

**Psychedelics and Cognitive Liberty: reimagining drug policy through the prism
of human rights**

Charlotte Walsh

School of Law, University of Leicester

University Road

LEICESTER

LE1 7RH

charlotte.walsh@le.ac.uk

Psychedelics and Cognitive Liberty: reimagining drug policy through the prism of human rights

Keywords: psychedelics; cognitive liberty; human rights; drug policy

Abstract

This paper reimagines drug policy – specifically psychedelic drug policy – through the prism of human rights. Challenges to the incumbent prohibitionist paradigm that have been brought from this perspective to date - namely by calling for exemptions from criminalisation on therapeutic or religious grounds - are considered, before the assertion is made that there is a need to go beyond such reified constructs, calling for an end to psychedelic drug prohibitions on the basis of the more fundamental right to cognitive liberty. This central concept is explicated, asserted as being a crucial component of freedom of thought, as enshrined within Article 9 of the European Convention on Human Rights (ECHR). It is argued that the right to cognitive liberty is routinely breached by the existence of the system of drug prohibition in the United Kingdom (UK), as encoded within the Misuse of Drugs Act 1971 (MDA). On this basis, it is proposed that Article 9 could be wielded to challenge the prohibitive system in the courts. This legal argument is supported by a parallel and entwined argument grounded in the political philosophy of classical liberalism: namely, that the state should only deploy the criminal law where an individual's actions demonstrably run a high risk of causing harm to others.

Beyond the courts, it is recommended that this liberal, rights-based approach, also inform psychedelic drug policy activism, moving past the current predominant focus on harm reduction, towards a prioritization of benefit maximization. How this might translate in to a different regulatory model for psychedelic drugs, a third way, distinct from the traditional criminal and medical systems of control, is tentatively considered. However, given the dominant political climate in the UK - with its move away from rights and towards a more authoritarian drug policy - the possibility that it is only through underground movements that cognitive liberty will be assured in the foreseeable future is contemplated.

Psychedelics and Cognitive Liberty: reimagining drug policy through the prism of human rights

“Psychedelic drugs” is an (admittedly imprecise) overarching term used for a range of substances, be they plant-based or synthetic, which alter consciousness when ingested: “[t]he subjective effects of psychedelics include (but are not limited to) unconstrained, hyperassociative cognition, distorted sensory perception (including synaesthesia and visions of dynamic geometric patterns) and alterations in one’s sense of self, time and place” (Tagliazucchi *et al*, 2014). Human beings take psychedelics – and are known to have done so over wide spans of historical time and geographical space – for a multitudinous medley of reasons (Bakalar and Grinspoon, 1997). Many psychedelics are criminalised, both through the international system of drug prohibition and, on the domestic front in the UK, through the Misuse of Drugs Act 1971.

This paper argues for the decriminalisation of psychedelic drugs using human rights based instruments, most notably the ECHR, more specifically the right to freedom of thought, to cognitive liberty, contained therein. The mechanism through which this might occur is that the courts in the UK are under an obligation to read legislation in such a way that it is compatible with human rights obligations under the ECHR or, where this is not possible, to make a declaration of incompatibility, which will usually result in legislative change (Human Rights Act 1998). The legal arguments put forward along these parameters are supported by - and entwined with - claims that are rooted in the political philosophy of classic liberalism, which itself underpins the ECHR. It is suggested that these lines of reasoning should inform not only defences

raised in court, but also the discourse of drug policy activism more broadly.

Whilst the arguments made herein are by no means of necessity restricted to psychedelics, this is where the author's research interest lies. To clarify, the author is against drug prohibition *in toto*, though that is not the focus of this paper. However, many of the assertions articulated within draw their strength from the premise that the harms of taking certain drugs can be scientifically proven to be minimal, the benefits potentially great: a contention that pertains far more readily to the psychedelics than to other genres of prohibited substance, as shall hopefully be demonstrated. The edifice of prohibition will not crumble all at once, but rather incrementally, piece by piece, and the pleas presented below are merely one suggested inroad.

The Story So Far

It is perhaps because of their particular attributes that, on those rare occasions where drug users subjected to criminal prosecution have sought to challenge the prohibitionist regime in court, this has tended to involve psychedelics. Such defences have been rooted in the rights-based framework as described above: namely, the argument that users' human rights, as purportedly protected by the ECHR, are infringed by the drug prohibitions contained within the MDA, and that the former should take precedence over the latter. These contentions have been almost exclusively constructed around pleas for either therapeutic or religious exemption from prohibition, both because these categorisations genuinely describe defendants' motivations for taking psychedelics, and because there is anticipated protective power attached to them (Walsh, 2010).

In the case of *R v Quayle* [2005] 1 WLR 3642, for instance, the Court of Appeal heard a number of challenges to the prohibition of cannabis on therapeutic grounds (Bone & Seddon, 2015). Whilst cannabis has been used as a healing plant in a variety of contexts for millennia (Holland, 2010) – and its medicinal qualities are fast becoming verified by modern science (Armentano, 2014) – it remains a controlled substance in its natural form in the UK; however, a synthetic version of cannabis, Sativex, was developed and is licensed in this country (<http://www.gwpharm.com/Sativex.aspx>), and medicinal use of cannabis is authorized in a growing number of States internationally (Sznitman & Zolotov, 2015). The appellants in *Quayle* argued, *inter alia*, that the prohibitions on cannabis breached their right to privacy, as protected by Article 8 of the ECHR, through interfering with their ability to self-medicate - or to assist others with self-medicating - with the only substance that brought them palliative relief from a number of different painful conditions.

The Court of Appeal did not make it clear whether they agreed that Article 8 was engaged, though they did point to the potentially legitimate qualifiers in Article 8(2): namely, that this right can be interfered with “in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. However, the court stopped short of ruling upon whether any – and if so which – of these might apply here, claiming that they lacked the detailed information necessitated in order to make such a decision:

“The court’s decision would involve an evaluation of the medical and scientific evidence ... a greater understanding of the nature and progress of the tests of cannabis

which have taken and are taking place, and a recognition that, in certain matters of social, medical and legislative policy, the elected Government of the day and Parliament are entitled to form overall policy views about what is best not just for particular individuals, but for the country as a whole, in relation to which the courts should be cautious before disagreeing. On the material before us, so far as it is appropriate for us to express any view, we would not feel justified in concluding that the present legislative policy and scheme conflict with the Convention” (3680-3681).

Thus, importantly, any real deliberation on this issue seems to have been sidestepped, as opposed to definitively decided; nonetheless, the convictions of the appellants were upheld. Ironically, the balancing exercise outlined above is exactly what the courts should have carried out in determining whether or not to apply the qualifiers; instead, an overly cautious approach was taken. If this was considered unavoidable due to a lack of necessary evidence, then any binding decision on this issue should have been viewed as deferred until a more suitable case arose; however, this is not what has happened, with the partial analysis in *Quayle* instead being unjustly read in subsequent cases - such as *Altham* [2006] EWCA Crim 7 - as having closed such arguments down.

With regards to pleas for religious exemptions from prohibition, the leading authority is *Taylor* [2001] EWCA Crim 2263, which concerned Rastafarian cannabis usage. Religious freedom is protected by Article 9 of the ECHR, which reads: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom ... to manifest his religion or belief, in worship, teaching, practice and observance”. Through such a lens, prohibition of a plant that doubles as a sacrament can be viewed

as religious persecution. Taylor was arrested entering a Rastafarian temple with around 90 grams of cannabis. He admitted that he was intending to supply this to others, for religious purposes, as part of a regular act of worship: smoking cannabis whilst studying the bible is customary for some Rastafarians, who believe this pursuit brings them closer to Jah. At trial, the prosecution conceded that Rastafarianism is a religion and did not contest that Taylor was supplying cannabis for religious purposes: thus, Article 9 was clearly engaged.

However, whilst the protection of freedom of religion is absolute, there are permissible qualifiers under Article 9(2) that apply to the freedom to *manifest* one's religion, "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". Accordingly, the court had to answer the questions of whether there was a pressing social need to interfere with Taylor's rights in order to protect the public on one of these grounds, and, further, whether the means adopted constituted a proportionate response.

The view was taken that the fact that cannabis is scheduled under the MDA - and that this Act, in turn, is perceived as being the domestic fulfilment of the UK's international obligations under the various United Nations Drug Conventions that create the system of global prohibition – constituted powerful evidence of a cross-national consensus that an unqualified ban on cannabis is necessary to combat the dangers arising from this psychoactive plant. Detrimentally, by accepting the very existence of the Drug Conventions as determinative of these issues, the court made little use of the medical, sociological or religious material available, either on cannabis or Rastafarianism. This leaves Taylor - and Rastafarians in general - in the

unenviable position of having to choose between the expectations of their religion and those of the prohibitionist regime (Gibson, 2010).

This (over) reliance on the Conventions was echoed in the Court of Appeal when refusing leave for Taylor to appeal against his conviction. Here, the judges distinguished between legislation prohibiting conduct *because* it relates to or is motivated by religious belief, and legislation which is of more general application but prohibits, for other reasons, conduct that happens to be encouraged or required by religious beliefs, such as smoking cannabis; further, the question of whether defences should be created for religious usage was seen as being a matter properly the province of the legislature, not the judiciary. It is submitted that this is an overly restrictive approach: it is the *effect* of the prohibitive legislation that matters – namely, its curtailment of sacramental cannabis use - rather than the intention behind it. Further, it is undeniably within the court's jurisdiction – indeed, it is a duty of the court - to read legislation so as to be compatible with the ECHR, thus leaving them scope to accord religious exemptions (Human Rights Act 1998).

Nonetheless, this questionable approach was replicated in the case of *Aziz* [2012] EWCA Crim 1063. Peter Aziz, a self-styled shaman, was prosecuted for supplying clients with ayahuasca - a psychedelic brew traditionally used in shamanic ceremonies in the Amazon (Labate & Cavnar, 2014a) – as the central sacrament in the rituals that he conducted with a view to advancing their enlightenment and personal development (Walsh, 2015). Again, Aziz argued that he should be exempted from the prohibitive drug laws on religious grounds, applying Article 9.

Whilst this raises the (disputed) question of whether or not shamanism constitutes a religion, the courts in the UK actually take an exceedingly liberal view as regards which belief systems fall within the purview of Article 9. As was made clear in the leading case of *R (Williamson & Others) v Secretary of State for Education and Employment* [2005] 2 AC: “The court is concerned to ensure an assertion of religious belief is made in good faith ... But, emphatically, it is not for the court to embark on an enquiry into the asserted belief and judge its ‘validity’ by some objective standard ... Each individual is at liberty to hold his [sic] own religious beliefs, however irrational or inconsistent they may seem to some, however surprising” (para 22). Indeed, it is not necessary for an individual’s beliefs to be even vaguely religious to attract the protections of Article 9: “The atheist, the agnostic, and the sceptic are as much entitled to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom” (para 24).

Nevertheless, such liberalism as regards what constitute ostensibly protected belief systems may become circumscribed when the question arises of whether or not Article 9 protects an individual’s right to *manifest* their beliefs, such as, for instance, by drinking ayahuasca. The trial judge in *Aziz* followed *Taylor*, ruling that the mere fact of ayahuasca’s inclusion in the MDA - itself a highly contestable conclusion (Walsh, 2015) - proved that it constituted a threat to public health, thereby engaging the qualifiers under Article 9(2): any actual evidence on the harms – or indeed the benefits - of ayahuasca was not forthcoming. Further, the judge categorically stated that if a religious group, however well established, adopts as part of its rituals an unlawful act, the fact that this is part of a religious ceremony does not provide it with legal authorization. These lines of reasoning were confirmed by the Court of Appeal

in refusing Aziz leave to appeal.

It is submitted that this approach is unacceptably circular, affording insufficient weight to human rights: if the view is taken that incursions into human rights are automatically justified by virtue of the fact that they are statutorily created, the powers within the Human Rights Act 1998 to deem legislation incompatible with the ECHR on human rights grounds lose all their teeth. Rather, a rigorous, evidence-based approach should have been deployed by the courts before deciding whether or not it was legitimate to interfere with Aziz's freedom to manifest his beliefs, with the burden of proof being firmly on the prosecution.

What is more, the approach taken in *Taylor* - and, consequently, *Aziz* - is legally unpersuasive, given that Article 36 of the Single Convention on Narcotic Drugs 1961 explicitly allows for exemption from enforcement of its provisions on constitutional grounds, clearly anticipating limitations such as those demarcated by Article 9 of the ECHR. It is also revelatory to consider that the Conventions are significantly deprioritized in parallel cases brought in the United States (US) – the supposed home of global prohibition - where a much more liberal approach to allowing for religious exemptions to prohibition has been adopted (*Gonzales v O Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 US 418). Further, it is notable that the recent legalization of cannabis for use *recreationally* in a number of US States demonstrates that the Drug Conventions are nowhere near as constrictive in practice as might previously have been assumed (Thoumi, 2014). Religious exceptions to prohibition have also been allowed in various European States, demonstrating that Article 9 has a much greater liberalizing potential than has been realized in the UK

(Labate & Cavnar, 2014b).

Cognitive Liberty in the Courtroom

Although the courts in the UK thus appear to have taken the view that rights-based challenges to drug prohibition go too far, there is an opposing contention that, rather, they do not go far enough. The ensuing arguments are grounded in political philosophy, most notably that of classic liberalism. Whilst this may at first seem like a diversion into a statement of preference - rather than a strictly legal argument - it will hopefully be demonstrated how the ECHR is built upon liberal foundations, thus according this position legal weight.

The rationales for seeking to extend exemptions beyond the therapeutic and/or religious are manifold. For one thing, these are artificial distinctions that easily melt in to one another: if one adopts a holistic understanding of health, for instance - so that it incorporates the notion of humans flourishing to their full potential, as against the simple absence of physical or mental illness - there is no bright line between using substances therapeutically, using them for religious or spiritual reasons, or, indeed, using them for pleasure (Labate & Cavnar, 2014c).

Religion is a similarly slippery concept to pin down: “To truly define what religion is, if such a thing is possible, would take an extremely high degree of abstraction that no human being could meet. It would require being able to take into account all religions and express this definition in a language that can truly express this meaning without excluding any others” (Possamai, pp 19-20). As witnessed, a more expansive view of religion will acknowledge alternative ideologies to those belief systems that are

steeped - to greater or lesser degrees - in dogma. Religion, in its broadest sense, encompasses one's understanding of the world, of one's part in it; psychedelics may - or may not - play a part in this existential quest. Accordingly, exemption from prohibition should also apply to those who have more loosely spiritual experiences on psychedelics, unbounded by any established framework. The need for this is intensified by the fact that an off-shoot of ingesting these molecules is often a questioning of orthodoxies: "The psychedelics are a red-hot, social/ethical issue precisely because they are de-conditioning agents. They will raise doubts in you if you are a Hassidic rabbi, a Marxist anthropologist, or an altar boy because their business is to dissolve belief systems" (McKenna, 1997, p. 61).

Logic drives this argument onwards. Taking psychedelics *may* catalyze a spiritual experience, an experience of unified transcendence; then again, it may not. These substances are perhaps best understood as non-specific amplifiers, with their effects largely determined by who is ingesting them, with what mindset, and in which environment (Grof, 2008). To a large extent the drug experience is socially constructed, heavily shaped by expectations: a wide range of substances – including alcohol, tobacco and opium - have at different times over the course of history been imbued by their users with mystical properties, so to rely on such assertions as setting psychedelics apart is perhaps tenuous (Jay, 2010). Furthermore, what would it even *mean* to describe an experience as categorically "non-spiritual"? There is no clear division between the "sacred" and the "profane": adding psychedelics into the mix can fudge the issue yet further, exposing the inadequacy of any such binary distinctions and, indeed, experiences with psychedelics often implicitly encourage an expansion of one's idea of the sacred.

Even were there such a thing as a categorically non-spiritual experience on psychedelics, does it follow that it should not be eligible for a human rights exemption, that it should be criminally prohibited? It may still be of equal significance to the individual concerned; or, it may not. Should this even matter? Whether or not it is believed that people should have to justify their psychedelic use *on any grounds* is bound up with one's view of the proper relationship between the individual and the State, with whether or not it is believed that the latter has any business concerning itself with which substances the former choose to ingest. Therapeutic and religious exemptions - whilst considerably better than nothing - perpetuate the notion that people should only be allowed to take psychedelics in constrained circumstances that their government has deemed acceptable. Thus, there is a strong argument for a need to move beyond simply seeking exemptions from drug prohibition in the name of reified constructs such as therapeutic usefulness or religious freedom: rather, there should be a broader right to take psychedelics as an aspect of cognitive liberty.

What exactly is meant by this term "cognitive liberty"? Cognitive liberty is in one sense synonymous with freedom of thought, yet more precisely evokes the idea that this should be read to acknowledge the fact that individuals should have the right to autonomous self-determination over their own brain chemistry, a right that is currently infringed by psychedelic drug prohibition. The importance of cognitive liberty is encapsulated by Richard Glenn Boire in his seminal paper "On Cognitive Liberty" (Boire, 1999/2000): "The right to control one's own consciousness is the quintessence of freedom. If freedom is to mean anything, it must mean that each

person has an inviolable right to think for him or herself. It must mean, at a minimum, that each person is free to direct one's own consciousness; one's own underlying mental processes, and one's beliefs, opinions, and worldview".

Given the chemical nature of human thought processes, controlling the chemicals that can lawfully be ingested - prohibiting psychedelic drugs - can be seen as an interference with cognitive liberty, with these substances being the necessary precursors to particular styles of thinking. Prohibition can thus be viewed as a form of censorship, a series of psychopharmacological filters, curtailing the mental landscapes available. Professor Thomas Roberts is one of the early champions of this notion, and in his foundational essay "Academic and Religious Freedom in the Study of the Mind", he clarifies that: "Freedom of thought includes freedom of both the contents of thinking and the processes of thinking. Self-control over one's thoughts cannot occur if one does not have freedom to select both the specific ideas one finds truthful and the freedom to select the cognitive processes one uses when thinking with those ideas ... By needlessly restricting the accessibility of drug produced states, current laws limit what we can know about our minds and how we can use them" (Roberts, 1997, p. 141).

Cognitive liberty can be seen as a natural extension of the classic liberalism espoused by legal theorist John Stuart Mill (Mill, 1982). Mill was concerned with "the nature and limits of the power which can be legitimately exercised by society over the individual" (p. 59): that most governments have criminalized the ability to legitimately access unorthodox mind states is an inappropriate use of such power. Crucially, Mill laid down the principle of *the prevention of harm to others* as essential

to justifiable criminalization from a liberal perspective (pp. 68-69). The Millsean approach thus rules out paternalism: the idea that the State should legislate to protect psychedelic drug users from themselves. With its implicit infantilization, paternalism is deeply problematic; it should remain up to individuals - not the State, spuriously on their behalf - to prioritize whether or not they accord greater value to the possibility of, for instance, a mystical experience, versus an outside risk of either physical or psychological harm. Further, even on paternalistic grounds, the psychedelic drug laws fail: how can being subjected to State punishment possibly be for an individual's own good when the primary - and often solitary - harm being suffered is that inflicted from *on high*, rather than from having *been high*?

Liberalism also rules out legal “moralism”: the unsubstantiated ideology that psychedelic users should be subject to prohibitive measures as there is something intrinsically wrong with drug taking. Liberty comprises freedom to choose, including the freedom to make what the “moral” majority might consider to be bad choices. How could it be otherwise? Who but individuals themselves should decide what is of value to them? It is through such choices—including those regarding which substances to ingest, or not—that they engage in self-creation; when the law limits such choices, it curtails who they can become. This is unacceptable in a supposedly liberal democracy, designed to embrace pluralism. Mill famously advocated “experiments in living” (p. 147): in accordance with this view, individuals should be free to carry out chemical experiments in the living laboratories of their own bodies. Thus, in line with Mill, a negative liberty is called for, the freedom to be left alone to do as one pleases, so long as society is not thereby harmed.

All of which perhaps raises the question, why liberalism? It is accepted that this is in itself an unashamedly moral, even occasionally dogmatic, position: paradoxically, liberalism must not tolerate illiberalism. This is not to say that the benefits of liberalism cannot be established by consequentialist argument, but rather to accept that allegiance to this view runs deeper than evidence, as a values-based, ontological philosophy. However, liberalism is also, crucially, enshrined within the ECHR, according these arguments legal clout. Thus - in line with the harm principle - incursions into the freedoms protected therein will only be valid where exercising them would create real, measurable harms in society.

It is out of recognition that some actions can impact others to an extent that warrants State interference with rights that - as has already been seen in relation to manifestation of religious freedom - there are qualifiers to Article 9. However, interestingly, as with freedom of religion, freedom of thought itself is actually an absolute right: in other words, it is not subject to such qualification. If Thomas' dual notion of cognitive liberty is recalled - to involve both the processes and contents of thinking - it could feasibly be argued that psychedelic drug prohibitions interfere with this absolute right to freedom of thought, and are thus unjustifiable *without the qualifiers even being applicable*. However, if a less radical approach is taken - that psychedelic drug use is a *manifestation* of freedom of thought, of an individual's belief system - the qualifiers become relevant. Whilst there is a lot of merit in the former view, it is perhaps more generally palatable to consider this from the less extreme perspective, viewing cognitive liberty as a potentially qualifiable right.

Qualified to think

On paper, the qualifiers to Article 9 can be seen predominantly (though not exclusively, a point which will be returned to) to arise from concerns about tangible harm to others, thus embodying the liberal spirit. What is more questionable is the ease with which - as has been demonstrated - these qualifiers are engaged in practice in cases involving psychedelics, with supposed harms not empirically demonstrated in the courtroom. And, importantly, even if harm were to be evidenced, it is apposite to remember that it is one thing to show harm, and quite another thing entirely to allege that the best way of minimizing such harm is through criminalization, which most often serves to layer harm upon harm (Transform, 2014). Lots of activities – such as infidelity, for instance - are potentially harmful to others: it does not necessarily follow that they need to be dealt with through the criminal law.

The tendency of the courts to weave unsupported futuristic worst-case-scenarios as likely to arise out of individuals' drug-taking – used to justify engaging the qualifiers - fatally undermines the protections Article 9 ostensibly affords. In reality, the qualifiers are arguably utilized by the courts to avoid protecting certain people's freedoms when to do so would be unpopular, either politically or with the public. Behind the guise of legal objectivity, value judgments are made, with the moral imperative to protect rights undermined by legal "moralism". Indeed, "protection of public morals" is one of the recognized qualifiers under Article 9(2), a fact that is deeply troublesome from a liberal perspective. Legal moralism - that notorious conclusion in search of an argument – is an entirely unacceptable, even immoral, basis for qualifying Article 9 rights (and, in point of fact, an immoral justification for prohibition itself). The devastating power to infringe rights - not to mention to impose punishment - should be taken seriously by the State.

It is worth taking a brief detour to try to surmise what it is that legal moralists are *actually* fearful of, given that, whilst often unspoken, this philosophy appears to be behind many a court decision regarding drugs, and, indeed, behind drug policy itself. The liberal critique of the over-criminalization created by the drug laws has been made convincingly again and again (Szasz, 1996; Husak, 1992); further, the fact that these laws do not work on empirical grounds, causing more harms than they ameliorate, has been repeatedly shown, to little effect (Transform, 2014). Thus it is clear that legal moralism needs to be directly addressed, the more authentically moral position of liberalism - enshrined in human rights legislation - brought to the fore. As a result of reluctance to state their case in such terms, this exercise is almost unavoidably based on supposition, with legal moralists generally hiding behind a rather unconvincing mask of consequentialism.

In his perceptive essay on drug use, human rights and over-criminalization, lawyer and legal academic, Richards, commits to taking legal moralists seriously, to unearth the concerns at the heart of this position (Richards, 1986). Richards identifies the belief that drug use is fundamentally degrading as pivotal, viewed as preventing people from fulfilling their full potential, predominantly through interfering with their self-control. Richards then brilliantly lances this assumption: “What for one is a reasonable, self-imposed ideal of self-control and social service may be for another a self-defeating impoverishment of human experience and imagination, a rigid and inflexible wilfulness without intelligent freedom or reasonable spontaneity, a masochistic denial of self and subjectivity in the service of uncritical and dubiously manipulative moral aims”.

There seems likely to be a strongly psychological, unconscious element behind legal moralism. In his recent impressive tome on drug prohibition, *Chasing the Scream*, Johan Hari insightfully comments that: “It is a natural human instinct to turn our fears into symbols, and destroy the symbols, in the hope that it will destroy the fear. It is a logic that keeps recurring throughout human history, from the Crusades to the witch-hunts to the present day. It’s hard to sit with a complex problem, such as the human urge to get intoxicated, and accept that it will always be with us, and will always cause some problems (as well as some pleasures). It is much more appealing to be told a different message – that it can be ended” (Hari, pp. 44-45). In short, the legal moralists are engaged in a culture war, with drugs as ciphers for inchoate angst.

Of course, even supposedly consequentialist assessments of harm can never be entirely free of value judgments: they will always involve subjective decisions, such as how much weight to accord any given parameter (Roberts, 2014). Regardless, a valiant attempt should be made to ground application of the qualifiers to Article 9 in objective, scientifically measurable reality. Of the evidence that tends to be ignored in this realm in practice, most notable, perhaps, is that produced by a group of scientists - led by former (sacked) chair of the Government’s Advisory Council on the Misuse of Drugs, David Nutt - who synthesized the available relevant literature and gave a score to potential social harms from different drugs, creating the most reliable such hierarchy to date (Nutt, King & Phillips, 2010). Nutt’s matrix reveals the UK drug classification system – and, even more damningly, drug prohibition itself - to be composed of pseudoscientific divisions not borne out by empirical evidence, with an almost perversely inverse correlation between risk of harm and positioning in many

instances.

So, for example, the clear front-runner in terms of harm, both personal and social - though, notably, it is only social harm that is relevant from a liberal perspective - is alcohol, a substance that is legally and culturally accepted in the UK: alcohol use is, for instance, highly correlated with crime. Psychedelics, conversely, are at the opposite end of Nutt's scale, posing very low risk of social harm consequent to their use, yet the vast majority of them are criminalized as Class A drugs. The fact that drinkers of alcohol can alter their consciousness freely, their Article 9 rights to cognitive liberty undisturbed by State sanction, despite the risk of harm they pose to others, while psychedelic users are persecuted, exposes the hypocrisy of legal moralism. Further, this situation is legally questionable, given the existence of Article 14 of the ECHR, a provision that ostensibly guards against arbitrary discrimination in the protection of rights.

As an important aside, this disjoint between potential for social harm and where - or, indeed whether - a substance is placed in the MDA is not always apparent: heroin and cocaine are revealed to have a high potential for social harm and are categorised as Class A drugs. This is not to argue for their continued criminalisation but, rather, to demonstrate that they are a class apart from the psychedelics and should be treated as such in any future regulatory regime, always heeding the fact that set and setting are of crucial importance in mediating risk potential. Indeed, it is recommended that drug policy makers of the hereafter should adopt a much more nuanced approach, focusing increasingly on how drugs are taken, rather than simply divvying them into different genres.

Returning to the present, that the ECHR provides substantial - rather than merely rhetorical - protection of human rights is of great importance for minority groups: those that require shielding from the tendency of democracies without such safeguards to veer towards mob rule. Drug users are not, of course, in the minority—that term aptly describes practically every adult on the planet (and child, if one counts sugar)—but psychedelic users are. Where human rights and freedoms are being restricted, the burden of proof as regards harm to others should be on the State, to avoid these protections being hollowed out. Much finer distinctions between the different types of controlled drugs and the ways in which they are taken need to be made when assessing whether or not they represent a threat to public safety. In short, a far more parsimonious and evidence-based approach is advocated. The role of governments is to prevent harm to society, not to prevent people from traversing other mindscapes, from making the conscious decision to explore their own consciousness.

It is also important when assessing the risk of harms posed by psychedelics not to include the harms caused by prohibition itself, lest one's argument becomes circular, an easy trap to fall into (Transform, 2014). Furthermore, undertaking a proper balancing exercise when applying Article 9(2) should involve weighing any potential *harms* against the potential *benefits* of psychedelics: the fact that these substances may advantage their users remains largely absent from both policy discussion and the language of the courts. For instance, the idea that people should be allowed to take drugs because they enjoy them is rarely invoked, as though pleasure were a dirty word, and there must be some higher motivation to get high. This needs to be challenged, to avoid implicit complicity with the underlying moral puritanism of

mainstream discourse.

Along with their hedonic properties, many users of psychedelics profess great benefits from them in a multiplicity of ways, up to and including avowals that they enable achievement of enlightenment (or at least allow a transient glimpse of such!) (Carhart-Harris & Nutt, 2013). Thus, it should not be necessary for users to prove that these substances are *risk-free* in order to avoid the clutches of the qualifiers (for, like most things, they are not), but rather for the State to prove that the harms to society *actually do* outweigh the benefits. Crucially, the courts need to recognize that benefits to the individual may translate into benefits for society as a whole, comprised, as it is, of individuals.

To develop this latter point, it is worthy of note here that underground movements centred around psychedelic drug use can be argued to have benefited society enormously. This contribution becomes most visible when the work of such groups starts bubbling to the surface, such as, for instance, with the legitimization of the benefits of marijuana in a therapeutic context (or, rather, the re-legitimation, for this is, of course, an ancient healing plant) (Armentano, 2014), or, as a second example, the emerging legitimization (or, again, re-legitimization) of the use of psychedelics in psychotherapy, where they are showing great promise in treating a range of mental health conditions, from PTSD, to depression, to addiction, to end of life anxiety, none of which is news to the underground therapists who have been using them with their clients for years and who are pivotal in the ongoing psychedelic psychotherapy renaissance (MAPS, 2013).

To bring all of this back to Article 9, appreciation of the fact that the benefits users might accrue from their psychedelic use often, consequently, advantage society, punctures the dichotomous assumption that in applying the qualifiers a choice is of necessity being made: between freedom to individuals to use drugs, which *may*, at a push, be recognized by the courts as benefiting them, but is seen as being at the expense of potential harm to society - and thus unjustifiable - to recognizing that psychedelic drug use may benefit *both* the individual concerned *and* society. For many, this is a transcendent leap to make, especially given how stigmatised psychedelic substances and their users are.

A Cognitive Liberty Informed Drug Policy Activism

This focus on enhancing rights, on emphasizing benefits, is recommended beyond the courtroom: it should also inform drug policy activism, more traditionally rooted in the principles of harm reduction. Harm reduction is essentially a consequentialist approach, critiquing the incumbent system of prohibition from the perspective of its perceived failings, such as that the system is iatrogenic, creating more problems than it solves (Rhodes & Hedrich, 2010). Whilst the harm reductionist approach has been incredibly useful - undoubtedly saving countless lives - it is perhaps best understood as a stepping-stone: it is ultimately limited if it does not fundamentally challenge the existence of the prohibitionist system itself. So, for instance, one of the main drug policy activism groups in the UK, Transform – who, it is swiftly acknowledged, do invaluable work – have as one of their main messages the idea that drugs need to be legally regulated because they are dangerous, not because they are safe (Transform, 2014, p. 13). The focus is squarely on harms, with benefits largely ignored. Whilst this approach is no doubt pragmatic and makes sense in the context of drug policy

activism traditionally focusing on the controlled drugs with the greatest harm potential – such as the opiates and cocaine – a different perspective needs to be adopted when advocating for psychedelic policy change.

This is the line taken by an activist organization recently established in the UK, The Psychedelic Society, whose mission is to unleash psychedelic pride, complete with organizing psychedelic ‘coming out’ events (www.psychedelicsociety.org.uk). Indubitably, coming out as a psychedelic drug user is not an easy thing to do, given how high the stakes can be when admitting to a criminalised activity – such as loss of employment, loss of freedom to travel to certain countries, and so on - but it was similarly far from easy for those who came out in the more traditional sense of the term when homosexuality was outlawed. Yet, over a relatively short space of time, homosexuality has morphed from being illegal, to same-sex couples’ ability to marry being increasingly recognized as a human right (*Obergefell v Hodges* (2015) 576 US). This is evidence that things can change - things do change – and, furthermore, they can change through a rights-based activism. For psychedelic drug policy activists, the concept of cognitive liberty thus becomes essential, as it “exposes the argument that the drug policy reform movement has conspicuously shied away from making: namely that drug prohibition is untenable because it infringes freedom of thought” (Ruiz-Sierra, 2003, p. 55).

For if harm reduction is relied upon to collapse the prohibitionist regime, the risk is that, even if successful, its replacement would be such a strictly controlled regulatory model - to protect against said harms - that it would represent little more than a watered down, attenuated version of prohibition itself (Bey, 1999/2000).

Alternatively, prohibition could simply be supplanted by the medical model: underground psychedelic healers, for instance, could easily find themselves freed from prohibitive constraints, only for their tools to instantaneously be engulfed by the strictures that surround Western biomedicine. Adopting a rights-based stance more naturally leads into the development of a new paradigm for dealing with these molecules whereby individuals can access the substances of their choosing, in the ways that they require, as is their right. Whilst the detail of this post-prohibitive regime will be the subject of a future paper – with this one primarily being a call for decriminalisation, an end to unjust laws – in essence what is hoped for is a grass-roots driven promotion of ethical standards and best practices in psychedelic use, voluntarily ascribed to.

However, hopes for progressive, human rights informed psychedelic drug policy reform seem perhaps ever further away. Not only have the current Conservative Government signalled their intention to withdraw from the ECHR, they have produced the Psychoactive Substances Bill 2015-16, a piece of legislation that potentially creates a blanket ban on trade in *any substance capable of producing a psychoactive effect*, because heaven forbid that any of us should experience anything other than quotidian consciousness! Crucially, no reference is made to the concept of harm herein: indeed, the desire to avoid the need to prove harm is the motivation behind this Bill being drafted, as opposed to substances being incrementally scheduled under the Misuse of Drugs Act 1971, a process which, whilst imperfectly followed, ostensibly requires proof of such. Thus, by definition, this is a fundamentally illiberal piece of legislation.

These recent developments emphasize yet further the importance of approaching psychedelic drug policy from the perspective of human rights, ensuring a healthy relationship between the State and the individual. As evidenced, when that is lost, the State believes it has the right to tell individuals that they cannot ingest anything that has a psychoactive effect, unless they have been given explicit permission. Ironically, exemptions from the proposed legislation include the potentially extremely harmful yet culturally sanctioned psychoactive substances, alcohol and tobacco. The Psychoactive Substances Bill 2015-16 was introduced under the precautionary principle: yet another example of the extreme damage that can be caused by positing mythical worst-case-scenarios without recourse to actual assessments of harm, to evidence. Through this paranoid lens, such a draconian enactment is viewed as necessary to protect individuals and society; when evaluated through the prism of rights, it is exposed as an intolerable intrusion into private choices, not to mention a breach of the rule of law through its blatant disregard for the need for legal certainty, as enshrined within Article 7 of the ECHR.

This legislation will not achieve its aims and will create numerous detrimental side effects, as such enactments inevitably do: paradoxically, the problem of newly created substances that the Bill is designed to address can itself be seen to have emerged out of the wreckage of prohibition. People will continue to buy psychoactive substances, both classic and novel. Indeed, perhaps one of the most interesting developments in the past few years has been the use of the Dark Web to sell drugs (EMCDDA, 2015). This phenomenon can be viewed as almost inevitable: it seems unrealistic to bring up generations in the grip of rampant capitalism, to train them as proficient consumers who can have anything they desire if they can only pay for it, and then to inform them

that, actually, certain drugs are banned, that they cannot eat from the tree of knowledge, the forbidden fruit, and to expect that prohibition to be taken seriously. Ironically, the idea that individuals should be able to consume what they can afford (and beyond!) has been elevated almost to a right in its own right and new technologies were always going to be manipulated so as to facilitate this (Walsh, 2011).

The year 2015 saw the trial of Ross Ulbricht, aka Dredd Pirate Roberts, former chief administrator of perhaps the most famous online drug retail website, Silk Road. The Silk Road Charter makes it clear that the site was established with a view to empowering people to live more freely: “We provide systems and platforms that allow our customers to defend their basic human rights and pursue their own ends, provided those ends do not infringe on the rights of others” (https://www.reddit.com/r/SilkRoad/related/1d5f0q/silk_road_charter/). However, it was harm reduction based arguments that dominated at trial, with Ulbricht’s defence contending that - with its Amazon-style ratings system and customer feedback - Silk Road had led to higher quality products being sold than typically, alongside the removal of attendant risks for customers when buying online rather than from street dealers. These arguments – whilst borne out by evidence (Van Hout & Bingham, 2014) – were roundly rejected, with Ulbricht being awarded, amongst other things, two life sentences, without the possibility of parole.

Despite Ulbricht paying the price through his loss of freedom, and the FBI takedown of Silk Road, analogous websites continue to proliferate on the dark web. Like the mythical hydra, every time a head is cut off, another one grows: there is always a new

online market place ready to replace those that are shut down. From a radical, rights-based perspective, this can be viewed as a positive development, with the existence of such sites enabling more and more people to exercise their cognitive liberty, to traverse their mental landscapes, beyond the reaches of liberally unjustifiable laws. This idea is neatly encapsulated by the journalist Mike Power, who has commented: “In just under two years, Silk Road administrators have used technology and ingenuity to achieve what thousands of campaigners have toiled since the 1960s to achieve: the right for people to buy and sell natural and artificial chemicals that affect their consciousness in ways they choose without interference from the State. It is a paradigm shift that cannot easily be reversed” (Power, 2013, p 234). The creation of online drug markets can thus be viewed as yet another example of underground movements helping society to progress. These developments can also, perhaps, be witnessed as the death knell of prohibition (Seddon, 2014), with new technologies as beautifully and anarchically impossible to govern as psychedelic drug use itself, and with both throwing up similar questions about the acceptable reach of State control and restrictions on cognitive liberty.

Concluding Remarks

This paper has contended that it is crucial to evolve the jurisprudence on the right to freedom of thought liberally, to interpret it so as to incorporate cognitive liberty, and to use this as the foundation stone through which to reconfigure drug policy, by way of both legal challenges and drug policy activism more generally. It is recognized that this is an optimistic position, given that the more limited claims for therapeutic and religious exemptions to prohibition have received short shrift in the courts in the UK, alongside the broader context of the draconian shift in drug policy heralded by the

Psychoactive Substances Bill 2015-16; regardless, it is important to argue for what is believed to be right, not simply for what is believed to be possible. Reimagining drug policy through the prism of cognitive liberty is in one sense a radical approach; indeed, it threatens the very existence of the structure of prohibition. Yet, from another perspective, what could be less radical than demanding the right to control of one's own consciousness?

References

Armentano, P. (2014). *Emerging clinical applications for cannabis and cannabinoids: a review of the recent scientific literature*. (6th ed.) Washington DC: NORML.

Bey, H. (1999/2000). Against legalisation. *Journal of Cognitive Liberties*, 1: 1, 34-38.

Boire, R. G. (1999/2000). On cognitive liberty (part 1). *Journal of Cognitive Liberties*, 1: 1, 7-13.

Bone, M., & Seddon, T. (2015). Human rights, public health and medicinal cannabis use. *Critical Public Health*, 26: 1, 1-11.

Carhart-Harris, R., & Nutt, D. (2013). Experienced drug users assess the harms and benefits of drugs: a web-based survey. *Journal of Psychoactive Drugs*, 45: 4, 322-328.

EMCDDA (2015). *The Internet and drug markets*. Lisbon: EMCDDA.

Gibson, M. (2010). Rastafari and cannabis: framing a criminal law exemption. *Ecclesiastical Law Journal*, 12: 3, 324-344.

Grinspoon, L., & Bakalar, J. B. (1997). *Psychedelic drugs reconsidered*. New York: Lindesmith Centre.

Grof, S. (2008). *LSD psychotherapy*. Santa Cruz: MAPS.

Hari, J. (2015). *Chasing the scream: the first and last days of the war on drugs*. London: Bloomsbury.

Holland, J. (2010). *The Pot Book*. Vermont: Park Street Press.

Husak, D. (1992). *Drugs and rights*. Cambridge: Cambridge University Press.

- Jay, M. (2010). *High society: mind-altering drugs in history and culture*. London: Thames and Hudson.
- Labate, B. C., & Cavnar, C. (2014a). *Ayahuasca shamanism in the Amazon and beyond*. Oxford: Oxford University Press.
- Labate, B. C., & Cavnar, C. (2014b). *Prohibition, religious freedom and human rights: regulating traditional drug use*. Berlin: Springer-Verlag.
- Labate, B. C., & Cavnar, C. (2014c). *The therapeutic use of ayahuasca*. Berlin: Springer-Verlag.
- MAPS (2013). *Psychedelics in Psychology and Psychiatry*, 23: 1.
- McKenna, T. (1997). Psychedelic society. In R. Forte (Ed), *Entheogens and the future of religion* (Chapter 7). San Francisco: Council on Spiritual Practices.
- Mill, J. S. (1982). *On liberty*. London: Penguin English Library.
- Nutt, D. J., King, L. A., & Phillips, D. (2010). Drug harms in the UK: a multicriteria decision analysis. *The Lancet*, 376: 9752, 1558-1565.
- Possamai, A. (2009). *Sociology of religion for generations X and Y*. London: Equinox Publishing Ltd.
- Power, M. (2013). *Drugs 2.0: the web revolution that's changing how the world gets high*. London: Portobello Books Ltd.
- Rhodes, T., & Hedrich, D. (Eds) (2010). *Harm reduction: evidence, impacts and challenges*. Lisbon: EMCDDA.
- Richards, D. (1986). *Sex, drugs, death and the law: an essay on over-criminalisation*. Lanham: Rowman and Littlefield.
- Roberts, M. (2014). Making drug policy together: reflections on evidence, engagement and participation. *International Journal of Drug Policy*, 25: 952-956.
- Roberts, T. (1997). Academic and religious freedom in the study of the mind. In R. Forte (Ed), *Entheogens and the future of religion* (Chapter 11). San Francisco: Council on Spiritual Practices.
- Ruiz-Sierra, J. (2003). Is it time for a cognitive liberty social movement? *Journal of Cognitive Liberties*, 4:2, 53-62.
- Seddon, T. (2014). Drug policy and global regulatory capitalism: the case of New Psychoactive Substances (NPS). *International Journal of Drug Policy*. 25, 1019-1024.
- Szasz, T. (1996). *Our right to drugs: the case for a free market*. New York: Syracuse University Press.

Sznitman, S. R., & Zolotov, Y. (2015). Cannabis for therapeutic purposes and public health and safety: a systematic and critical review. *International Journal of Drug Policy*, 26, 20-29.

Tagliazucchi, E., Carhart-Harris, R., Leech, R., Nutt, D., & Chialvo, D. R. (2014). Enhanced repertoire of brain dynamical states during the psychedelic experience. *Human Brain Mapping*, 35(11), 5442-5456.

Thoumi, F. E. (2014). Marijuana in the United States and the international drug control regime: why what is promoted abroad is not applied at home. *Crime, Law, Social Change*, 61, 273-285.

Transform (2014). *Debating drugs: how to make the case for legal regulation*. Bristol: Transform.

Van Hout, M. C., & Bingham, T. (2014). Responsible vendors, intelligent consumers: Silk Road, the online revolution in drug trading. *International Journal of Drug Policy*, 25, 183-189.

Walsh, C. (2010). Drugs and human rights: private palliatives, sacramental freedoms and cognitive liberty. *The International Journal of Human Rights*, 14: 3, 425-441.

Walsh, C. (2011). Drugs, the internet, and change. *Journal of Psychoactive Drugs*, 43:1, 55-63.

Walsh, C. (2015). Plant psychedelics in the English court: legal uncertainty, guinea pigs and “dog law”. In J. H. Ellens, & T. Roberts (Eds), *The psychedelic policy quagmire: health, law, freedom and society* (Chapter 16). Connecticut: Praeger Publishers.