



# WASHTENAW COUNTY

## OFFICE OF THE PROSECUTING ATTORNEY

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### POLICY DIRECTIVE 2021-06: POLICY REGARDING ENTHEOGENIC PLANTS

#### I. Introduction and Background

On September 21, 2020, Ann Arbor's City Council unanimously adopted a resolution declaring the use, growth, possession, and distribution of entheogenic plants to be "the lowest law enforcement priority for the City of Ann Arbor."<sup>1</sup> The resolution defined entheogenic plants "as the full spectrum of plants, fungi, and natural materials and/or their extracted compounds, limited to those containing the following types of compounds: indole amines, tryptamines, and phenethylamines."<sup>2</sup> Multiple studies highlighted in the resolution indicated that entheogenic plants "can benefit psychological and physical wellness," as well as "support and enhance religious and spiritual practices."<sup>3</sup>

The Washtenaw County Prosecuting Attorney agrees with and supports the City Council resolution. It now adopts this Policy precluding the prosecution of entheogenic plant use, growth, and possession across Washtenaw County.

As an initial matter, given that entheogenic plants are the "lowest law enforcement priority" in Ann Arbor, it would be unjust to continue prosecuting entheogenic plant use or possession. The Washtenaw County Prosecutor's Office is committed to ensuring that justice is dispensed evenhandedly. With entheogenic plants functionally decriminalized in Washtenaw County's largest city, it would be capricious to continue pursuing entheogenic-related charges originating in other parts of the county.

More fundamentally, though, prosecuting entheogenic-plant use or possession is not in the interest of justice. Naturally occurring entheogenic plants are not generally addictive<sup>4</sup>, nor do they present a significant risk of a fatal overdose.<sup>5</sup> Entheogenic plants, moreover, are not associated with violent behavior. Just the opposite: the use of psilocybin mushrooms has been associated with *reduced* partner violence in men.<sup>6</sup> And crucially, Ann Arbor is not the first

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<sup>1</sup> Ann Arbor City Council Resolution 20-1389, *Resolution Declaring That The Investigation And Arrest of Individuals Involved With The Personal Use, Growth, and Possession of Entheogenic Plants, Including Those Scheduled At State And Federal Levels, Be The Lowest Priority For The City Of Ann Arbor* (Sept. 21, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See Drug Policy Alliance, *Are Psilocybin Mushrooms Addictive?*, available at <https://www.drugpolicy.org/drug-facts/are-psilocybin-mushrooms-addictive>.

<sup>5</sup> See Alcohol and Drug Foundation, *Psilocybin* (Oct. 7, 2020), available at <https://adf.org.au/drug-facts/psilocybin/>.

<sup>6</sup> Michelle S. Thiessen, Zach Walsh, Brian M. Bird, & Adele Lafrance, *Psychadelic Use and Intimate Partner Violence: The Role of Emotion Regulation*, *J of Psychopharmacology*, 026988111877178 (2018).

municipality to experiment with the decriminalization of entheogenic plants. In Denver (CO), Oakland (CA), and Santa Cruz (CA), entheogenic plants have been effectively decriminalized—without any reported negative consequences.<sup>7</sup> Washington, DC, also recently voted to decriminalize entheogenic plants.<sup>8</sup>

What is more, it is important to contextualize entheogenic plants within broader drug policy. The so-called War on Drugs—in which multiple substances have been criminalized, regardless of their pharmacological properties—has been a failure. It has resulted in the incarceration of millions of people.<sup>9</sup> And the racial disparities arising from the War on Drugs are pronounced. According to at least one source, “[n]early 80 percent of people in federal prison and almost 60 percent of people in state prison for drug offenses are Black or Latino.”<sup>10</sup>

To be sure, many people who are justice-involved as a result of personal substance use avoid prison time. But the consequences can still be profound. A criminal record makes it more difficult for a person to obtain housing, secure a job, or continue their education.

Criminalization, moreover, has not meaningfully deterred drug use. Over 10% of the U.S. population report using “illicit drug[s]” in the past month.<sup>11</sup> That statistic—combined with the harsh penalties associated with criminalization—indicates that our current national drug policy has created a cruel roulette wheel of sorts. The vast majority of people who engage in substance use are able to do so without criminal consequences. But for an unlucky few, their decision to use substances results in harsh, life-changing penalties. And make no mistake: the roulette wheel is a weighted one. As referenced above, Black people and people of color are far more likely to face criminal consequences related to drug use than white people.<sup>12</sup>

Nationwide, use rates for entheogenic plants are difficult to find, and the best data available indicates that use of such plants is relatively uncommon.<sup>13</sup> Anecdotally, however, use

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<sup>7</sup> Harmeet Kaur, *Santa Cruz Decriminalizes Magic Mushrooms and Other Natural Psychedelics, Making it the Third US City to Take Such a Step*, CNN (Feb. 3, 2020), available at <https://www.cnn.com/2020/01/30/us/santa-cruz-mushrooms-psychedelics-trnd/index.html>.

<sup>8</sup> Business Insider, *Washington, DC votes to decriminalize psychedelic plants and mushrooms* (Nov. 3, 2020), available at <https://www.businessinsider.com/washington-dc-initiative-81-to-decriminalize-shrooms-live-results-2020-10>.

<sup>9</sup> See Drug Policy Alliance, *The Drug War, Mass Incarceration, and Race* (January 2018) at 2, available at [https://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race\\_01\\_18\\_0.pdf](https://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf).

<sup>10</sup> *Id.*

<sup>11</sup> See Centers for Disease Control, *Use of selected substances in the past month among persons aged 12 years and over, by age, sex, race, and Hispanic origin: United States, selected years 2002–2017*, available at <https://www.cdc.gov/nchs/data/hus/2018/020.pdf>.

<sup>12</sup> Though marijuana has been legalized in Michigan, statistics related to marijuana use are instructive. Prior to marijuana’s legalization, Black people in Washtenaw County were 4.7x as likely as white people to be arrested for marijuana possession. That is true despite the fact that marijuana usage rates are roughly equal across races. See ACLU of Michigan, *Rates of Black Arrests Compared to White Arrest for Marijuana Possession*, available at <https://graphics.aclu.org/marijuana-arrest-report/MI>.

<sup>13</sup> According to the Drug Policy Alliance, “[p]sychedelic use is so low that several drugs are grouped under the category of ‘hallucinogens,’ which includes LSD, peyote, mescaline, psilocybin mushrooms, and ‘Ecstasy’ or ‘Molly’ (MDMA).” Drug Policy Alliance, *How Many People Use Psilocybin Mushrooms?*, available at <https://www.drugpolicy.org/drug-facts/how-many-people-use-psilocybin-mushrooms>.

rates in Washtenaw County may well be higher. Many Washtenaw County residents know people who have used entheogenic plants for a variety of reasons—without adverse consequences or criminal penalties. And prosecution for possession or use of entheogenic plants is already a very small fraction of the Prosecutor’s Office’s caseload.

In other words: the status quo is that a significant number of Washtenaw residents safely use entheogenic plants. Only an unlucky few run afoul of the criminal-justice system as a result of that use. The Prosecutor’s Office is committed to ending that arbitrariness, and accordingly will no longer prosecute the possession, use, or cultivation of entheogenic plants.

With that being said, two points are in order:

*First*, nothing in this Policy suggests that that first responders should decline assistance to people who experience adverse consequences as a result of entheogenic-plant use. This Policy is an exercise in discretion by the Prosecutor’s Office, and does not purport to dictate any operational, on-the-ground response to entheogenic-plant use.

Moreover, the Ann Arbor City Council resolution—which dictates priorities for City of Ann Arbor personnel—declares only that entheogenic-plant use is lowest “*law enforcement*” priority for the City of Ann Arbor.<sup>14</sup> The Prosecutor’s Office does not purport to definitively interpret a municipal resolution. But presumably, the term “*law enforcement*” does not include fire, medical, or EMS services. Nothing in this Policy should be interpreted to preclude or discourage the provision of such services, and the Prosecutor’s Office hopes that such services will continue to be provided, countywide, to people suffering adverse consequences from entheogenic-plant ingestion.

Indeed, it stands to reason that this Policy will make it *more* likely for people to seek medical attention as a result of entheogenic-plant use. After all, without the threat of prosecution, Washtenaw residents who are experiencing adverse effects will have assurance that they will not face criminal consequences because they called for help.

*Second*, nothing in this Policy should be interpreted to preclude prosecution of people who drive under the influence of entheogenic plants. Driving under the influence is a different category of crime than mere “use,” “possession,” or “cultivation” of a controlled substance. Nothing in this Policy prohibits or discourages the Prosecutor’s Office from charging such crimes, where appropriate, and the Prosecutor’s Office will continue to pursue charges stemming from conduct that puts public safety at risk.

## **II. Policy Directive**

**1. Use, Possession, and Cultivation:** Consistent with the Ann Arbor City Council resolution, the Washtenaw County Prosecutor’s Office will no longer file criminal charges for unauthorized use, possession, or cultivation of entheogenic plants. For purposes of this policy, “entheogenic plants” are defined the same way they were in the Ann Arbor Council resolution: “the full spectrum of plants, fungi, and natural materials and/or their extracted compounds, limited to

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<sup>14</sup> Ann Arbor City Council Resolution, *supra* n. 1.

those containing . . . indole amines, tryptamines, and phenethylamines.”

Assistant Prosecuting Attorneys (APAs) are prohibited from authorizing such charges.

**2. Distribution:** The Ann Arbor City Council resolution makes it the “lowest law enforcement priority” to investigate and arrest for charges relating to the “purchasing, transporting, [and] distributing” of entheogenic plants. Consistent with the resolution, the Washtenaw County Prosecutor’s Office has a general presumption against filing criminal charges relating to the small-scale sale or distribution of entheogenic plants.

In appropriate circumstances, however, the Washtenaw County Prosecutor’s Office may file charges against large-scale, for-profit distributors of entheogenic plants, or to adults who intentionally sell such plants to children. This carve-out is consistent with the Ann Arbor City Council resolution, which expressly provides that “any significant violation of state or federal law, or any use of Entheogenic Plants that poses a threat to the public health, safety, and welfare, may result in law enforcement involvement by the City of Ann Arbor.”<sup>15</sup>

Every case is different, and the Prosecutor’s Office is opting not to adopt inflexible criteria to determine when distribution charges are appropriate. Factors to consider when making a decision to charge include, but are not limited to:

- (a) The amount of entheogenic plants at issue;
- (b) The sophistication and number of people involved in the distribution operation;
- (c) The amount of money at issue; and
- (d) The clientele to whom entheogenic plants are being sold.

In considering the last factor outlined above—“the clientele to whom entheogenic plants are being sold”—several points should be considered. First, distribution charges are less likely to be appropriate if a person was selling entheogenic plants to friends, family, or acquaintances. Distribution charges are, however, more likely to be appropriate if the alleged distributor is effectively operating as a “commercial” actor, and is selling to a broad swath of clientele with whom they do not have a personal relationship.

In addition, distribution charges are more likely to be appropriate if the alleged distributor is an adult selling to minors. APAs should not, however, adopt an inflexible age-based standard. A 21-year-old senior in college (an adult) who is caught selling entheogenic plants to a 17-year-old freshman (a minor) should not be treated the same way as a 40-year-old who is selling entheogenic plants to middle schoolers.

All distribution charges relating to entheogenic plants require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney prior to being authorized.

**3. Other Substances:** Nothing in this Policy should be interpreted to prohibit charges relating to other controlled substances. If, for example, the evidence demonstrates that a person possessed, sold or manufactured a drug cocktail which includes both entheogenic plants and fentanyl, an APA may authorize charges, if they are supported by the evidence and in the interests of justice.

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<sup>15</sup> *Id.*

**4. Operating Under the Influence:** Nothing in this Policy should be interpreted to prohibit charges relating to operating a motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence of entheogenic plants. Such charges may be filed if they are supported by the evidence and in the interests of justice.

**5. Forensic Processing and Confiscation:** Nothing in this Policy shall be interpreted to prohibit or discourage the forensic processing, or confiscation and destruction, of any contraband seized as a result of any law enforcement action.

**6. Other Charges Not Covered By This Policy:** Nothing in this Policy shall be interpreted to prohibit or discourage the filing of charges that are not covered by this Policy.

For example: if, following a lawful search of an automobile, an officer discovers entheogenic plants and also discovers a weapon that links a suspect to a homicide, the Prosecutor's Office may, consistent with this Policy, file homicide charges if the evidence dictates.

**7. Charges Should Be Supported by Evidence and in the Interests of Justice:** Nothing in this Policy shall be interpreted to mandate or encourage the filing of charges that are not covered by this Policy. If an APA believes that filing charges other than those covered by this Policy are not supported by the evidence, or are not in the interest of justice, the APA should not file those charges.

**8. Provision of Addiction-Related Services:** Nothing in this Policy shall be interpreted to preclude the provision of treatment or resources to individuals who possess, use, or sell entheogenic plants, including, but not limited to, through a Law Enforcement Assisted Diversion (LEAD) program.

**9. Expungement:** The Prosecutor's Office will not contest any application for expungement where the underlying charge was for the possession, use, cultivation, or distribution of entheogenic plants.

**10. No Substantive Rights Created:** This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney's Office. Nothing in this Policy purports to affect the legality or propriety of any law enforcement officer's actions. Nothing in this Policy shall be interpreted to create substantive or enforceable rights.

**11. Exceptions:** All cases are different, and this Policy accordingly provides guidance that is presumptive only. Requests for deviations from this Policy shall be made in writing, and require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.



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