuana and the groups that prefer it as their sacramental drugs of choice are likely contributing factors.

## **4. Peyote, Identity, and Equal Protection in the United States**

Kevin Feeney

This chapter will seek to outline the parameters of the “trust responsibility” as it relates to protections for the religious use of peyote by American Indians, to explain the significance of this doctrine in the preservation of tribal entities and American Indian culture, and to examine its shortcomings in relation to the preservation of the cultural institution of peyotism. Since American Indians first received a federal exemption for religious use of peyote in 1965, many

groups seeking legal protection for the religious use of psychoactive substances have sought to capitalize on this exemption in the form of an Equal Protection challenge, arguing that their religious use of psychoactive drugs is parallel to the American Indian use of peyote. Challenges to the exemption are largely premised on the notion that “special” treatment of American Indians is based upon a fundamentally racial categorization, and is therefore constitutionally intolerable. The trust responsibility, while frequently misconstrued, has been applied in ways that raise legitimate questions regarding the use of racial criteria by the federal government when dealing with Native peoples. The importance of the trust responsibility will be examined in light of these race based Equal Protection challenges, and further critical examination of this doctrine will be made to understand how race has played a role in regulating religious use of peyote, and also how the static views of culture and cultural identity inherent in the racial application of this doctrine may ultimately threaten, rather than preserve, traditional American Indian practices such as peyotism.

## **5. From the Sacrilegious to the Sacramental: A Global Review of Rastafari Cannabis Case Law**

Melissa Bone

This chapter will explore the innate legal tensions present between the right to religious freedom and global prohibitionist drug policies in relation to Rastafari cannabis use. While many jurisdictions have recognized Rastafarianism as a religion, and have acknowledged the conceptual flexibility inherent within religious manifestations, the case law largely fails to reconcile the present tensions in favor of religious freedom. Yet, although the bulk of these cases have been determined in favor of upholding prohibitionist drug policies, the often-habitual majoritarian reasoning behind such decisions is perhaps less evident in some jurisdictions. Some judiciaries have recently given more weight to the religious rights of the Rastafari than others. This chapter will chart the historic progression of the extent to which Rastafarianism and its associated herbal sacrament is now recognized as a religion/religious manifestation, and is protected. It will also compare the diverse judicial reasoning of five jurisdictions confronted with this conflict, and will ultimately consider whether the courts are becoming more progressive in upholding the religious rights of the Rastafari to consume cannabis.

## **6. The Expansion of Brazilian Ayahuasca Religions: Law, Culture and Locality**

Kevin Feeney and Beatriz Caiuby Labate

This chapter will explore globalization, diversity, and issues of social justice by examining the global expansion of ayahuasca religions through a lens of transnationalism, and against the backdrop of international drug control. Politics have often equated cultural groups with particular national boundaries, and, proceeding from this premise, have made legal and cultural exceptions for groups that were seen as specifically situated geographically. A perfect illustration of this is in a provision of article 32 of the 1971 United Nations Convention on Psychotropic Substances, which permits signatories to make reservations for “plants growing wild which contain psychotropic substances...which are traditionally used by certain small, clearly determined groups in magical or religious rites.” The provision reflects a view that exemptions for psychoactive drug use are acceptable if they are confined to a specific locality, and to a specific culture group. The ayahuasca religions pose a particular challenge to this line of thinking. The Brazilian-based religions of Santo Daime and

the União do Vegetal (UDV) have established a global presence with international adherents, followers who are not constrained by national boundaries, and not identifiable as members of any particular ethnic categories. As these religions expand outside of their traditional regional and cultural contexts, they come to be viewed through the Western framework of the “War on Drugs,” and become classified as criminal enterprises. The expansion of the ayahuasca traditions will be used as a foundation for examining issues of international human rights law and protections for religious freedom within the current prohibitionist system and global milieu of cultural transnationalism.

## **7. Framing the Chew: Narratives of Development, Drugs, and Danger with Regard to Khat (*Catha Edulis*)**

Axel Klein

Khat has become increasingly subject to legal regulation in European and North American countries, even though there is very little consumption among mainstream populations. The regulation of khat has been introduced for the “protection” of migrant populations, and is sometimes even demanded by anti-khat campaigners. The unintended consequence of these bans, once introduced, is that migrant populations are targeted by law enforcement. This has not helped these groups’ social integration nor promoted public health. What has not been considered in the discussion is the effect on khat farmers. Khat has been an engine of development for parts of Kenya and Ethiopia. It has also provided an opportunity for capital accumulation in Somaliland. It is a major source of revenue across the region. The positions of all stakeholders must be considered when defining the regulatory context, as well as the dimension of community cohesion and the potential for development.

## **8. *Salvia divinorum*, Hallucinogens, and the Determination of Medical Utility**

O. Hayden Griffin, III

In 1970, The United States government enacted the Controlled Substances Act (CSA). The CSA usurped all existing federal laws regulating controlled substances and established three primary criteria for evaluating all drugs: medical utility, potential for abuse, and safety of the substance. Since the passage of the CSA, the federal government has generally taken the lead when regulating drugs; however, a psychoactive plant, *Salvia divinorum*, has illustrated some of the problems when evaluating hallucinogenic drugs under the current regulation scheme. Beginning in the late 1990s, *Salvia divinorum* began to appear for sale on the Internet and in “head shops,” often marketed as a “legal high.” The availability of a “legal high” has concerned many state lawmakers, but failed to gain the attention of federal drug regulators. To date, nearly half of the individual United States have chosen to regulate *Salvia divinorum*. One of the reasons for the regulation is that hallucinogens are not typically considered to have medical utility and have often been deemed to have no recognized medical utility. Furthermore, hallucinogens tend to be niche drugs with no real potential for abuse or addiction. As recently witnessed with the case of *Salvia divinorum*, the plant may not have a recognized medical utility, but the plant does not seem to present any real danger either. These circumstances can be problematic, since the rush to regulate a “legal high” seems to take precedence over determining if *Salvia divinorum* has medical utility.

## **9. “Legalize Spiritual Discovery”: The Trials of Dr. Timothy Leary**

Devin R. Lander

Beginning with his arrest for possession of marijuana December 24, 1965, Dr. Timothy Leary became embroiled in a very public series of court cases that sought initially to utilize the Free Exercise Clause of the United States Constitution to challenge established United States drug laws regarding marijuana. Though Leary's attempts at using the Free Exercise Clause were unsuccessful, his case was eventually heard by the United States Supreme Court, who, in 1969, found major elements of the 1937 Marihuana Tax Law unconstitutional and overturned Leary's conviction. This chapter will trace evolution of Leary's defense argument from one based on religious freedom to one based on due process and the Fifth Amendment protection against self-incrimination. Leary's initial freedom of religion defense was based on the success of the Native American Church's 1964 California State Supreme Court ruling that protected that group's sacramental use of peyote within its religious ceremonies. This chapter will also describe how the success of Native American Church case led Leary to popularize and speak out in favor of small groups of psychedelic users establishing their own "official" religions. Leary followed his own advice by creating the League for Spiritual Discovery in 1966 and was seen as a religious leader by the founder of the Neo-American Church (another psychedelic quasi-religion) as well. Seeing themselves as a persecuted people under legal attack for their spiritual and experimental practices, both the Neo-American Church and the League for Spiritual Discovery sought to emulate the Native American Church and establish legal protections for the use of illegal substances.

## **10. Cannabis and the Psychedelics: Reviewing the UN Drug Conventions**

Amanda Feilding

The current international prohibitionist approach to the regulation of psychoactive drugs causes serious harms. It creates an illicit market that is responsible for conflict and corruption; denies medication to the world's poorest; and impedes scientific research into the potential benefits of psychoactive substances. Moreover, it undermines the personal and societal benefit of allowing people to do things that they value, so long as they do not harm others. At the heart of the problem lie the three UN Drug Conventions, which mandate a one-size-fits-all criminalizing approach on all parties. The work of the Beckley Foundation's Global Cannabis Commission, and a new Beckley Foundation Report on reforming the UN Drug Conventions, spell out how countries—acting alone or, better, in concert with other like-minded nations—could work within the framework of international law in order to implement drug policies that better meet their own special needs and circumstances. Recent initiatives for reform, emanating mostly from the drug-producing and transit countries of Latin America, provide encouraging signs that progress is within our grasp.

## **11. Beyond Religious Freedom: Psychedelics and Cognitive Liberty**

Charlotte Walsh

This chapter will examine the blurred boundaries between the sacred and the secular when it comes to psychedelic experiences, and the inevitable ensuing arbitrariness involved in protecting some such rituals and not others. It will put forth the argument that there is a need to move beyond simply seeking exemptions from drug prohibition in the name of religious freedom; rather, there should be a

broader right to ingest psychedelics as an aspect of cognitive liberty. Cognitive liberty is the right to control one's own consciousness. It is a concept that equates to freedom of thought, a right protected internationally by the Universal Declaration of Human Rights and enforceable in Europe through Article 9 of the European Convention of Human Rights.

## **12. Fear and Loathing in Drugs Policy: Risk, Rights, and Approaches to Drug Policy and Practice**

Ross Coomber and Nigel South

The proliferation of controls over drugs and drug users in countries around the world over the last century has in part been a result of poor understanding of the substances themselves and/or those that use them. A common thread running through the development of such controls is recourse to images and beliefs about the substances that are exaggerated and often false. Many of these beliefs—despite a contrary evidence base—continue to prevail in discourses around drugs. Fundamental to this is a continued lack of understanding of how risks and harms manifest and a tendency to generalize such experiences as an inevitable outcome of drug use. Drugs, their use, and the outcomes of that use, are not pharmacologically determined, but are situated and contingent. The concept of drug, set and setting (and process) enables us to better understand drug effects and how they can produce different, including non-problem, outcomes, be controlled by both individuals and groups, and have outcomes for societies that are positive as well as negative. Understanding “how” drugs are used and the extent to which they are utilized provides better insight into the real nature of drug use in any one context and counters simple ideas about generic, simple, and inevitable (destructive) outcomes. Failure to meaningfully contextualize risks has resulted in abuses of individual, social, cultural rights and traditions and ecological damage.

### **Authors Biographies**

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

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

**Melissa Bone** (LLB [Hons]; MSc; PhD [pending]) is currently a PhD student of law at the University of Manchester. Her thesis investigates whether there is a human right to consume legally restricted substances, how the UN drug conventions and provisions contained within the Misuse of Drugs Act 1971 could conflict with these rights, and how such conflicts could

be resolved. She has helped found a drugs research group for academics within the law department at the University of Manchester and facilitates the group's collaborations. Her research interests include exploring the interplay between drug use and human rights and examining the effectiveness of drug treatment programs, as she worked with Leicestershire Probation's Criminal Justice Drugs team throughout her master's program.

**Mark R. Brown** was born in Louisville, Kentucky and graduated from the University of Louisville School of Law in 1984. He earned a B.S. from the University of Dayton in 1981. Following graduation from the University of Louisville, Professor Brown earned his LL.M. at the University of Illinois in 1988. He clerked for the Honorable Harry W. Wellford, Judge of the United States Court of Appeals for the Sixth Circuit, from 1984 to 1985, and also served as a judicial fellow at the Supreme Court of the United States in the October Term of 1993 under the Chief Justice of the United States. Professor Brown currently holds the Newton D. Baker/Baker & Hostetler Chair at Capital University. He has also taught at Stetson University, University of Illinois, Ohio State University, and Florida State University.

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

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

**David T. Courtwright** received a B.A. in English from the University of Kansas and a Ph.D. in history from Rice University. He is Presidential Professor in the department of history at the University of North Florida, where he offers courses in political, medical, social, and legal history. He has authored books on drug use and drug policy in American and world history; the special problems of frontier environments; and, most recently, the culture-war clashes that have roiled American politics since the 1960s. He is currently researching a book about capitalism, pleasure, and addiction in the modern world.

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



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

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

**Axel Klein** is a social anthropologist and has worked for both the charity sector (ISSD, DrugScope) and inter-governmental agencies (EC, UNODC) in different national and international settings. He has conducted fieldwork and evaluations in over 20 countries, including Afghanistan, China, Jamaica, and Nigeria. His interests include problematic and recreational substance use, the culture of consumption, drug policy, and criminal justice reform. He is currently developing a new model for the study of drug policy using systems analysis. This is an attempt to explain the continuous expansion of the drug control nexus in spite of perverse consequences and poor outcome delivery. The approach seeks to identify the role of vested interests and the significance of cross-domain referencing. In addition to this, for the past five years, Dr. Kline has been looking at the production, distribution, and consumption of khat (*Catha edulis*), the latest psychoactive substance to become a globalized commodity. *Cannabis* production in the Caribbean, and the convergence/divergence with cocaine trafficking are also interests of Dr. Klein.

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

**Pien Metaal** has been a member of the staff of the NGO Transnational Institute (TNI) since 2002. TNI was established in 1974 in Amsterdam as an international network of scholar-activists committed to critical analyses of global problems, such as drug policies, environmental issues, military intervention, fair trade, and financial crises. Pien has studied

political science, and in 1997 received a master's degree in international relations at the University of Amsterdam. She is an expert in the political economy of the drug market in Peru, Bolivia, and Colombia, and other parts of Latin America, focusing especially on the coca market. She is co-author, with Anthony Henman, of “Coca Myths” (TNI Series Drugs & Conflict Debate papers no. 17, 2009), and, with Martim Jelsma and Ricardo Soberon, of “Coca Yes, Cocaine No? Legal Options for the Coca Leaf” (TNI Series Drugs & Conflict Debate Papers no. 13, 2006), among other publications.

**Nigel South** BA MA (Essex) PhD (CNA) is professor of sociology at the University of Essex. He has taught at various universities in London and New York and, between 1981 and 1990, worked as a research sociologist at the Institute for the Study of Drug Dependence (now Drugscope) in London. Research interests include: drug use and related health and crime issues; environmental harms and crimes; and crime, inequalities, and citizenship.

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