

Cannabis Prohibition: Race, Equality, and the Case for Reform

An Analysis of Democratic Equality Theory and the Disproportionate Impact of Cannabis Law & Policy on Black and Minority Ethnic Groups

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Abstract

The original intent for the war on cannabis is heavily linked to racial prejudice and discrimination. The consequences of these tainted origins of drug laws can be traced through its impacts on particular racial groups—specifically black and ethnic minorities—including through targeted enforcement and policies, leading to more arrests for drug offences and, subsequently, disproportionate criminalisation and social exclusion. These practices have been used to justify a repeating cycle of discrimination; institutionalised racism and systemic inequality upheld by the law. This dissertation contends that the current regime of cannabis prohibition does not justify its disproportionate and negative effects, which are contrary to democratic equality. Furthermore, in consideration of shifting attitudes in global cannabis policy and emerging trends towards legalisation and commercialisation, an equality-based approach must be adopted to remedy injustices directly inflicted by prohibition and restore full enjoyment of democratic equality.

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1. Introduction

The original intent for the war on cannabis is heavily linked to racial prejudice and discrimination. The consequences of these tainted origins of drug laws can be traced through its impacts on particular racial groups—specifically black and ethnic minorities—including through targeted enforcement and policies, leading to more arrests for drug offences and, subsequently, disproportionate criminalisation and social exclusion.¹ These practices have been used to justify a repeating cycle of discrimination; institutionalised racism and systemic inequality upheld by the law. This present situation is contrary to egalitarian principles and theories of justice—often regarded as the ‘first virtue of social institutions’²—of which the political state and its prevailing systems, laws and regulations, and the administration of law and order are included. Specifically, Elizabeth Anderson’s ‘Democratic Equality’ theory seeks to eradicate oppression and establish a society in which individuals stand in relations of equality to each other.

Accordingly, this dissertation contends that the current regime of cannabis prohibition does not justify its disproportionate and negative effects, which are contrary to democratic equality. Furthermore, in consideration of shifting attitudes in global

cannabis policy and emerging trends towards legalisation and commercialisation, an equality-based approach must be adopted to remedy injustices directly inflicted by prohibition and restore full enjoyment of democratic equality.

Chapter I will examine the intrinsic connection between prohibition and racial discrimination by outlining how the historical justifications for cannabis laws in the US and subsequently, the UK and various jurisdictions were not founded on any scientific analyses; rather, where discussions on cannabis did occur, they centred mostly around racial prejudice and rhetoric linking cannabis to criminality. It will also bring to light how these flawed justifications spread globally through international drug policy, culminating in disproportionate enforcement, criminalisation and incarceration, social exclusion and inequality on a widespread scale.

Having provided the underlying background on the history and impact of prohibition, Chapter II will undergo an analysis of Anderson’s democratic equality theory to demonstrate its incompatibility with the status quo, thereby demanding a new equality-based approach that will not only prevent further criminalisation, but mitigate the inequality imposed by the principally flawed, outdated and unjust present regime.

Finally, Chapter III will examine potential approaches to cannabis reform using democratic equality theory. Consideration

¹This is discussed extensively in Chapter I.

²John Rawls, *A Theory of Justice* (Harvard University Press 1971) 3.

will be given to decriminalisation, legalisation, and affirmative action, including the expungement of criminal records, to demonstrate the applicability of democratic equality as an appropriate response to the devastating impacts of cannabis prohibition.

2. The Tainted Origins of Cannabis Laws and Subsequent Impacts on Racial Minorities

2.1. Chapter Summary

The purpose of this chapter is to descriptively outline the history of cannabis laws and their racial origins, before tracing the disproportionate impact of prohibition on black and ethnic minorities. Analysis will centre on a wide range of jurisdictions which have taken conventional approaches to cannabis prohibition, largely based on homogenised global drug policy—such as the US, UK, Australia and the majority black British Overseas Territory of Bermuda—to underscore the widespread impact of cannabis enforcement against minorities. Finally, brief consideration shall be given to how the institution of law intersects with race to legitimise oppression—relevant for discussion of social exclusion and democratic equality in Chapter II.

2.2. The History of the War on Drugs and Global Cannabis Prohibition

The present system of worldwide drug control is based upon three UN conventions,³ largely traceable to the historical influence of the US on drug policy which made cannabis a prohibited drug internationally. In the US, there was no national public policy on cannabis prior to its inclusion in the *Uniform Narcotic Drug Act* in 1932 and the passage of the *Marihuana Tax Act 1937*.⁴ Hitherto, cannabis was largely unheard of, its use considered a new phenomenon. Whilst it might be assumed that justifications for the first cannabis laws would have centred on health-based concerns, or perhaps a proven link to crime, an analysis of media and legislative accounts has led legal historians to conclude that ‘the most prominent [justification] was racial prejudice’.⁵ States in the southwest generated support for prohibition by associating cannabis with ‘the growing Mexican-American minority’, whilst others blamed criminal activity on ‘its use among blacks in urban ghettos’.⁶

It was the Mexicans who first introduced recreational cannabis to the US, immigrating to the southwest after the Mexican Revolution of 1910; it is for this reason that cannabis came to be commonly known as ‘*marijuana*’—US lawmakers propagated this Mexican terminology to associate cannabis with the unwanted surge of immigrants.⁷ A New York Times editorial asserted, ‘Marijuana...is a direct by-product of unrestricted Mexican immigration’.⁸ Although by the 1920s most Americans still had not heard of cannabis, its popularity began to grow among blacks in urban communities, media reports denouncing

the phenomenon as ‘reflective of Negro, jazz and degenerate bohemian subcultures’.

Thus, not only did few middle-class Americans know about marijuana and its use, but also what little “information” was available provoked an automatic adverse association of the drug with Mexican immigration, crime and the deviant life style in the Black ghettos.⁹

Overall, ‘no state undertook any empirical or scientific study of the effects of the drug. Instead they relied on lurid and often unfounded accounts of marijuana’s dangers as presented in what little newspaper coverage the drug received’.¹⁰ These prejudices were exploited nationally over the following decade to build a campaign to criminalise cannabis federally, then internationally.

Apparently, legislators in these states found it easy and uncontroversial to prohibit use of a drug they had never seen or used, and which was associated with ethnic minorities and the lower class.¹¹

One prominent figure, Harry Anslinger, first commissioner of the Federal Narcotics Bureau, was responsible for the formation of drug policy from 1930-1962 and spearheaded the *Marihuana Tax Act*,¹² before serving another two years as Representative to the UN Narcotics Commission where he further championed the prohibitionist agenda.¹³ In a 1937 ‘calculated effort to silence opposition’ to the bill, Congress held only one hearing at which Anslinger testified that the majority of cannabis users comprised of ‘Negroes, Hispanics, Filipinos and entertainers’ whose ‘Satanic music, jazz and swing, result from marijuana use’ and ‘cause white women to seek sexual relations with Negroes’.¹⁴ His justifications could not be more explicit:

The primary reason to outlaw marijuana is its effect on the degenerate races. Marijuana is an addictive drug which produces in its users insanity, criminality, and death.¹⁵

Despite the objections of the American Medical Association, which declared cannabis a relatively innocuous drug, the Act passed without a recorded vote. As ‘the public perception of marijuana’s ethnic origins and crime-producing tendencies often went hand in hand’, naturally, cannabis, as had the earlier state legislation, ‘became entangled with society’s views of these minority groups’.¹⁶

Congress stiffened drug penalties via the *Boggs Act*¹⁷ in 1951; introducing mandatory imprisonment ranging from two to twenty years and placing cannabis in the same category as heroin regarding the seriousness of its effects and penalties for possession and sale. To date, cannabis is designated a Schedule I controlled substance—a category graver than cocaine, OxyContin, and reserved for drugs with the highest potential for abuse, no medicinal or safe method of use—despite not satisfying the three

³These include the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁴9A ULA 182 (1932) (US); IRC § 39(a) (1937).

⁵Richard Bonnie, Charles Whitebread, ‘Forbidden Fruit and the Tree of Knowledge - An Inquiry Into the Legal History of American Marijuana Prohibition’ (1970) 56 VaLRev 971, 1016.

⁶ibid.

⁷Prior to this, the plant, ‘hemp’ had been widely used for industrial and medicinal purposes. Carole Shapiro, ‘Law v. Laughter: The War against the Evil Weed and Big Screen Reefer Sanity’ (2004) 29 Oklahoma City ULRev 795, 808.

⁸Bonnie and Whitebread (n5) 1036.

⁹ibid 1035.

¹⁰ibid 1016.

¹¹ibid 1021.

¹²n4.

¹³Arthur J. Lurigio, Mikaela Rabinowitz, and Justyna Lenik, ‘A Century of Losing Battles: The Costly and Ill-Advised War on Drugs in the United States’ (2009) 6 Justice Policy Journal 1, 8.

¹⁴ibid.

¹⁵ibid.

¹⁶ibid.

¹⁷21 USC §§ 174 (1951).

tenets for such a categorisation.¹⁸ The only drug not referenced by its scientific name in the schedule, cannabis remains listed under its pejorative, *marihuana*—an ironic allusion to its racist origins.¹⁹

It is evident that the extent of attention given to cannabis in the US primarily centred around racial prejudices and misinformation, sanctioned by federal policymakers and institutions. But the significance of such is underscored by the fact that the US was instrumental not only in prevailing social attitudes toward cannabis, but legally—heavily influencing international drug policies which remain the standard today.²⁰

For example, the UK's first cannabis laws were passed in response to international pressures rather than domestic concerns.²¹ When it was first proposed that cannabis be included under the *International Opium Convention*,²² there was no notable consumption by the general public; however, the little public attention that was received locally also made use of racial prejudices. Notably, the passage of the *British Nationality Act 1948*, which resulted in the migration of half-a-million colonial residents to the UK, was alleged to be the cause of the growth of the domestic cannabis market. This culminated in a 1951 declaration by the head of the Drugs Branch, FW Thornton, that 'the invasion of unemployed coloured men threatened Britain with a serious hashish smoking problem'—further promoting the perception of cannabis as a threat arising from ethnic minorities.²³

Nevertheless, the influence of the US regarding international drug policy resulted in nearly all countries agreeing to a unified control regime, outlawing cannabis under the *Single Convention on Narcotic Drugs* in 1961 to create a universal system of drug control.²⁴ The Transnational Institute noted, 'the idea of having a Single Convention was an initiative of the United States, determined to impose a hard line on drugs on the rest of the world'.²⁵ As the Convention expanded existing control measures to cover the cultivation of plants from which narcotics are derived, in many cases cannabis was lumped into national legislation without discussion—and by 1970 was criminalised in all member countries under the goal of creating 'a drug-free world'.²⁶ Stressing the main legal innovations from 1925-1964 were in response to 'international pressures, not domestic problems', the UK Drug Policy Commission acknowledged these conventions continue to impose limits on national drug legislations, 'still most powerfully upheld by the USA'.²⁷

Thus, to date, the global approach to cannabis remains largely homogenous as a result of these Conventions. Specifically, under the 1961 Convention, cannabis is subject to the general control

measures including article 4(1)(c) limiting the production, use and possession of drugs, article 33 outlining that parties must not permit the possession of cannabis 'except under legal authority'.²⁸ This was introduced into UK domestic law via the *Dangerous Drugs Act 1964*, which criminalised the cultivation of cannabis. In 1971, US President Nixon declared the "War on Drugs", aligning with the 1971 Convention containing a general obligation under article 7 to prohibit THC—the main psychoactive chemical in cannabis; In the same year, the UK passed the *Misuse of Drugs Act*, providing the domestic basis for controlling illicit drugs. This act criminalised, *inter alia*, the possession, usage and cultivation of cannabis, and remains the primary UK legislation concerning cannabis to date.

2.3. The Disproportionate Impact of Cannabis Prohibition

With such evidence demonstrating the racially prejudiced origins of cannabis laws, perhaps it comes as no surprise that enforcement has since been proven to disproportionately affect racial minorities. However, as it is arguable that the mere presence of prejudice as a basis for the formation of a law or policy is not sufficient in and of itself to necessitate its removal, ramifications of the law in practice must be considered to determine whether reform is truly needed.

2.3.1. Drugs, Race, and Crime

In 1971, critics of the Misuse of Drugs Bill predicted it would be impossible to enforce, leading to selective enforcement.²⁹ Similarly, planners of the "War on Drugs" in the US anticipated their proposed policies would disproportionately target African-Americans and scapegoat minorities.³⁰ Indeed, such has been the case, with 'longstanding concerns over the disproportionate impact of prohibition enforcement on certain ethnic minority groups'.³¹

It is therefore notable that since enactment, cannabis laws have resulted in the disproportionate investigation, searching, detention, arrest, charging, conviction, incarceration, disenfranchisement and social exclusion of blacks and minorities.³² Statistics throughout all convention signatories which have collected data in these areas—including the UK, Canada, Australia, New Zealand, and Bermuda—indicate these racially disproportionate impacts have remained consistent worldwide.

In the US, blacks are arrested nearly three times as frequently as whites for cannabis offences, despite user rates standing close to equal.³³ A study of over two million cases identified 'significant racial disparities in the implementation of marijuana enforcement',³⁴ whilst nearly one in three African-American men in their twenties are under criminal justice supervision due to the "War on Drugs".³⁵ The issue is not confined to men, as the largest increase in women's incarceration rates consists of black women who, often being 'low level players' in drug offences, are unable to

¹⁸Cannabis (1) has a low potential for harm and abuse; (2) appears to have therapeutic benefits, and (3) the American College of Physicians suggests it may be used safely under appropriate conditions. Eric Blumenson, 'Liberty Lost: The Moral Case for Marijuana Law Reform' (2010) 85 *Indiana Law Journal* 279, 299.

¹⁹21 USC § 812(b)(1) (2006).

²⁰Thomas Moran, 'Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and how it Might Affect Racial and Ethnic Minorities' (2011) 17 *Wash&Lee J Civil Rts & Soc Just* 557, 569.

²¹UK Drug Policy Commission, *An Analysis of UK Drug Policy* (London, UKDPC April 2007) 14.

²²International Opium Convention (adopted 19 February 1925, entered into force 25 September 1928) 81 *LoNTS* 319.

²³James Mills, *Cannabis Nation: Control and Consumption in Britain, 1928-2008* (OUP 2012).

²⁴Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 *UNTS* 151.

²⁵Martin Jelsma and Amira Armenta, *The UN Drug Control Conventions* (Transnational Institute, October 2015).

²⁶David Bewley-Taylor, 'The Contemporary International Drug Control System: A History of the UNGASS Decade,' in John Collins (ed), *Governing the Global Drug Wars* (London: LSE IDEAS Special Report, 2012), 49.

²⁷UK Drug Policy Commission (n21) 14.

²⁸n24 art 33.

²⁹J Young, *The Drugtakers: The Social Meaning of Drug Use* (London, Paladin 1971).

³⁰Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* (OUP 1995) 83-104.

³¹UK Drug Policy Commission (n21) 51.

³²Kenneth Nunn, 'Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"' (2001) 6 *Journal of Gender Race & Justice* 381.

³³R Ramchand, R Pacula and M Iguchi, 'Racial Differences in Marijuana-Users' Risk of Arrest in The United States' (2006) 84 *Drug and Alcohol Dependence* 264.

³⁴Amanda Geller and Jeffrey Fagan, 'Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing' (2010) 7 *Journal of Empirical Legal Studies* 591.

³⁵D Coker, 'Addressing the Real World of Racial Injustice in the Criminal Justice System' (2003) 93 *The Journal of Criminal Law and Criminology* 827, 832.

provide useful information to authorities—thus receiving higher sentences.³⁶

These figures are even more disproportionate in the UK, where blacks are seven times more likely to be arrested and fourteen times more likely to be imprisoned for drug offences than whites, despite their rate of drug use being no higher.³⁷ New Zealand's Human Rights Commission acknowledged 'evidence of bias at different points throughout the system from apprehensions to sentencing,³⁸ revealing Maori/Pacific persons accounted for 42% of possession convictions and were arrested at three times the rate of white/non-Maori users.³⁹ This disparity remains in jurisdictions where non-whites comprise a numerical majority: In Bermuda, blacks comprise 54% of the population but account for 90% of all possession charges; a government drug reform committee determined 'Blacks are more likely targeted through profiling and structural racism'; 'while racial profiling is evident in charges, the demand for cannabis is non-discriminatory'.⁴⁰ This indicates the disproportionate impacts of prohibition are structural—resulting not simply from individual prejudices; but laws and policies themselves, institutions and methods used to enforce them, and categorisations perpetuated throughout society at large.

The use of stop-and-search has been a major contributor to this disproportionality. This is largely because, as 'drug use is a consensual activity, it rarely comes to light through victim or witness reports; police must rely on more proactive methods for finding cannabis offences than other forms of street crime'.⁴¹ A study on 'Race, drugs and law enforcement in England and Wales' determined all 43 police forces target blacks at a higher rate than whites, with drugs searches accounting for 60 per cent of all stop-and-searches.⁴² Blacks in the UK are stopped and searched eight times more than whites, although it is less likely for drugs to be found.⁴³ Additionally, police were found to target suspected cannabis users—with nearly 600 recorded incidences of officers conducting stop-and-searches on the grounds of 'being able to smell cannabis' alone.⁴⁴

This disproportionality is mirrored worldwide. Bermuda's Drug Reform Committee reported 'evidence of racial profiling', citing as many as 17,000 stop and searches in one year—a significant figure, considering the island's mere population of 65,000:

Of those stopped and searched, 90% were male and 85% were Black. Nearly two thirds were males between the ages of 18 and 36. When considering the black male population in this age group, the figures were such that it was possible to search every one of them four times in the year.⁴⁵

In consideration of these statistics, it could be alleged the true cause of disproportionality lies solely in enforcement practices,

such as racial profiling in stop-and-search. However, as analyses of revised enforcement methods have revealed, efforts to alter policing to comply with the *Race Relations Act 1965* have been counterproductive:⁴⁶ 'disproportionality has increased as the use of stop and search has declined, indicating that the remaining use of the powers is more heavily concentrated on black and minority ethnic groups'.⁴⁷

A comprehensive new analysis of the criminal justice system reveals such reform has failed to address racial bias. Rather, it documents a disquieting increase in ethnic disparity in the policing and prosecution of drug offences.⁴⁸

Overall, arrests for drugs as a result of stop-and-search fell by 52% for whites between 2010-11 and 2016-17, but did not fall at all for blacks.⁴⁹ Additionally, the analysis demonstrates that the over-policing of black and minority communities cannot be fully explained by the concentration of law enforcement resources in deprived areas. It also shows how ethnic disparities introduced earlier in the process are perpetuated by sentencing decisions in court.⁵⁰

Beyond enforcement, studies have further revealed that systemically, 'black people are treated more harshly when they are found in possession of drugs': blacks are more likely to be formally dealt with for cannabis possession than whites, and more likely to be charged rather than cautioned.⁵¹ In 2017, 'more black people were prosecuted and convicted of cannabis possession than for the supply of Class A and B drugs combined. For white people the balance was reversed'.⁵²

Accordingly, despite making up less than 4% of the UK population, blacks comprise a quarter of those convicted of possession, also sentenced to immediate custody for drug offences at 9.1 times the rate of whites.⁵³ This has been termed 'an affront to justice' and 'a conveyor belt for the criminalisation of young black people for low-level offending, while treating white people more leniently for the same offences'.⁵⁴ Other convention signatories such as the US, Canada, and Australia have reported similarly, with Bermuda acknowledging the issue extends beyond disparities in police interactions as 'Blacks bear the brunt of most possession charges while whites are far less likely to be charged'.⁵⁵

Overall, evidence supports the argument that globally, states' approaches to drug enforcement in general stem partly from wider perceptions 'weighted towards a fictitious narrative that drug use is especially prevalent among black and minority ethnic groups'.⁵⁶ The implications of these disproportionate effects of cannabis laws extend beyond the criminal justice system—such as social exclusion resulting from stigma over drugs and crime.⁵⁷

⁴⁶UK Drug Policy Commission (n21).

⁴⁷Shiner (n45).

⁴⁸B Bowling and C Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70 ModLRev 936.

⁴⁹Catherine Wylie, 'Black people "nine times as likely" as whites to be stopped and searched by police in England and Wales' (Independent, 14 October 2018).

⁵⁰Shiner (n45).

⁵¹UK Drug Policy Commission (n21) 51.

⁵²Shiner (n45).

⁵³N Eastwood, M Shiner, and D Bear, *The Numbers in Black and White: Ethnic Disparities In The Policing And Prosecution Of Drug Offences In England And Wales* (Release & Manheim Centre for Criminology at LSE 2013).

⁵⁴Shiner (n45).

⁵⁵CRC (n44) 38.

⁵⁶M Townsend, 'May vowed to reform stop and search – but it's getting worse for black Britons' (Guardian, 13 October 2018).

⁵⁷See discussion in Chapter II.

³⁶Phyllis Goldfarb, 'Counting the Drug War's Female Casualties', (2002) 6 Journal of Gender, Race & Justice 277.

³⁷UK Drug Policy Commission (n21) 51.

³⁸Human Rights Commission, *A fair go for all? Addressing Structural Discrimination in Public Services* (HRC July 2012) 34 (NZ).

³⁹Sally Abel, 'Cannabis Policy in Australia and New Zealand' (2009) 16 Drug and Alcohol Review 421, 425.

⁴⁰Cannabis Reform Collaborative, *An Analysis of Cannabis Reform in Bermuda* (CRC April 2014).

⁴¹M Shiner et al, *The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales* (LSE, Stopwatch & Release 2018).

⁴²ibid.

⁴³ibid.

⁴⁴Tom Embury-Davis, 'Police shouldn't stop and search people just because they can smell cannabis, says report' (Independent, 12 December 2017).

⁴⁵CRC (n44) 33.

2.3.2. Criminality as Racial Subordination

But what is the importance of the connection between these tainted origins of cannabis prohibition and their devastating institutionally racist effects? Nunn argues that the impact of the drug war on black communities is simply ‘a prominent example of the central role both race and the definition of crime play in the maintenance and legitimization of white supremacy.’⁵⁸ Race and crime, as two significant social phenomena, are linked in an endless cycle of oppression: What is defined as crime determines who is oppressed in society and simultaneously legitimates that oppression; Race provides the contours of a discourse of threat that supplies the social phenomenon of crime with power and political significance.⁵⁹ In this way, law is used as a mechanism for legitimising inequality and racial subordination⁶⁰, whilst crime can mask oppression by allowing it to be represented as a legitimate response to wrongdoing. At the same time, ‘pool of surplus criminality’ theory holds that when faced with a perceived drug problem, minorities are considered scapegoats for threats perceived by the dominant community; consequently, the historic link between drugs, racial prejudice, and the predictable consequences of prohibition are all evidence of the use of power and violence against marginalised groups, resulting in social exclusion and ‘outcast’ status in the construction of social order.⁶¹ Such ideas explain longstanding biases in perceptions of criminality—such as white survey respondents overestimating the proportion of crime committed by blacks by up to 30 percent, suggesting harsher punishments when a crime is perceived to be a “black crime”, and consistently perceiving white criminality in terms of individual failing whilst categorising black criminality as a result of failings of the entire group.⁶²

2.4. Conclusion

Overall, the legal system is breeding criminals with inappropriate cannabis legislation that entangles offenders in court rooms, excluding and marginalising them from the mainstream, taints individuals with a moral stigma, takes away their hope of future success in the community, and bars effective societal engagement.⁶³ As Chapter II will demonstrate, this situation is contrary to equality principles. The wider societal impact reveals the issue is too far gone for selective concessions and band-aid alterations in enforcement; the prohibition regime must be overhauled—with comprehensive reform incorporating measures which eradicate the outstanding ramifications of the law urgently needed.

3. Democratic Equality and the Case for Cannabis Reform

3.1. Chapter Summary

Chapter I reveals the current regime of cannabis prohibition is, foundationally, the result of sustained efforts associating the drug with criminality and minority groups, with no

meaningful dialogue or scientific analysis and a disregard for the disproportionate outcomes of prohibition and enforcement. Having placed the origins of cannabis laws and their lasting impacts in their rightful context, Chapter II goes on to critique the status quo based on the theory of democratic equality as espoused by Elizabeth Anderson—which demands a society in which all persons are free from oppression, stand in positions of equality to each other and share equal access to effective participation at all levels. The chapter will further discuss potential conflicts which may arise considering the illegality of cannabis, before concluding that democratic equality is an appropriate framework by which to consider cannabis reform; the ultimate objectives of which are culminated in Chapter III.

3.2. Democratic Equality: A Society of Equals

Democratic equality as espoused by Elizabeth Anderson is an extension of egalitarianism, concerned with principles of equal rights and opportunities for all individuals in society. However, Anderson criticises the works of mainstream egalitarianists, including Dworkin,⁶⁴ Arneson,⁶⁵ and Cohen,⁶⁶ whom she claims have all lost sight of the meaning of equality by placing too much emphasis on theorising how to compensate people for ‘undeserved bad luck’ or ‘cosmic injustice’ rather than fighting inequality.⁶⁷ According to Anderson, this doctrine of ‘luck egalitarianism’ has too narrowly targeted ‘victims of brute luck from human affairs’ as exemplary beneficiaries of egalitarian concern, to the detriment of the true victims of oppression—arising from hierarchies of race, gender, class and caste throughout society.⁶⁸ In this regard, Anderson befittingly reasserts that ‘the true meaning of equality’ must be to eradicate oppression, creating a society of equals.

The proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others.⁶⁹

Such a view recognises the role of egalitarianism in challenging oppression—encompassing a social order involving systematic exploitation of power by dominant groups, including through marginalisation, status hierarchy, exploitation and cultural imperialism—and occurring where one holds power over another through social institutions such as laws, customs and norms.⁷⁰ These unequal relations generate and justify inequalities in the distribution of freedoms, resources, and welfare.⁷¹

Democratic equality is therefore the application of egalitarian objectives which work negatively towards the eradication of ‘forms of social relationship which dominate, exploit, marginalize, demean, and inflict violence upon others’, and positively, recognising that the democratic state is nothing more than citizens acting collectively—to secure a social order in which persons

⁵⁸Nunn (n36) 385.

⁵⁹R Delgado, ‘Rodrigo’s Eighth Chronicle: Black Crime, White Fears on the Social Construction of Threat’ (1994) 80 VaLRev 503.

⁶⁰Cheryl Chambers, ‘Institutional Racism: Is Law Used as a Tool to Perpetuate Racial Inequality?’ (PhD Sociology, North Carolina State University 2008) 1.

⁶¹Nunn (n36) 385.

⁶²National Academies of Sciences, Engineering, and Medicine, *The Criminal Justice System and Social Exclusion: Race, Ethnicity, and Gender: Proceedings of a Workshop—in Brief* (National Academies Press 2018).

⁶³Glenn Williams, ‘The Criminalization of Recreational Marijuana Use in Canada: A Scientific, Social, Legal and Philosophical Analysis Based on the Work of Douglas Husak’ (MA Public Ethics, University of Ottawa 2010) 43.

⁶⁴Ronald Dworkin, ‘What Is Equality? II. Equality of Resources’ (1981) 10 Philosophy and Public Affairs 283, 285.

⁶⁵Richard Arneson, ‘Equality and Equality of Opportunity for Welfare’ in Louis Pojman and Robert Westmoreland (eds), *Equality: Selected Readings* (OUP 1997) 231.

⁶⁶G Cohen, ‘On the Currency of Egalitarian Justice’ (1989) 99 Ethics 906, 922–23, 930–31.

⁶⁷Elizabeth Anderson, ‘What Is the Point of Equality?’ (1999) 109 Ethics 287, 288.

⁶⁸ibid.

⁶⁹ibid.

⁷⁰Kimberle’ Williams Crenshaw, ‘Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law’ (1988) 101 HarvLRev 1331.

⁷¹Anderson (n71) 312.

stand on equal terms in a democratic community and citizens are obliged to secure for each other ‘effective access to the social conditions of their freedom at all times’.⁷²

These social conditions comprise ‘a package of capabilities sufficient for standing as an equal over the course of an entire life’; guaranteed to individuals in a democratic society without restriction based on social identity or membership. At the primary level, it includes access to basic conditions of human agency, such as autonomy and freedom; More comprehensively, equality within society necessitates the exercise of citizenship, involving functioning not only as political agents, but participating equally within wider society—the sphere of social life that is open to the general public and is not part of the state bureaucracy and the administration of laws’.⁷³ This extends to public institutions, services, private enterprise, and the right to receive education and fair value for one’s contributions; Any situation whereby a group is subjected to discrimination on the basis of social identity and restricted from access to equal participation in institutions and areas of civil society would violate democratic equality, as they have effectively been relegated to ‘second-class citizenship’—even if they maintain political rights in law.⁷⁴

Finally, capable functioning requires not just the ability to exercise political rights such as freedom of speech and voting, but also ‘to participate in the various activities of civil society more broadly’, such as in economics and other interactions.⁷⁵ Crucially, this entails the social conditions of being accepted by others, including ‘the ability to appear in public without shame’ and not being ascribed ‘outcast status’. These capabilities are unalienable, irrevocable and untradeable.⁷⁶

3.3. Why Cannabis Laws are ‘an Equality Issue’

It thus follows that democratic equality is an appropriate theory by which to examine cannabis prohibition and its disproportionate results. As evidenced in Chapter I, from inception, global drug policy and cannabis laws were largely implemented based on ascribing outcast status based on social identities such as race and ethnicity. Further, when placed into its correct legal historical context, it is evident that the laws prohibiting cannabis do not simply yield disproportionate racial results by some inadvertent mishap; rather, these laws, from their origin to the present day are built upon an intention to disproportionately target and marginalise ethnic minorities. The tangible, immediate effects of these targeted laws in relation to enforcement and criminalisation have already been demonstrated in Chapter I. But further analysis reveals the wider implications necessary for consideration regarding the various capabilities needed to participate effectively as an equal member of society, which have been violated by the current regime.

3.3.1. Beyond Criminalisation: Social Exclusion and the Capabilities Approach

Beyond the immediate legal ramifications of cannabis offences such as criminalisation and incarceration, prohibition has severely impacted individuals’ ability to engage equally and effectively throughout society. Simply put, criminal laws stigmatise and punish people. The resulting stigma works by labelling people as deviant, wicked, or a threat to wider society. Many cannabis users are looked down upon in society; The criminal label placed on otherwise law-abiding citizens can create ‘long-lasting effects

on the individual that can severely disrupt their way of life’⁷⁷ by limiting individuals from opportunities that societal members otherwise enjoy:

There can be an instant impact on the individual’s relationship with their family, friends and co-workers. There can be a significant financial burden on the individual and relatives if forced to go through the court system with a respectable lawyer. Opportunities and freedoms must often be given up in light of the legal consequences of the offense, such as employment opportunities or international travel.⁷⁸

This not only negatively affects an individual’s social and personal life; it can actually lead one to commit further crimes, as ‘the “illegality” of cannabis may increase criminal behaviour in society by virtue of labelling’: the stigma associated with criminal sanctioning ‘alienates the individual from conventional society, promoting contact with deviant referent groups and enhancing the likelihood of future deviance befitting the label—a self-fulfilling prophecy’.⁷⁹

Crucially, the consequences of what is largely a victimless crime extend to restrictions upon many of the capabilities deemed necessary under democratic equality. Particularly, access to travel, employment, participation in the political process and other areas of engagement have been severely hampered due to cannabis prohibition and social exclusion. Those convicted of drug offenses may be prevented from obtaining financial aid, welfare, or public housing;⁸⁰ the high rate of incarceration has contributed to higher poverty rates and lower labour force participation among blacks specifically.⁸¹ An Australian study on individuals who received their first criminal conviction for a minor cannabis offense found that whilst the conviction had little impact on subsequent cannabis use, a significant number reported further complications with the law, and employment, accommodation, relationships and travel opportunities.⁸² Bermuda, which relies on travel connections through larger hubs like Canada and the US, notes that convictions for small quantities of drugs comprise the majority of individuals on the ‘stop list’—whereby persons deemed ‘illegitimate’ are given a lifetime ban on international travel—resulting in denied access to airports, ports of entry, US residency, citizenship, and overseas hospital treatment.⁸³ In some instances, individuals have reported being denied travel based solely on mere suspicion of engaging in drug activities or prior arrest, despite no convictions.⁸⁴ A legislative report declared, ‘upon being released from prison, several black males have found it extremely difficult to find employment and to earn enough money to support their families, which creates a cycle of poverty, anger and frustration’.⁸⁵

⁷⁷Williams (n67).

⁷⁸ibid.

⁷⁹Robert J MacCoun, Peter Reuter, *Drug war heresies: learning from other vices, times, and places*. (CUP 2001) 91.

⁸⁰Coker (n39) 841.

⁸¹Jeff Grogger, ‘Arrests, Persistent Youth Joblessness, and Black/White Employment Differentials’ (1992) 74 *Rev Econ & Stat* 100, 105.

⁸²Simon Lenton, Penny Heale, ‘Arrest, Court and Social Impacts of Conviction for a Minor Cannabis Offense under Strict Prohibition’ (2000) 27 *Contemp. Drug Probs.* 805.

⁸³Jonathan Bell, ‘No stop list, but crimes will prevent entry to US’ (Royal Gazette, 19 April 2012).

⁸⁴Raymond Hainey, ‘Hope for Bermudians on US stop list’ (Royal Gazette, 29 July 2017).

⁸⁵Horton et al, *Executive Summary Joint Select Committee on the causes of violent crime and gun violence in Bermuda* (House of Assembly 2011).

⁷²ibid 289.

⁷³ibid 317.

⁷⁴ibid.

⁷⁵ibid.

⁷⁶ibid 318.

Cannabis prohibition and its unequal enforcement has also had devastating results on the ability of large segments of populations to exercise citizenship and effectively engage in the political process. In the US, many states impose a lifetime ban on voting for persons with felony convictions. Despite comprising only 13% percent of the population, blacks comprise 38% of all Americans who have been stripped of their voting rights, with more than 2.2 million of the 6.1 million ineligible to vote in the 2016 election being African-American; Presently, one in 13 African-Americans cannot vote due to prior convictions—a rate four times higher than non-black Americans.⁸⁶ In Kentucky, this rate is so high that 1 in 3 black males are banned from voting for life.⁸⁷ The majority of these felony records stem from minor drug offences, many of which were committed prior to adulthood; this means that many individuals barred from voting have never in life been eligible to vote at all.⁸⁸ Considering the racially targeted enforcement practices cited in Chapter I, felony disenfranchisement has thus been recognised as ‘a potentially effective means to neutralize threats from African-American voters’.⁸⁹ Although there is no lifetime franchise ban in the UK, the *Representation of the People Act 1983* also means that imprisoned convicts cannot vote in elections; this disproportionately affects blacks and ethnic minorities due to their higher rates of criminalisation for the same offenses. As if the stakes could not be any higher, ‘drug enforcement policies are also the justification given by the US Attorney General’s Justice Department for the unequal number of African-Americans charged with federal death penalty eligible crimes’—imposing a fundamental threat to life and liberty itself.⁹⁰

Overall, the effects of continued prohibition extend far beyond mere acknowledgement that it ‘has severely inhibited the growth of racial and ethnic minority communities by disproportionately arresting and imprisoning their youth’.⁹¹ Mere identification as a cannabis user or offender can produce conceptions of self consistent with the stigmatising label, have a cumulative effect on criminal identity, and exclude large numbers of individuals from equal access to opportunities in society, including employment, the economy, travel, voting, social benefits, and overall effective engagement.⁹² Most notably, these consequences are all exacerbated where the individual falls within the black or ethnic minority identity.

It is therefore evident why drug laws are a matter of egalitarian concern: Cannabis laws have had the effect of disproportionately ‘othering’ black people especially—casting them as deviant; disproportionately restricting a significant membership of an entire group from access to several opportunities, and outcasting them beyond the bounds of society through consequences ranging from enforcement and incarceration to social exclusion.

3.3.2. An Exception to Democratic Equality?

However, in full examination of democratic equality, it is necessary to consider the extent to which the denial of the outlined ‘capabilities’ for equal functioning might be justified under the label of criminality. Whilst a crucial tenet of democratic

equality holds that these rights are ‘unalienable, irrevocable and untradeable’, Anderson cites a sole exception to the guarantees of democratic equality whereby ‘the commission of a crime can justify taking away a person’s basic liberties and status as an equal in civil society’.⁹³

It is thus necessary to discuss the potential claim that democratic equality is not applicable to individuals who commit drug offences, considering its illegality: Does a conviction for a cannabis offence therefore justify ramifications which would otherwise amount to a denial of equality?

Indeed, it could be proposed that individuals who have chosen to commit drug offences should not be romanticised as victims of injustice; that stigma, social exclusion, and denied political participation are simply deserved consequences of a decision to violate the law.

However, this writer posits that Anderson’s statement is more nuanced than a mere declaration that democratic equality is contingent upon legal innocence. Surely, no egalitarian would argue that a criminal record amounts to a blanket justification for unequal treatment; whilst a literal interpretation of Anderson’s statement might call for some form of restriction upon the full guarantees of democratic equality, it would be implausible to suggest this was intended to extend to all illegal actions.

For example, it would appear unreasonable to demand that an individual convicted for a mere traffic violation be denied the right to vote or function in society free of ‘outcast status’ as a consequence for committing such a common, largely innocuous strict liability offence. Further, it would not be justified for democratic equality to fall away if the state were to criminalise, eg, criticising the government and individuals were arrested for this offence. Surely, these guarantees of democratic equality are sufficiently important such that they take precedence over many trivial offences not considered threatening to the freedoms of others: Anderson would not have placed such emphasis on the importance of equal society if its guarantees were so fragile that they could be so easily stripped away for the many individuals who dare to indulge in *the killer marijuana*. To suggest otherwise would not only be to justify the subjection of a large section of the population to wide-reaching restrictions on various social, economic and political capabilities considered fundamental in a democratically equal society—it would also signify a willingness to ignore the fact that these restrictions have never applied equally to all individuals engaging in such acts; as these consequences have mostly affected individuals from black and minority ethnic groups. It is therefore evident that this exception would not be justifiable by the offence: the detrimental impact it would have would result in oppression, leading to further social inequality—contradicting the objectives of democratic equality outlined by Anderson in the first place.

Instead, it is likely that the justifications for such conditions are based on the idea that certain behaviours by individuals may pose a threat to the enjoyment of democratic equality for others. Perhaps a more accurate interpretation of Anderson’s exception would hold that the instances in which an exclusion from equal status in society may be warranted, are those whereby an individual has committed an offense deemed serious enough to present a threat to the enjoyment of equality by others. In this sense, Anderson’s exception for criminal conduct is qualified by the extent to which said actions constitute an infringement upon the rights of other citizens in a society of equals, such that certain exclusions are justified to safeguard the guarantees of equality for

⁸⁶C Uggen, L Larson & S Shannon, *6 million lost voters: State-level estimates of felony disenfranchisement* (Washington, DC: The Sentencing Project 2016).

⁸⁷Michael Wines, ‘Why So Many Kentuckians Are Banned From Voting on Tuesday, and for Life’ (New York Times, 4 Nov 2018).

⁸⁸ibid.

⁸⁹A Behrens, C Uggen & J Manza, ‘Ballot manipulation and the “menace of Negro domination”: Racial threat and felon disenfranchisement in the United States, 1850–2002.’ (2003) 109 *American Journal of Sociology* 559–605.

⁹⁰Coker (n39) 829.

⁹¹Moran (n20) 560.

⁹²Wodak A, ‘The abject failure of drug prohibition’ (2014) 47 *Australian & New Zealand Journal of Criminology* 190.

⁹³Anderson (n71) 327.

all. Such conduct would likely include more serious offences such as murder, rape, burglary, fraud, and acts which infringe upon the personal and proprietary rights of others and their ability to participate in society free from oppression. Offences which arguably remain established in criminal law based on rationales of paternalism,⁹⁴ such as cannabis laws, would therefore fall outside of this scope; as the means of democratic equality would otherwise be self-defeating regarding its aims.

Such an interpretation appears to fall more in line with the ethos of democratic equality, with Anderson acknowledging that ‘even convicted criminals retain their status as equal human beings’—recognising that ‘democratic equality guarantees effective access to the social conditions of freedom to all citizens, regardless of how imprudently they conduct their lives’.⁹⁵

The counterpart to an individual’s inalienable right to the social conditions of her freedom is the unconditional obligation of others to respect her dignity or moral equality. [...] This implies that there are some things one may never do to other people, even if one has their permission or consent.⁹⁶

This view appears to be backed in egalitarianism as well as in law. The UN High Commissioner for Human Rights has stated, ‘Too often, drug users suffer discrimination, are forced to accept treatment, marginalized and often harmed by approaches which over-emphasize criminalization and punishment while under-emphasizing harm reduction and respect for human rights’.⁹⁷

Thus, although democratic equality does not indemnify individuals against all losses due to imprudent conduct, it does ‘guarantee a set of capabilities necessary to functioning as a free and equal citizen and avoiding oppression’.⁹⁸ Whilst individuals still maintain personal responsibility, the consequences of their decisions should not lead to radically different outcomes; doing so would be antithetical to the aim of ensuring equal societal relations. If a law is racially targeted or results in the disproportionate revocation of access to capabilities of equal functioning, this would not be defensible in a society committed to ensuring democratic equality. On this basis, it is reasonable to conclude that the mere illegality of cannabis would not be sufficient to justify the resulting oppression inflicted by the present regime.

3.4. Conclusion

In consideration of the effects of prohibition on blacks and ethnic minorities, it is evident why the status quo is contrary to the guarantees of democratic equality: From formation to implementation, cannabis laws have created a caste of people who are locked out of social, economic and political influence and opportunities in society. The cumulative effects of prohibition mean that a significant proportion of members within black and ethnic minority groups cannot participate effectively or equally in relation to others. Cannabis laws therefore violate equality principles and, given this fact, the purported aims of prohibition do not justify the consequential subordination of black and ethnic minority groups. In seeking the construction of a community of equals, democratic equality integrates principles of distribution

with the expressive demands of equal respect, charting an appropriate framework for eradicating the contributors of socially imposed oppression. Accordingly, it directly follows that democratic equality is an appropriate framework by which cannabis law and policy can be examined, whilst simultaneously serving as the basis of reform—to work towards the guaranteeing of effective participation of all, in a society of democratic equals.

4. Examining Equality-Based Responses to the Impact of Cannabis Laws

4.1. Chapter Summary

Having outlined the context of the present cannabis law and policy framework in Chapter I, and its incompatibility with Anderson’s Democratic Equality in Chapter II, this Chapter examines potential socio-legal and policy approaches which can be justified under democratic equality. Consideration will be given to decriminalisation, legalisation, and the application of redistributive justice measures such as affirmative action and the expungement of criminal records, in order to demonstrate the applicability of Anderson’s theory of democratic equality as an appropriate response to the disproportionate effects of prohibition on black and minority ethnic groups.

4.2. Visions for Reform

According to the Global Commission on Drug Policy, the global war on drugs has been a massive failure. Citing ‘repressive measures’ which have failed to reduce demand and devastating consequences for individuals and wider society, the Commission declared that fundamental reforms are urgently needed:

End the criminalization, marginalization and stigmatization of people who use drugs but who do no harm to others. Challenge rather than reinforce common misconceptions about drug markets, drug use and drug dependence. Encourage experimentation by governments with models of legal regulation of drugs to undermine the power of organized crime and safeguard the health and security of their citizens.⁹⁹

The Commission emphasised that ‘this recommendation applies especially to cannabis’ but encouraged ‘other experiments in decriminalization and legal regulation that can accomplish these objectives and provide models for others’.¹⁰⁰ In a similar thread, a European Commission report declared:

Enforcement of drug prohibitions has caused substantial unintended harms; many were predictable. The challenge for the next ten years will be to find a constructive way of building on these lessons so that the positive benefits of policy interventions are increased, and the negative ones averted.¹⁰¹

Having undergone a thorough analysis of these devastating effects in relation to the demands of democratic equality in previous chapters, it is evident that the aim of democratic equality is to establish a society whereby individuals are guaranteed the capabilities necessary to engage in society as equals. Fundamentally, such theory requires the eradication of

⁹⁴Joel Feinberg, ‘Legal paternalism.’ (1971) 1 Canadian Journal of Philosophy 105-124.

⁹⁵Anderson (n71) 327.

⁹⁶ibid 319.

⁹⁷Global Commission on Drug Policy, *The War on Drugs* (Global Commission on Drug Policy 2011) 2.

⁹⁸Anderson (n71) 287.

⁹⁹Global Commission on Drug Policy, *The War on Drugs* (Global Commission on Drug Policy 2011) 2.

¹⁰⁰ibid.

¹⁰¹P Reuter and F Trautmann (eds), *A Report on Global Illicit Drugs Markets 1998-2007* (Brussels, European Commission 2009) 17.

oppression, inclusive of the systems and institutions underlying societal interactions, and therefore must be free to implement reforms in wider areas such as economics and politics. Accordingly, the desideratum of comprehensive cannabis reform must be to construct a regime which shall: acknowledge the historical context of racial prejudice within cannabis policy; objectively consider potential justifications for prohibition as opposed to legalisation or civil regulation of cannabis; and, in light of resulting inequality, instrument the steps required to ameliorate present-day inequities in criminalisation, enforcement, incarceration and social exclusion. Moreover, considering emerging trends indicating more relaxed attitudes toward cannabis and recreational use generally; to prevent further disenfranchisement of racial minorities mitigate and future harm.

4.3. Jurisdictional Responses and Possible Remedies

4.3.1. Decriminalisation

The use of decriminalisation¹⁰²—typically for minor possession only—has increased in recent years, currently effective in jurisdictions such as Australia, Bermuda and some Caribbean countries, Portugal, and thirteen US states. A variety of explanations have been given for this trend, including the high costs of enforcement, economic recession, and shifts in public attitude.¹⁰³ However, Yankah contends that the key drivers of the decriminalisation movement are fundamentally attributable to ‘a convergence of principles across philosophical starting points’ in which both ends of the academic and legal-political spectrum have begun to recognise the dangers of overcriminalization and a criminal law system growing out of control, which has seen ever-increasing numbers of persons imprisoned for ever-increasing lengths of time, and ‘threatens to criminalize so much behaviour as to leave the actual exertion of power over the citizen all too often at the whim of the state’:

This power has all too often been focused on racial minorities and the poorest among us. With so much behaviour increasingly falling under the government’s criminal law powers, unrestrained and discriminatory enforcement discretion threatens to undermine the rule of law itself.¹⁰⁴

It is subsequently argued that the criminal law is only justified if it ‘prevents a nontrivial harm, suppresses wrongful behaviour, and punishes those who deserve to be punished.’¹⁰⁵ In the case of cannabis, such punishments can be considered unjust ‘not only because they exceed any justifiable response to the criminal conduct, but often simply because they are levelled at conduct that ought not be criminalized at all.’¹⁰⁶ Accordingly, both liberals and non-liberals alike have come to an agreement regarding the decriminalisation of cannabis, with the understanding that ‘whatever the right answer to the difficult question of addictive drugs, there is no question that the current war on drugs, besides leading to the arrest and conviction of millions, has visited pain in deeply racialized lashes, yoking countless young people with a felony record that often prevents them from seeking an education,

holding a job, or in some cases, obtaining food in times of need’.¹⁰⁷ In this sense, the criminal sanctioning of cannabis must be put to a halt if societies are to even begin to address the many violations of democratic equality inflicted upon minorities.

Such a position seems to have been supported, even if not vigorously, by international bodies. Most notably, a UN briefing document leaked in 2015 affirmed that criminal sanctions for minor drug possession have ‘induced negative consequences for safety, security, and human rights’, whilst ‘the heavy emphasis on criminalization has fuelled high levels of discrimination’.¹⁰⁸ Taking into consideration existing international conventions, the UNODC not only confirmed its internal position that decriminalising drug use and possession for personal consumption is ‘consistent with international drug control conventions’; it further suggested that it may very well ‘be required to meet obligations under international human rights law’.¹⁰⁹

Worldwide, millions of people are imprisoned for minor, non-violent drug-related offences, in spite of the international drug control conventions’ provisions permitting to apply alternatives to conviction in cases of a “minor nature”. [...] A disproportionate share of those incarcerated is from the most marginalized groups such as people who are poor, and racial or ethnic minorities. [...] Incarceration, in turn, fuels poverty and social exclusion, as having a criminal record can negatively affect access to future employment, education, housing, and child custody and also exercising civil rights such as voting.¹¹⁰

Ultimately, the practice of criminalisation has provided the rationale for policies allowing police to stop, search, and arrest, and for courts to incarcerate, disproportionate numbers of ethnic minorities, whilst the associated aggressive over-policing and the concentration of incarceration in poor minority neighbourhoods has diminished the liberty and dignity accorded all members of society. The removal of criminal sanctions would likely result in a significant reduction of the number of individuals who are disproportionately restricted from capabilities under democratic equality—particularly those committing minor cannabis offences. Indeed, a study on depenalisation in England and Wales found that the declassification of cannabis from a class B to a class C drug in 2004 effectively made cannabis possession less risky due to the likelihood of a prosecution and maximum penalties being lowered.¹¹¹

However, under the demands of democratic equality, decriminalisation may still be insufficient. Whilst reducing the high number of criminalised minor offenders, decriminalisation would likely place added pressure on minorities due to the fact that most drug networks ‘predominately target minority ethnic neighbourhoods’.¹¹² As such, a heightened focus on enforcement against drug supply networks would disproportionately impact minority communities; Notwithstanding the number of people

¹⁰²Decriminalisation means ‘leaving production and distribution of the drug entirely illegal, but removing criminal penalties—that is, the threat of arrest and trial, though not necessarily the threat of monetary penalty—for possession for personal use’. Mark Kleiman, *Against Excess: Drug Policy for Results* (Basic 1992) 268.

¹⁰³EN Yankah, ‘A Paradox in Overcriminalization’ (2011) 14 *New Criminal Law Review: An International and Interdisciplinary Journal* 1.

¹⁰⁴ibid 33-34.

¹⁰⁵Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2007) 65.

¹⁰⁶Yankah, (n107) 26.

¹⁰⁷EN Yankah, ‘Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment’ (2004) 25 *Cardozo LRev* 1019, 1031.

¹⁰⁸United Nations Office on Drugs and Crime, *Briefing paper: Decriminalisation of Drug Use and Possession for Personal Consumption* (United Nations, 2015).

¹⁰⁹ibid.

¹¹⁰ibid.

¹¹¹Braakmann N, Jones S, ‘Cannabis Depenalisation, Drug Consumption and Crime – Evidence from the 2004 Cannabis Declassification in the UK’ (2014) 115 *Social Science & Medicine* 29, 31.

¹¹²Moran (n20) 575.

sentenced to custody for production in the UK increased after depenalisation,¹¹³ the problem of racially disproportionate drug enforcement remains in that as the use of heavy-handed policing tactics decline, their residual use targets black and ethnic minorities even more.¹¹⁴ Further, as decriminalising minor cannabis offences would increase demand without completely disabling criminal organizations absorbing more profits; ‘minorities would be faced with not only the same criminals besetting their communities, but financially strengthened ones’. In this sense, some argue that ‘decriminalization represents the worst of all possible policies’.¹¹⁵

Finally, as cannabis would still be prohibited under decriminalisation, the element of illegality would prevent the legal basis for acknowledgement of the failed regime of prohibition and its historical impact on minorities; it would not address the problem of disproportionate racial targeting in drug enforcement, nor shield non-minor and non-personal possession cannabis offenders from disproportionate severe punishments, and do nothing to mitigate the effects of criminalisation, stigmatisation and social exclusion to date. Accordingly, whilst ‘some important features in the decriminalization of marijuana are critical to the success of any sustained effort to stem the tide of overcriminalization’,¹¹⁶ decriminalisation alone would not meet the guarantees of democratic equality. At best, from a rights-based standpoint it would constitute a bare minimum response—only marginally reducing the explosive growth of criminalisation under what is already universally recognised as a devastatingly draconian regime, without regard to the reprehensibility of prohibition altogether.

4.3.2. Legalisation and Commercialisation

In reality, democratic equality requires more than decriminalisation, because decriminalisation would not create a sufficiently substantive form of equality that democratic equality requires. It is therefore necessary to consider more extensive remedies on the basis that cannabis prohibition has failed entirely.

The current regime has seen the prohibition of a drug that ‘at least physically speaking, does not put individuals at high risk, nor mark them out as noticeably different than nonusers’.¹¹⁷ Yet, from inception, prohibition has concentrated on racial minority neighbourhoods, deepening poverty and social disorganization, thus increasing the vulnerability of residents to more crime; Its enforcement efforts and heavy surveillance increases apprehension of criminal offending; the concentration of individuals on probation increases the range of offenses for which persons can be charged.¹¹⁸ It therefore appears that the impact of enforcing prohibition has caused more harm than the drug itself.

That the increasing number of arrests has had ostensibly no diminishing effect on use rates also demonstrates the failures of current marijuana prohibition law.¹¹⁹

In many jurisdictions, cannabis is the third most popular drug, behind only alcohol and tobacco, despite having less physical health risks; in the UK, it is the most widely used illegal drug.¹²⁰

¹¹³Braakmann (n115).

¹¹⁴Shiner (n45).

¹¹⁵Moran (n20) 576.

¹¹⁶Yankah (n107).

¹¹⁷Moran (n20) 589.

¹¹⁸ibid.

¹¹⁹ibid 571.

¹²⁰UK Drug Policy Commission (n21).

And whilst there are many moral, health-related and economic arguments for legalisation, including a rejection of paternalism in favour of individual autonomy, economic stimulus, a more humane medical outlook, and growing evidence contradicting previous health-concerns posed by cannabis,¹²¹ in any case, here we are concerned with whether the status quo is satisfactory regarding the demands of democratic equality.

In this regard, it seems nearly impossible to justify the consequences prohibition has inflicted on black and minority ethnic groups. The Marijuana Policy Project argues that whilst drug abuse is a real problem for minority communities, prohibition hasn’t helped; instead, regulating cannabis similar to alcohol would weaken the criminal market and allow resources to be redirected elsewhere whilst keeping minorities out of jail.¹²²

Subsequently, a growing number of users and nonusers alike now see little justification for infringing an individual’s decision to engage in the use of an apparently harmless euphoriant.¹²³ Uruguay became the first country to legalise cannabis in 2011, followed by Canada as recently as October 2018. In the UK, doctors have been allowed to prescribe cannabis products for medical use since November 2018, whilst cannabis has been legalised in 10 US states. In light of the recency of such approaches, some have argued that it would be ‘irresponsible’ for member states to change their cannabis policies from a prohibitive regime in a hurry due to the experimental nature of legalisation policies and their unintended consequences;¹²⁴ Others have highlighted the gravity of the risk in that ‘legalisation would be virtually irreversible if it goes badly wrong’.¹²⁵

But it is hard to imagine a regime which could go more wrong than the one at present. And as Husak notes, the disaster of cannabis prohibition ‘is not merely an abstract problem for the intellectual grist of legal theorists, but one that produces excessive and unjustifiable amounts of punishment to be visited on real people’.¹²⁶ Under a lens of democratic equality which has seen millions of black and minority individuals unable to effectively engage in a society of equals, *justice delayed is justice denied*.

Accordingly, legalisation is the only way to ensure the prevention of future disproportionate treatment of black and minority individuals and its devastating effects resulting from the inherently racialised war on cannabis.

4.3.3. Affirmative Action and Beyond

Whilst acknowledging that legalisation would be a positive step toward substantive equality, this too would do nothing to remedy past injustices: previously convicted individuals would still be considered criminals, face restrictions on democratic participation and be denied opportunities for employment, travel, etc. due to the legacy of criminalisation. Indeed, it has now been widely acknowledged that ‘prohibition, combined with all too condemnable criminal behaviour among minority communities, has hollowed out neighbourhoods, gutted families, and all but guaranteed failed communities and generations’.¹²⁷ After decades of racialised cannabis policies, the broad painting of so many with the stigma of criminality has lead naturally to the creation of a despised criminal class; the ‘association in the communal mind

¹²¹Bonnie and Whitebread (n5) 971.

¹²²Moran (n20) 576.

¹²³Bonnie and Whitebread (n5) 971.

¹²⁴C Fijnaut, ‘Legalisation of Cannabis in Some American States: A Challenge for the European Union and its Member States?’ (2014) 22 EurJCrimeCrLcTrJ 207, 217.

¹²⁵Mark Kleiman, *Against Excess: Drug Policy for Results* (Basic 1992) 268.

¹²⁶Douglas Husak, *Legalize This! The Case for Decriminalizing Drugs* (Verso 2002) 135.

¹²⁷Yankah (n107) 9.

the image of the young black or brown man and the petty drug dealer' contributing to perceptions 'that criminal punishment is in part based on a person's criminal character'.¹²⁸ In this sense, there remain deeply embedded racist stereotypes of black criminality and dangerousness in public perceptions of crime.¹²⁹ This stigma and resulting social exclusion will likely endure for some time, regardless of any legislative reform. Accordingly, Husak suggests that 'repairing negative attitudes about law and authority among blacks is among the foremost challenges facing criminal justice policy in the twenty-first century'.¹³⁰ Whilst 'ending prohibition would be a major step toward alleviating racism in the criminal law'¹³¹ and help prevent future harms, legalisation would offer no relief to the millions affected by prohibition who remain incarcerated at present or are denied access to a variety of opportunities post-conviction.

Therefore, it is finally worth considering whether affirmative action and redistributive justice measures can serve as appropriate tools for ameliorating the devastating legacy of prohibition.

Expungement One potential response has been the expungement of criminal records for cannabis offences. Such has the potential to free millions from prison whilst clearing records to restore access to opportunities such as financial grants, employment, travel, and voting. California has already adopted such a policy, with existing law authorising the District Attorney to recall or dismiss a sentence, seal or redesignate convictions for which a lesser or no offense would be imposed under the *Adult Use of Marijuana Act 2016*.¹³² Reports on former convicts who have been pardoned to date indicate that although expungement cannot erase the damage done to their personal life, it 'can herald a whole shift in self-identity and a deluge of opportunities once barred to those whose records had been smeared with felony convictions'.¹³³

This concept of expungement is not unfamiliar in the UK. Following the famous pardon posthumously granted in 2013 to war-hero Alan Turing, the *Policing and Crime Act 2017* contains a provision extending this to individuals who were convicted under historical legislation outlawing homosexual acts. Prior to this, there was already a procedure for living persons to apply to the Home Office for expungement—the justification being to remedy injustices resulting from convictions for past offences no longer considered punishable by society.¹³⁴

Some critics have argued that statistical racial disparities alone should not justify rule changes, as 'crime is one area that we must keep absolutely off limits to concepts of affirmative action'.¹³⁵ Brolick proposes that if minorities are disproportionately arrested for crimes, they are also perhaps even more disproportionately victims of crimes; thus, affirmative action would elevate 'the so-called civil rights of criminals over the far more fundamental civil rights of their victims'.¹³⁶ However, it is Brolick himself who provides an exception for the application of affirmative action in criminal law: in the case of 'a dispositive showing

that a rule was adopted for discriminatory purposes'¹³⁷—and the discriminatory basis of cannabis law and policy has long been demonstrated. Furthermore, an individual's choice to engage in cannabis-related activity is fundamentally a private one; Those who have suffered unjustly at the hands of the state through disproportionate enforcement and incarceration are the real victims—of a legally sanctioned regime which has destroyed communities and barred access to the exercise of actual rights and guarantees under democratic equality. Moral arguments against cannabis users are simply outdated in the wake of a clear commitment to remedying the problem of overcriminalisation and securing justice for the many individuals who have been convicted for acts which no longer justify criminal prosecution today.

Redistributive Justice Beyond the blackletter law, Anderson also declares that to be capable of functioning as an equal citizen also includes effective participation in the economy.¹³⁸ Whereas Dworkin suggests an equal society would ensure its members have an equal share of resources,¹³⁹ democratic equality justifies a more positive duty to achieve outcomes in which minorities can participate in society as true equals. Anderson argues that substantive equality may require different levels of resources for individuals from different circumstances, to 'avoid being oppressed by others and to function as an equal in civil society':

Because of differences in their internal capacities and social situations, people are not equally able to convert resources into capabilities for functioning. They are therefore entitled to different amounts of resources so they can enjoy freedom as equals.¹⁴⁰

In this sense, democratic equality goes beyond, eg, Rawls's maximin criterion of distributive equity,¹⁴¹ by declaring that equality in the space of capabilities may justify an equal division of resources to accommodate the disadvantaged.¹⁴²

Subsequently, it must be noted that in recent years, cannabis has proven to be a profitable cash crop in states that have legalised it—representing a multibillion-dollar state-sanctioned industry to a newly minted class of entrepreneurs.¹⁴³ Yet, Black and Latino victims of the drug war are noticeably absent from current markets, with less than 12 of the 3,000 US storefront dispensaries owned by blacks.¹⁴⁴

After a long history of pervasive discrimination in housing, employment, and education, Black and Latino Americans are far less likely to be able to raise the money necessary to start marijuana businesses. The interlocking systems of inequality leading to the racial wealth gap have made many of the black and Latino victims of marijuana prohibition unlikely to capitalize on the newly permissive environment.¹⁴⁵

Amid predictions that the market for legal cannabis will reach \$18 billion by 2020, it is particularly concerning that the profits of

¹²⁸ *ibid.*

¹²⁹ Tonry (n34).

¹³⁰ Husak (n130).

¹³¹ Tonry (n34).

¹³² AB-64 Control, Regulate and Tax Adult Use of Marijuana Act 2016.

¹³³ Madison Margolin, 'How Legalization is Helping Cannabis Felons Move on With Their Lives' (Civilized, 15 Nov 2018).

¹³⁴ Ministry of Justice, 'Thousands officially pardoned under "Turing's Law"' (UK Gov, 31 January 2017).

¹³⁵ Clint Bolick, 'Civil Rights and the Criminal Justice System' (1997) 20 Harvard Journal of Law & Public Policy 391.

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ Anderson (n71) 317.

¹³⁹ Dworkin (n68) 283.

¹⁴⁰ Anderson (n71) 320.

¹⁴¹ Joshua Cohen, 'Democratic Equality' (1989) 99 Ethics 727.

¹⁴² *ibid.* 729.

¹⁴³ Harvard Law Review, 'Drug Policy — Marijuana Justice Act of 2017 — Senator Cory Booker Introduces Act to Repair the Harms Exacted by Marijuana Prohibition.' (2018) 131 HarvLRev 926.

¹⁴⁴ Amanda Chicago Lewis, 'How Black People Are Being Shut Out of America's Weed Boom: Whitewashing the Green Rush', (BuzzFeed News, 16 March 2016).

¹⁴⁵ Harvard Law Review (n147).

legal sale have disproportionately gone to middle and upper-class white Americans; additionally, as ‘the highest concentration of drug dealers is found in lower income, urban environments prone to minority dwelling’, the commercialisation of cannabis ‘might represent another tool of economic oppression’ if minorities are excluded from the legal industry due to the current flow of income being diverted elsewhere.¹⁴⁶ Such discrepancies would threaten to further entrench inequalities exacerbated by prohibition.

Accordingly, in addition to remedying the impacts of criminalisation, democratic equality must also demand that ‘future legislation committed to dealing with the harm exacted by prohibition’ consider providing ‘a regulatory framework that addresses the racially disparate distribution of the wealth generated by the market for legal marijuana’.¹⁴⁷

Perhaps the most comprehensive attempt to address the legacy of prohibition in recent times was evidenced via the proposed *Marijuana Justice Act 2017*.¹⁴⁸ Citing the ‘collateral consequences’ of arrest and incarceration and other inequalities perpetuated by prohibition, the bill attempted to expunge all convictions for cannabis use or possession offences to ‘help curb the myriad collateral consequences facing those convicted of marijuana-related felonies’; Additionally, it aimed to establish a Reinvestment Fund to create grant programs ‘to reinvest in communities most affected by the war on drugs’ by providing job training, re-entry services, health education, community centres, and youth programs.¹⁴⁹ The act followed earlier attempts at redistributive justice, such as California’s *Proposition 64*,¹⁵⁰ which established an equity permit program giving preference in the cannabis permit process to residents convicted under prohibition, to secure better economic participation for victims of prohibition.

Such reforms are provided for by democratic equality under the recognition that one’s capabilities of engaging as an equal in society ‘are a function not just of one’s fixed personal traits and divisible resources, but of one’s mutable traits, social relations and norms, and the structure of opportunities, public goods, and public spaces’.¹⁵¹ Ultimately, the longstanding results of prohibition on blacks and minorities extend much further than the mere allocation of resources. But without such provisions for affirmative action, cannabis legalisation threatens to further entrench inequalities exacerbated by the dreadful history of prohibition. Overall, the call for urgent reform is growing—‘the time is ripe to overhaul cannabis laws to remedy the negative effects which have accrued, and chart forward a new path for drug law and policy’.¹⁵²

5. Conclusion

This dissertation has illustrated how global cannabis prohibition has largely been shaped by discrimination; the effects of which have been evidenced from their origins right up to the present day. The initial justifications for cannabis prohibition laws were founded upon racial prejudices and politicised rhetoric, legitimising a cycle of oppression. These policies, globalised via international conventions, fuelled the expansion of disproportionate criminalisation, incarceration, and social exclusion, compounded by public perceptions associating blacks

and minorities with violence and criminality. The cumulative effects have resulted in denial of the guarantees of democratic equality, which demand a society that works toward the abolition of oppression in favour of equal relations between individuals; including basic liberties, freedom from outcast status and social exclusion, and effective economic participation.

An appropriate response to this decades-long denial of equality would cease cannabis prohibition and the continuation of a system which disproportionately punishes minorities for an activity conducted no more by blacks than whites. Additionally, measures must be implemented to acknowledge the historical injustices of prohibition and ameliorate its present-day effects, which have predictably and deliberately stigmatised millions of black and minority ethnic individuals. Finally, in light of an emerging multi-billion-dollar legal cannabis industry which has seen an overwhelming majority of white entrepreneurs profit from the precise activities for which blacks and minorities have been disproportionately targeted, redistributive measures must be implemented to eradicate inequality and prevent future harm.

Whilst this dissertation has focused normatively on utopian ideals of a society under democratic equality, it is worth noting that the practical limitations often highlighted in relation to the proposed reforms are not insurmountable. Nevertheless, it is evident that the current regime of cannabis law and policy runs contrary to egalitarian principles; requiring a comprehensive overhaul if it is to stand up to the scrutiny of democratic equality theory.

All in all, the time is always ripe to chart forward a new path for a 21st century global legislative and policy framework of cannabis control—an order founded upon visions of a world which guarantees effective access to mutually shared benefits of modern civil society, with respect for true relations of equality for all.

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