Jack Dong Hyun Lee

THE SHATTERED POT THAT IS CANNABIS PROHIBITION: AN ANALYSIS OF CANNABIS LAWS IN NEW ZEALAND.

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Abstract

This paper addresses the apparent issues of the Misuse of Drugs Act 1975 and the pseudo-prohibitive approach of New Zealand regarding cannabis laws. The paper analyses the historical narrative and foundations of the modern-day laws against cannabis and how international influence, domestic racism and a lack of research resulted in the adoption of laws which did not suit New Zealand at the time and still fails to cater to the needs of the nation. Currently the law continues to harm individuals through uncertain police and judicial discretion utilising outdated and subjective views of judges during sentencing and convictions for cannabis laws. Finally, the paper shows that legal theories fail to provide justification for cannabis prohibition and reveals the failures and lack of reasoning of cannabis prohibition.

Key Words

Misuse of Drugs Act 1975, Historical Narrative, International Influence, Domestic Racism, Police and Judicial Discretion, Legal Theories

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I Introduction

The close outcome of the 2020 Cannabis referendum in New Zealand saw 48.83% of participants voting yes to criminalisation and 51.17% voting no. It is evident that society is still divided upon the legality of cannabis in society.

The aim of this paper is to criticise the illegality of the possession of cannabis under s 7 of the Misuse of Drugs Act 1975 (MODA). The section reflects an unclear historical anachronism that no longer reflects current views and research.

The historical narrative shows that there were no well researched arguments against the use of cannabis. The start of cannabis prohibition was not based on valid scientific views, but on the immoral, racist, and xenophobic views belonging to broader society including Members of Parliament.

Section 7 of the MODA fails to reflect the current National Drug Policy of harm-minimisation and the move to more health-based and therapeutic approach. Instead, prohibitive legislation results in continued harm.[1] The current legislation is also burdened by many of the core prohibitive elements of previous, unjust legislation.

[1] Inter-Agency Committee on Drugs *National Drug Policy 2015 to 2020* (Ministry of Health, Wellington, 2015) at 7.

Furthermore, cannabis prohibition is inconsistent with many legal theories. When analysed from the perspective of legal scholars and their views, it fails to adequately satisfy the theoretical schools of thought regarding good law. The legal theories which have also been used to defend prohibition also fails in its justification when applied without prejudice and unfairness. Thus, the prohibition of cannabis is unsupported from a theoretical perspective.

II History

A The beginning of the legal narrative and international influence

The historical and legal narrative of cannabis prohibition reveals the context in which the legislation that prohibit its possession were passed. These laws were passed to meet the expectations set by other nations and failed to reflect the distinct needs of New Zealand at the time.

Cannabis prohibition in New Zealand started with the Dangerous Drugs Act 1927. The Hon Alexander Young, the Minister of Health under the Reform Party, stated the purpose of the Bill was an attempt to bring the New Zealand law into conformity with the 'modern idea' of drugs discussed by the League of Nations when dignitaries signed the second International Opium Convention in 1925.[2]

Mr Sullivan, the Labour Party member for Avon and opposition to the Hon Mr Young and the Reform Party, opposed the legislation on the basis that there was a lack of justification

[2] (15 July 1927) 212 NZPD 636; and Second Opium Conference LNTS 81 (opened for signature 19 February 1925, entered into force 25 September 1928).

for the statute other than to be in accordance with the League of Nations and the provisions under the second International Opium Convention.[3] He was "disappointed that the minister did not afford the house some evidence of the necessity for bringing down the bill other than that it is in accordance with the recommendations of the League of Nations."[4] Mr Sullivan claims that there was no evidence provided which showed that there was a drug consumption issue in New Zealand. Furthermore, statements made by social workers that claimed there was a drug issue had been denied by the police. Thus, he stated that if there was no drug menace, and the statute was being introduced solely to follow the League of Nations, then the extended powers that the statute gave to police officers, especially s 11 should be scrutinised.[5] Section 11 was the provision that gave officers the ability to search Chinese homes for drugs without a search warrant.

Thus, as there was no drug consumption issue in New Zealand, laws enacting harsh drug prohibition did not reflect the needs of New Zealand at the time. If there was no issue of drugs as said by Mr Sullivan, there was no immediate need for prohibition of drugs which were not being harmfully consumed.

The influence of international obligations on drug laws, rather than the genuine needs and requirements of New Zealand are further reflected in the Narcotics Act 1965, which was passed to `ratify New Zealand's commitment to the Single Convention on Narcotic Drugs.[6]

[3] (15 July 1927) 212 NZPD 638; and Second Opium Conference LNTS 81.
[4] (15 July 1927) 212 NZPD 636.
[5] (15 July 1927) 212 NZPD 638.
[6] (19 August 1965) 343 NZPD 2028.

From the time when the 1927 Dangerous Drugs Act was enacted till 1961, there was no specific offence relating to Cannabis that was reported by police. Cannabis was specifically referenced for the first time in a police report in 1961. The report stated that there were four reported offences of possessing or supplying cannabis.[7]

The foundational 1927 and 1965 Acts continued to shape the prohibitive approach and view of legislators on cannabis. This prohibitive view continues to harm society. Such harms include immense economic costs to governments in combatting drug use through judicial, sentencing, and policing costs, as well as the upkeep of prisoners.[8] Societal and individual costs are punitive punishments that have unfair sentencing disproportionately affecting minorities.[9] Punitive prohibition of drugs causes an emergence of a black markets ensuring that the quality of substances is not regulated or tested, leading to more dangerous and uncertain drugs being consumed, resulting in higher cases of overdoses.[10] Had legislation accurately reflected the lack of drug consumption in New Zealand at the time, there would not have been a need for these punitive Acts. Instead, the international obligations resulted in New Zealand committing to ill-suited laws that harm society on because of an unfounded assumption regarding drug use and the prioritisation of international standards above domestic needs.

[7] Annual Report of the Police Force of New Zealand for the Year Ended 31 March 1962.
[8] Randy E. Barnett, "The Harmful Side Effects of Drug Prohibition (2009) 817 Utah L. Rev. 11 at 22.
[9] At 19.
[10] At 19.

The Misuse of Drugs Act 1975 was again New Zealand's ratification of international obligation agreed to in the 1971 Convention of Psychotropic Substances.[11]

The international conventions which New Zealand ratified into domestic law, were predominately influenced by the United States of America (U.S.). This is because U.S. used their position as a global superpower after World War Two to spread their influence globally into all matters of governance, including their position on cannabis prohibition.[12]

B American Influence

The first express cannabis prohibition law in the U.S. was the 1914 El Paso, Texas City Ordinance Banning Sale and Possession of Marijuana.[13] This ban was based on ideas similar to the 1917 U.S. Department Agriculture Report that presumed cannabis caused "violent behaviour in Mexicans, Negroes, prostitutes, pimps, and a criminal class of whites."[14] This racist and xenophobic motive continued long into the 20th century. Many religious and or women-focused groups, championed by Harry Anslinger would lobby and campaign to prohibit cannabis with the view that it was morally abhorrent and would create catastrophic effects on society.[15] Anslinger served as the head of the U.S. Federal Bureau of Narcotics for 32 years from 1930 and was highly influential in creating wide public

[11] (28 March 1974) 370 NZPD 1278; and Convention on Psychotropic Substances UNTS 1019 (opened for signature 21 February 1971, entered into force 16 August 1976).

[12] David Bewley-Taylor *United States and International Drug Control, 1909*-1997 (Bloomsbury Academic, 2002) at 55.

[13] David Patton, "A History of United States Cannabis Law" 34 Journal of Law and Health 1 at 6.

[14] David Patton, "A History of United States Cannabis Law" at 6; and R.F. Smith, "Report of Investigation in the State of Texas, particularly along the Mexican Border, of the traffic in, and consumption of the drug generally known as 'Indian Hemp', or Cannabis indica, known in Mexico and States bordering on the Rio Grande River as 'Marihuana'; sometimes also referred to as 'Rosa Maria', or 'Juanita'," 1917.

[15] Bewley-Taylor, above n 12, at 8.

support for cannabis prohibition.[16] Anslinger targeted marginalised groups of society and utilised racist and xenophobic views of individuals to convince society into favouring drug prohibition.[17]

The racism and xenophobia of the U.S. is relevant to New Zealand despite being two different nations as after World War Two, the U.S. became the most powerful nation on the planet.[18] The U.S. used their power to obtain influence over the United Nations (U.N.) to influence nations to align with prohibition laws globally.[19] The U.S. wanted to ensure that the U.N. Commission on Narcotic Drugs, the central drug policy-making body within the U.N., would be "guided by an American agenda."[20]

Nations were unwilling to damage their political and economic relations with the U.S. for the sake of drug control, nor did drug control have any significant conflict with the interest of other nations.[21] New Zealand was also heavily reliant on U.S. trade. In 1963, 17% of New Zealand exports were to the U.S., compared to 4% to Australia.[22] This growing reliance on U.S. trade would have encouraged New Zealand's compliance on American plans and motives regarding cannabis prohibition. Thus, When the U.S. under Nixon in

[16] Ross Coomber, Karen McElrath, Fiona Measham, and Karenza Moore *Key Concepts in Drugs and Society* (SAGE Publications, 2017) at 148.
[17] At 148.
[18] David Bewley-Taylor *United States and International Drug Control, 1909*-1997 (Bloomsbury Academic, 2002) at 48.
[19] At 58.
[20] At 63.
[21] At 61.
[22] John Bernard Prendergast "Trade with North America" An Encyclopaedia of New Zealand 1966 <www.teara.govt.nz/en/1966/trade-external/page-7.

1971 declared the War on Drugs, New Zealand continued the punitive approach to cannabis regulation in line with the War on Drugs as it was not contradictory to the national view on cannabis and was politically popular with conservatives.[23]

Cannabis prohibition in New Zealand began through heavy United States influence which supported the legislation of xenophobic and politicised views on cannabis. By drafting New Zealand drug legislation under U.S. influence and its views on prohibition, which are so flawed, these Acts have similar tones of prejudice and racism. This brings the current New Zealand law into valid question as the core foundation of cannabis laws was prohibition, which was founded on racism, then if this core prohibitive element remains, the legislation is still flawed.

C Legal afterthought and racism

Not only did the early punitive Acts of cannabis stand as evidence of overseas racism, but it also reflected New Zealand's own racism and xenophobia.

Section 11 of the Dangerous Drugs Act 1927 stated that police officers despite needing a warrant for many other searches of homes, did not require a search-warrant to enter Chinese occupied homes. This was reinstating a law which was present in s 8 of the Opium Prohibition Act 1901.[24] Section 11 says nothing about how an officer was to ascertain the ethnicity, and only requires the 'Chinese' individual to be suspected of preparing, smoking. or storing opium.[25]

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[23] Coomber, McElrath, Measham, Moore, above n 16, at 178.

[24] Opium Prohibition Act 1901, s 8.

[25] Dangerous Drugs Act 1927, s 11.

S11

> If a Justice is satisfied by information on oath that there is reasonable ground for suspecting that any dangerous drugs are in contravention of the provision of this Act or of any regulation thereunder, in the possession or under the control of any person in any premises… he may grant a search-warrant authorising the constable… to enter if need be by force, the premises … and to search the premises and any persons found therein, and if there is reasonable ground for suspecting that an offence against this Act has been committed in relation to any such drugs, which may be found in the premises or in the possession of any such person… to seize and detain those drugs…
>
> Provided that, in the case of premises occupied by Chinese and suspected of being used for the preparation of opium for smoking or for the smoking of opium… a constable shall have and may exercise without a search-warrant all or any of the powers that would be conferred on him by the grant of a search-warrant as aforesaid.

Thus, the first statute which prohibited cannabis in New Zealand had a specific clause identifying a race of people to be under more extreme scrutiny than the rest.

This bill largely concerned opium and there is no reasoning or logic behind the criminalisation of cannabis. Both the legislation and its supporters such as the Minister of

Health Mr Young did not specify why cannabis was included in the statute during the parliamentary debates discussing the Act. Yet, it was still listed as a dangerous drug just as much as cocaine or opium which had greater discussion regarding their use and effect.[26]

Kevin Dawkins states that cannabis prohibition in the Act was based on an unexamined assumption that cannabis should be treated the same way as opium, and that the controls used for opiate narcotics were equally appropriate for cannabis. [27]

The advent of cannabis prohibition in New Zealand seems an afterthought in a legislation racially targeted against Chinese immigrants and the use of opium. When questioned regarding the targeted clause against Chinese individuals, the Minister of Customs at the time, the Hon. Mr Downie Stewart for the Reform Party stated that Chinese opium-smokers had a very careful system for stalling a raid and that because there was a similarly worded provision in the Opium Prohibition Act 1901, it was justified to separate Chinese individuals.[28] This was supported by Mr Young who stated that there was a "subtle nature of the particular nationality concerned", and that opium-smoking was a "vice largely peculiar to that race", which provided the rationale for the legislation.[29]

This undermines the current prohibition of cannabis because there was no true reason or justification for the prohibition of cannabis in New Zealand. Instead, the very first Act that

[26] Dangerous Drugs Act 1927, Schedule.
[27] Kevin Dawkins "Cannabis Prohibition: Taking Stock of the Evidence" 2001 OLR 39 at 43.
[28] Opium Prohibition Act 1901 s 8.
[29] (15 July 1927) 212 NZPD 636.

brought criminalisation of cannabis is heavily flawed due to its xenophobic and racist nature.

D Lack of research and a failure to reflect modern research

The Dangerous Drugs Act 1927, the earliest legislation prohibiting cannabis, was not passed with adequate research. Mr Young stated that the legislation was an attempt to reduce the use of drugs that formed "pernicious habits and the utter physical and mental demoralisation of the individuals so addicted".[30]

No research was done on the effects of cannabis, nor the prevalence of cannabis specifically in New Zealand during this time. The ministers supporting the bill accepted that New Zealand did not have a drug issue, and again, the effects of Indian hemp specifically were not mentioned.[31] My Young himself stated that "as a matter of fact, the habit of using and consuming dangerous drugs – those indicated in the schedule – is as far as I know, not very serious in New Zealand. The bill is largely a preventive measure."[32]

Thus, when cannabis was prohibited in 1927, rather than researching cannabis, legislators acted on the assumption that cannabis was to be treated equally to opium despite being drastically different substances.[33] Cannabis compared to opioids has significantly less

[30] (15 July 1927) 212 NZPD 636.
[31] (15 July 1927) 212 NZPD 639.
[32] (15 July 1927) 212 NZPD 639.
[33] Kevin Dawkins "Cannabis Prohibition: Taking Stock of the Evidence" above n 27, at 43.

detrimental effects physically and mentally.[34] The assumption made was incorrect, research should have been conducted regarding the distinct effects of cannabis.

Had research been done on cannabis, the ministers would have found a report written by the Indian Hemp Drugs Commission. The extensive report held that the moderate use of Indian hemp had no negative effects on the user, and specifically stated that the effects of Indian hemp did not justify prohibition and that the correct approach to controlling its use was taxation.[35] The Commission was created by resolution of the English House of Commons to study the effects of cannabis consumption in India. Thus, even at the time when the Act was passed, despite not having domestic research available, there were international reports showing that cannabis would not result in the utter physical and mental demoralisation of the individual. Ministers were unaware, or simply ignored the research.

This brings into question the validity of the legislation and the true motives behind the passing of the legislation. If Ministers were not motivated by sound research and instead primarily motivated by ratifying international obligations, they may have potentially been motivated by xenophobic and racist views held by influencing powers such as the United States and present in New Zealand. This is supported by the fact that ministers believed it reasonable to have different laws for Chinese individuals.[36]

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[34] David Nutt, Leslie A. King, William Saulsbury, Colin Blakemore "Development of a rational scale to assess the harm of drugs of potential misuse" (2007) 369(9566) The Lancet 1047 at 1050.

[35] Report of the Indian Hemp Drugs Commission, 1893-1894 (Simla, India: Government Central Printing House, 1894).

[36] Dangerous Drugs Act 1927, s 11.

The views of ministers have changed throughout the ages. When drafting the MODA 1975, the Hon Robert Tizard stated that it would be open for the committee to study future reports on cannabis and make decisions regarding cannabis in the Act after research had been studied. [37] The importance of research is also supported by other ministers who states that it is critical that the House should have the best advice and evidence available before coming to a decision on cannabis. [38] This is a significant change to the ministers discussing the Dangerous Drugs Act who did not mention the importance of research and evidence relating to cannabis.

These statements for having regard to the evidence and the research may serve as a basis for setting a precedent, that ministers today should give regard to studying relevant reports and studies on the effects of cannabis and then make the decision of legalisation then. Modern research is clear on the prohibition of cannabis, that it creates more harm than good, and that it is ineffective in reducing drug use. [39] If research indicates that prohibition should not be utilised for cannabis use, legislation should reflect this modern research in order for the legislation to be rational, thus the continuance of cannabis prohibition in New Zealand indicates the failure to do so and will only results in further harm whilst continuing to be unsuccessful.

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[37] (28 March 1974) 370 NZPD 1278.

[38] 28 March 1974) 370 NZPD 1279.

[39] Ross Coomber *The Control of Drug and Drug Users: Reason or Reaction?* (Harwood Academic Publishers, 1998) at 126; Coomber, McElrath, Measham and Moore, above n 16, at 179; and Dawkins, above, n 27, at 49.

E Conclusion

The history of cannabis regulation in New Zealand has been characterised by racism, xenophobia, and an overall lack of research. It was enacted largely through fear-mongering tactics and had few genuine and validly researched discussions on the reasons and implications of prohibiting cannabis.

This has created an injustice in the law. Cannabis prohibition has caused significant harm and disruption to many individuals and communities in New Zealand throughout history up to and including the present day.[40]

If the foundation of the prohibition of cannabis is so flawed, can the current system that was built on these questionable values truly be good? This is the discussion of the next chapter.

III The Legislation

A The current legislation

The current relevant sections regarding the prohibition of cannabis as a Class C controlled drug are s 7 of the MODA.[41]

> **7 Possession and use of controlled drugs**

[40] Dawkins, above, n 27, at 81.

[41] Misuse of Drugs Act 1975, s 7.

(1) Except as provided in section 8 or 35DD, or pursuant to a licence under this Act, or as otherwise permitted by regulations made under this Act, no person shall—

(a) procure or have in his possession, or consume, smoke, or otherwise use, any controlled drug; or

(b) supply or administer, or offer to supply or administer, any Class C controlled drug to any other person, or otherwise deal in any such controlled drug.

…

(2) Subject to subsection (3), but without prejudice to any liability under section 6, every person who contravenes subsection (1) commits an offence against this Act and is liable on conviction—

...

(b) to imprisonment for a term not exceeding 3 months or to a fine not exceeding $500 or to both in any other case: provided that, where any person is convicted of an offence against subsection (1) relating only to a Class C controlled drug and is liable to a penalty under paragraph (b), the Judge or District Court Judge shall not impose a custodial sentence (being a sentence under which a person is liable to be detained in a prison within the meaning of the Corrections Act 2004) unless, by reason of the offender's previous convictions or of any exceptional circumstances relating to the offence or the offender, the Judge or District Court Judge is of the opinion that such a sentence should be imposed.

> (5) To avoid doubt, it is affirmed that there is a discretion to prosecute for an offence against subsection (1)(a), and a prosecution should not be brought unless it is required in the public interest.
>
> (6) When considering whether a prosecution is required in the public interest, in addition to any other relevant matters, consideration should be given to whether a health-centred or therapeutic approach would be more beneficial to the public interest.

Thus, the general pathway for cannabis possession offences is s7(1)(a), which then results in sentencing to be liable for narrow judicial discretion under s7(2)(b) where custodial sentences are only to be given for specific circumstances.

Section 7(5) affirms that a prosecution should not be brought unless it is in the public interest, and s7(6) explains that for something to be in the public interest, consideration should be given whether a health-centred approach would be more beneficial to the public interest.[42] It is important to note that it is not the drug user's interest to be taken into account, but the public interest that is relevant.

[42] Misuse of Drugs Act 1975, s 7.

B How much has changed?

It is evident that the previous Acts prohibiting cannabis and other drugs are heavily flawed and built on baseless foundations. But is that still the case with the MODA? Has the legislation evolved enough to shed itself of the troubled burdens of the past?

Fortunately, the clearly xenophobic aspects of the legislation have been removed. Section 11 of the Dangerous Drugs Act has been removed, in our modern legislation, there is no specific ethnicity of people whose homes are able to be searched without warrant.

Further change is also seen in the penalties applied to wrongdoers. Despite the term of imprisonment not exceeding three months being constant, as well as the current fine of $500 being similar to the £200 in 1965, what has changed is the consideration required for custodial sentencing and the bringing of prosecution.[43] Under s7(2)(b), there is now a specific reference in statute requiring the judge to consider custodial sentencing only when the offender has previous criminal history, or in exceptional circumstances. Section 7(5) and (6) also states that offenders should only be prosecuted for possession of cannabis if it is in the public interest.[44]

These are all relatively progressive changes to the law compared to the previous statutes. They attempt to limit custodial sentences and encourage the use of discretion in prosecuting which were not available previously.

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[43] Narcotics Act 1965, s 15.

[44] Misuse of Drugs Act 1975, s 7.

However, despite this, the Act, and the punitive liability it imposes has remained steadfast since 1927. It is a criminal Act aimed to control and fix a societal issue through prohibitive and punitive sanctions. This aspect of the law has been stagnant.

All legislation following the Dangerous Drugs Act continue to apply punitive punishments including conviction to the possession of cannabis. Despite the evolution of the legislation in the past century, the core prohibitionary element remains.

C The current application of the law

When looking at how cannabis has been prosecuted using the current legislation, there has been an increase of non-court proceedings for personal drug possession from 66% in August 2019, to 82% in the first quarter of 2021.[45] Furthermore, 90% of first offences were dealt by way of non-court proceedings.[46] Non-court proceedings include informal warnings, formal warnings, and referrals to Te Pae Oranga.[47] This means that despite drug use remaining steady, there is an overall shift in the attitudes of the Police and judiciary to not criminally prosecute low-level cannabis offenders, and instead use alternative non-punitive measures.

Despite the Act and its effects, the reduction in punishments against the possession of cannabis may be a consequence of the changes in societal views of cannabis. The relative

[45] Ministry of Health *Misuse of Drugs Amendment Act 2019 Post-Implementation Review* (2021) at 8.
[46] At 8.
[47] At 8.

acceptance of the substance by most in our society has resulted in the decrease of punishments.

In 2020/21, 63% of cannabis convictions were low-level, as in possession related, and 337 individuals were sent to prison for cannabis-related convictions, 189 individuals for low-level offences such as cannabis possession or use.[48]

Therefore, the majority of cannabis possession offences are no longer being convicted and prosecuted. On its face, this seems to be a good outcome, there are fewer prosecutions and individuals being criminalised for possessing cannabis. However, this brings into question, for the small minority of people who are being criminalised for possessing cannabis, was the use of discretion fair?

The discretion to prosecute and criminalise an individual lays in the two-step discretion process, the police and prosecutor must decide to criminally prosecute, and then the judge has discretion to convict or acquit the drug user.[49] What makes judges penalise only 18% of all offenders and not penalise the others? Are there flaws and subconscious biases that are detrimental to marginalised groups in society that are held by the judges?

The uncertainty in sentencing may be caused by the views of the judges when exercising their discretion. The discretion exercised by judges in the Alcohol and Other Drug

[48] NZ Drug Foundation *"State of the Nation"* (2022) at 51.
[49] Misuse of Drugs Act 1975, s 7.

Treatment Courts (AODTC) can reveal how some judges view the problem of drug use, drug addiction and prohibition.

D Judges of the Drug Courts

An analysis of the AODTC is relevant in assessing the current views of the courts on drug use and cannabis, and how it still facilitates the outdated view of prohibition and does not necessarily reflect the national drug policy of harm-reduction.[50] There is bias against drug users which results in the lingering effects of prohibitive and punitive views of drug possession and cannabis.

The historical penal approaches to addiction and cannabis use have resulted in addicts and drug users to be labelled as criminals. Therefore, any attempt to have critical, constructive discussion regarding cannabis use or addiction lead to a tendency towards penal punishments towards 'criminals'. The tension between the health view and the criminal justice view to drug use continues to contribute to the confusion of cannabis reform debates in New Zealand.

The current views of the AODTC regarding drug addiction is that it is a disease.[51] The addict has a pathological behaviour and character that is amenable to treatment. The AODTC handbook recognises that addiction is a chronic and relapsing condition.[52]

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[50] Toni Carr "Governing Addiction: The Alcohol and Other Drug Treatment Court in New Zealand" (PhD Thesis, Victoria University of Wellington 2020) at 108.

[51] Katey Thom and Stella Black *Ngā Whenua Raranga/Weaving Strands #1 The therapeutic framework of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court* (Wellington 2018) at 12.

[52] Toni Carr "Governing Addiction: The Alcohol and Other Drug Treatment Court in New Zealand", at 189.

However, at the same time, despite viewing these drug-users as diseased and lacking volition, they attribute personal responsibility and liability to these individuals which results in the 'justified' use of penal punishments.[53]

Dr Toni Carr points out the paradoxical nature of this view.[54] If drug use is seen as a disease, how is it possible to attribute personal blame to the drug user for being 'diseased'? Treatment through the AODTC requires complete abstinence and thus great volition from the individual over oneself, but if drug use is a caused by an individual's will being overborne, resulting in a pathological need to consume drugs, in what logical sense is it justified to expect such personal control to completely stop the use of drugs?

Furthermore, the discretion to choose which individuals are placed into the AODTC process is subjective and based on individual values and beliefs of the judges and the team members.[55] Carr states that, "there is neither a need for, nor interest in, addressing offenders' health and wellbeing."[56] Participants are picked based on the judges' view of honesty, responsibility and whether the judge believes the participant would succeed.[57]

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[53] At 119.
[54] At 82.
[55] At 108.
[56] At 108.
[57] At 108.

Observations and interviews show that judges tend to search for and focus on participants' character, and either disregard or downplay clinical evidence of addiction and clinical treatment that challenges their beliefs.[58]

Not only is the subjective and biased discretion of AODTC members relevant in a direct sense, as many of the participants of the AODTC would be cannabis users and are therefore prohibited from its use in the goal of complete abstinence, but it also highlights the flaws of judicial discretion.

The examples of discretion may be sourced specifically from the operation of the AODTC, but the values and principles the judges hold and the manner which it is expressed may have a wider impact including decisions on cannabis possession and use, and more specifically, s7(2)(b) of the MODA. There may be many harsh punishments and punitive sentences given to individuals who have been prosecuted by the police but would not have been convicted but for the subjective and outdated beliefs of judges under s7(2)(b) who may have disregarded clinical evidence.

Despite s7(2)(b), 698 low-level cannabis offenders received convictions for cannabis related offences alone between 2020 and 2021.[59] It is also evident through the judicial exercise of discretion in the AODTC that judicial discretion regarding drug use is heavily subjective.[60] This is troublesome as subjective use of discretion leads to uncertainty in the

[58] At 117.

[59] NZ Drug Foundation *State of the Nation* above n 48, at 51.

[60] Catriona MacLennan "There's Something Wrong with the Sentences" (2016) 227/4 MoS 14 at 16.

sentencing of individuals committing the same crime. This view is not only present in the AODTC, but to wider courts as well, with many judges deciding on cannabis cases with their subjective belief that cannabis is a gateway drug. [61] Therefore, despite the focused analysis on AODTC judges, many other judges in drug offending cases are similarly guided by subjective views rather than scientific evidence. The subsequent decision to prosecute for cannabis possession under s7 of the MODA would result in discretion being exercised to the detriment of drug users in the same manner. The same injustice and unfairness likely impact the use of discretion under s7 of the MODA just as much as the discretion in the AODTC.

The possession and use of cannabis alone is a small specific area of legal punishment. To legalise the possession of cannabis would not result in any changes to general criminal sentencing due to New Zealand's concurrent system, however it would allow many harmless 'offenders' to escape criminal liability and its subsequent harms. This would include the 698 individuals who would have their lives subject to difficulty as a result of their criminal conviction for only cannabis related offending alone. [62]

Decriminalising the possession of cannabis, could keep individuals out of the criminal justice system which would save them from unnecessary exposure to the prohibitive approach employed by the MODA which could then subsequently reduce unnecessary and often wrongful punishment.

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[61] At 16.

[62] NZ Drug Foundation *State of the Nation* above n 48, at 51; and MacLennan, above n 60, at 16.

The AODTC based research shows that judicial discretion is not infallible, it has shortcomings and is vulnerable to subjective beliefs. For the cases of low-level cannabis offending such as possession of cannabis, to rely on judicial discretion would be wrong and result in more harm to society and to individual users than there would be if cannabis possession was simply legalised.

E Māori and Cannabis

Māori are more likely to be arrested or convicted on cannabis charges than non-Māori, even taking into account their higher rates of cannabis use.[63] The discretion used in cannabis prosecution is racially biased against Māori.[64] Therefore, the legalisation of cannabis would have an equally disproportionate positive impact on Māori. Unjust prosecutions would not be able to be exercised against Māori and would no longer disadvantage the minority group and would represent a harm minimisation and equitable approach in law.

Māori face systemic oppression in many areas of life, to alleviate this oppression in a small area of life is not an all-encompassing solution but is still an important principle in order to create justice in New Zealand.

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[63] Reremoana Theodore, Mihi Ratima, Tuari Potiki, Joseph Boden and Richie Poulton "Cannabis, the cannabis referendum and Māori Youth: a review from a lifecourse perspective" (2021) 16 New Zealand Journal of Social Sciences 1 at 2.

[64] At 11.

IV A theoretical analysis on the law

The legal history and narrative of cannabis prohibition in New Zealand is flawed. This section further demonstrates that the law is equally unsatisfactory when discussed under a theoretical lens.

The legal theories which have been used to support prohibition show that if these theories were applied without subjective qualifications, it would leave the law extremely oppressive by prohibiting various activities to such an extent that the staunchest of prohibitionists would cry fie.

A Mill's and Kaplan's principles of harm

Mill's view was that the right to self-determination was not unlimited and had certain limitations on individual liberties. This was known as the 'harm principle', that if an action resulted in doing harm to another, that action is wrong, and the state is able to intervene to prevent that action from occurring.[65] One's personal liberty to swing their arm ends where someone else's nose begins.[66]

However, it could be said that drug use is only a danger to oneself. Therefore, this theory, that the individual has freedom to use their own body so long as no harm is done to others would likely support cannabis use. To argue that cannabis use may directly harm others is

[65] John Stuart Mill *On Liberty* (Cambridge University Press, 2012) at 22.

[66] John B. Finch, Chairman of the Prohibition Party "The People Versus the Liquor Traffic: Speeches of John B Finch" (Opera-House, Iowa City, Iowa, May 7, 1882).

disingenuous, it would require a far stretch of specific circumstances to result in direct harm to others.

This is where Kaplan's four indirect and secondary harms are useful. These are the four situations where the law may find justification to prohibit conduct which may initially appear only to harm the actor.[67]

(1) These are the public ward harms, which are the costs to the public for injuries resulting in costs to the public health system.
(2) The non-support harms, which are that the directly harmed individual's responsibilities must still be fulfilled, and society is burdened to meet them.
(3) The direct harm might lead to modelling, that other individuals, especially youths have now been introduced to this wrongful act and thus will do it themselves, resulting in more direct and secondary harm.
(4) And a highly theoretical categorical imperative, that if more people began doing these actions, that society itself will collapse.

These principles of harm and the potential harms associated with cannabis use may prima facie indicate that Mill's and Kaplan's theory may lean towards prohibiting cannabis. With regard to the four indirect harms, it has been argued that cannabis has been prohibited to reduce these secondary harms. Public ward harms could occur if individuals injured themselves whilst under the influence of cannabis, which could then lead to non-support harms if the injured individuals have any dependents they are unable to cater to. Modelling

[67] John Kaplan "The Role of the Law in Drug Control" (1972) 1971(6) DLJ 1065 at 1066.

could occur where youths witness cannabis use and are influenced to consume cannabis themselves.

If these principles were applied indiscriminately, then many activities that have the similar secondary harms should be prohibited and criminalised when they are not. The secondary harms related to cannabis use are similar to that of alcohol use or tobacco use, as well as other unhealthy lifestyles which are legal. Dangerous sports such as spelunking equally create risk of indirect harms to the close family of the actor as well as to society at large. Yet these actions have been justified by individual liberty rights, whereas the possession of cannabis has not.

This is where the previous discussion on the legal history and narrative of cannabis prohibition provides context. If the principle of harm from Miller was adopted, merged with the secondary harms of Kaplan, many currently legal acts would be prohibited. The question is then asked, why is spelunking or alcohol allowed, where cannabis is not? By looking at the historical narrative, the answer is that secondary harms were used as a justification to stigmatise minorities and other unpopular groups.

Therefore, these two theoretical principles provide no support for the prohibition of cannabis, rather, they further demonstrate the morally bankrupt beginnings and justifications for cannabis prohibition. The nit-picking of certain activities deemed to be

'immoral' based on xenophobia and fervour. Kaplan himself acknowledges these flaws and the fact that these principles have been used to falsely justify cannabis prohibition.[68]

B Feinberg and legal paternalism

Another justification based on legal theory regarding the prohibition of cannabis and other drugs is legal paternalism. Legal paternalism justifies the state to exercise coercive power to prevent individuals from self-inflicted harm regardless of their own personal volition if it is for their own good.[69]

Examples of laws justified by legal paternalism would be laws mandating the use of helmets when riding motorcycles, or seatbelts in cars. These laws exist only to protect the individual from their own harm, even if the individual exercising their own autonomy did not wish to do any of these acts, they are still legally bound to do so.

In the drug context, no one is allowed to possess or deal in illicit drugs for their own leisurely purposes. This is because the government believes it is just to exercise their power through criminal law to prevent individuals from consuming illicit drugs on the basis that individuals consuming drugs would cause self-inflicted harm.

However, scholars who support legal paternalism being exercised in relation to substance consumption limits the sphere of prohibition to allow certain substances to be consumed and prohibit others, which often are substances that are widely socially accepted and does

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[68] At 1072.

[69] Joel Feinberg "Legal Paternalism" (1971) 1 CJP 105 at 105.

not apply to their lives. Feinberg boldly claims that the trick of legal paternalism is "stopping short once we undertake this path, unless we wish to ban whiskey, cigarettes, and fried foods, which tends to be bad for people too..."[70] Disregarding subjective views on morality, and instead focusing on actual harm done to oneself, there should be similar legal approaches to whiskey, cigarettes, and cannabis. Alcohol and tobacco cause more harm to self than cannabis.[71] Thus, if laws were applied without prejudice and discrimination, this would either prohibit whiskey and cigarettes, or legalise and regulate cannabis. Yet clearly as seen by New Zealand society, it does not, and legal paternalism is not applied indiscriminately.

Despite legal paternalism being a very important part of drug prohibition, the theory itself is used only when convenient subject to the political and social biases that critical cannabis discussion is so afflicted with. Legal paternalism as a theory does not support the prohibition of cannabis with alcohol remaining legal, however, the theory has been used in a niche and prejudiced way in an attempt to support the prohibition of cannabis and not alcohol.

C Gorecki's moral aversion

Gorecki believes that the key to criminalisation is the moral aversion to wrongdoing thereby making prohibitive laws part of the moral norms of a society.[72] Gorecki believes

[70] At 106.

[71] David Nutt, Leslie A. King, William Saulsbury, Colin Blakemore "Development of a rational scale to assess the harm of drugs of potential misuse" above n 34, at 1050.

[72] Alden Miller "Two Theories of Criminal Justice" (1981) 79 MLR 904 at 904.

that a sense of morality is better than the use of fear in criminalisation as fear is less admirable and fails to discourage uncalculated crimes.[73]

He establishes that this is done through associating the consequences of an action with those actions, thus individuals feel the same way about the action as they do the consequence.[74] Therefore, if the consequences of an action were punishment, then the negative connotation of punishment would pass on to the action itself.[75]

For this to work, Gorecki states that there must not be intermittent consequences, and instead punishment must be stable and certain and follow every single occurrence of the proscribed behaviour.[76] There must also be stability and certainty in the application of the law, Gorecki criticises judicial discretion believing it to lead to unfairness and ambiguity.[77]

The current application of cannabis prohibition fails this requirement. Only 18% of cannabis possession cases were dealt with through court proceedings.[78] The chance of being caught for possessing or using cannabis is very low, and even if an individual was caught, the chances of them being prosecuted are also low. Thus, following Gorecki's view, this would not create a moral aversion to the use of cannabis as drug users are less likely to associate cannabis with the negative experiences of punishment. If courts only punish

[73] At 905.
[74] At 905.
[75] At 905.
[76] At 905.
[77] At 906.
[78] Ministry of Health *Misuse of Drugs Amendment Act 2019 Post-Implementation Review* (2021) at 8.

18% of individuals who have been caught doing a prohibited behaviour, to what extent can that prohibition be regarded as authoritative? The apparent illegality of the action has dwindled. Why follow a rule if breaking this rule does not usually result in punishment? Is the law prohibiting that action truly a law when viewed from a pragmatic perspective? If a law has no power because it lacks a general societal consensus as well as effective enforcement, how legitimate is the law?

The result of the intermittent application of consequences is the failure of moral aversion towards cannabis.

Gorecki further states that for the law to be moral, and not simply powerful, the law must also be just. It must conform with what the majority of society view as right, and it must meet these moral expectations. A law will only be just in Gorecki's view if there is a societal moral consensus regarding the specific activity.

Society as a whole does not view cannabis with moral aversion. The recent cannabis referendum in New Zealand showed that 48.9% of the voting population voted for cannabis to be legalised.[79] Not only does cannabis prohibition fail in achieving moral aversion by being inconsistent in the dealing of punishment, but it fails to reflect the society's moral consensus. There is not enough convergence of people's morality and experiences to represent a sense of unanimity in beliefs that moral aversion would require.

[79] 2020 Cannabis Legalisation and Control Referendum Declaration of Official Results (6 November 2020) *New Zealand Gazette* No 2020-au5131.

This is reflected in Gorecki's own writing, where he states that drug use is too complicated to be dealt with through criminal sanctions.[80] His criticisms of the American criminal justice system can be applied to the New Zealand's cannabis prohibition system. It contains laws that proscribe activities that have no moral consensus, the judges apply the law inconsistently, and the system fails to provide certainty as every offence is not punished.[81]

Cannabis prohibition does not satisfy Gorecki's theory of criminalisation.

D Ashworth's principles

One of Ashworth's fundamental principles is the rule of law. This means a citizen deserves to be informed of the law before they can be fairly convicted for that offence and that citizens are not ambushed by the law due to ambiguities and confusion.[82]

One of the factors that help ensure the rule of law is the principle of maximum certainty. Certainty is achieved where an individual can read the wording of a provision and if need be, with the assistance of the court's interpretation, understand what acts and omissions will make him liable.[83]

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[80] Miller, above n 72 at 906.

[81] At 906.

[82] Andrew Ashworth and Jeremy Horder *Principles of Criminalisation* (7th ed, Oxford University Press, Oxford, United Kingdom, 2013) at 63.

[83] At 63.

The current s 7 of the MODA does not provide an adequate degree of certainty for possession of cannabis offences. Section 7 (5) and (6) state the use of the discretion to prosecute for an offence against possession of drugs should only be used if it is required in the public interest.[84] What is in the public interest should also have consideration to whether alternative health-centred or therapeutic approaches would be more beneficial.[85]

These are vague terms which undermine the principle of maximum certainty. The Act does not state what assessment to make when determining what the public interest is, and what behaviours or situations go towards improving or diminishing this supposed public interest. Therefore, an individual who reads the wording of this provision would not know whether they would be convicted or not based on the provision. There is uncertainty.

There is further confusion and lack of clarity in an outcome due to the current application of the law. Most possession of cannabis offences are not convicted.[86] An individual that has been charged under this section would not know whether they would be part of the gross majority of offenders who are dealt with using non-court proceedings, or if they are misfortunate enough to be caught within the seemingly vague, arbitrary, discretion leading to a conviction. The current state of the law is not only ambiguous in its wording, but intermittently enforced. Therefore, when it is enforced, there is unfairness that challenges the validity of the law and its theoretical soundness.

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[84] Misuse of Drugs Act 1975, s 7.

[85] Misuse of Drugs Act 1975, s 7.

[86] Ministry of Health *Misuse of Drugs Amendment Act 2019 Post-Implementation Review* (2021) at 8.

E Packer's limits on criminal sanctions

Packer states that there is no clearer case of the misapplication of criminal sanctions than in relation to drug use.[87]

He states that there is no strong scientific evidence that cannabis has similar functions to narcotics or opiates, that it is dangerous to the human organisms to the point of justifying severe criminal sanctions, nor that cannabis is a gateway drug.[88] He questions whether criminal sanctions best serve the legal paternalistic goal of saving individuals from themselves.[89]

When analysing the outcomes of drug prohibition, Packer notes the large number of individuals who are primarily users are disproportionately minorities.[90]

Furthermore, the failure of criminalisation, and therefore its limit, with regard to prohibited cannabis use demonstrates the inefficacy of criminal sanctions to control consensual behaviour.[91] The harsh penalties for cannabis related acts, as well as the significant policing activities and costs had no impact on decreasing cannabis use or cannabis production. [92]

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[87] Herbert L. Packer *The Limits of the Criminal Sanction* (Standford University Press, California, 1968) at 333
[88] At 338.
[89] At 338.
[90] At 333.
[91] At 339.
[92] At 339.

Not only this, more recently, individuals continue to use cannabis en masse, and discretion is heavily used to minimise the impact of the law.[93] He refers to this as the nullification of the law as society accepts its unsuitability, without creating legislative change.[94] This is evidenced by Misuse of Drugs Amendment Act 2019, where legislative change was enacted to minimise the impact of the law by requiring police and judges to use their discretion against prosecuting for cannabis possession, but falls short of legalising cannabis.[95]

The harm of cannabis prohibition, prohibition's inefficiency, the societal acceptance of cannabis and the significant costs to the government in policing and judicating cannabis cases, undermines the validity of cannabis prohibition as well as demonstrating the limit of criminal sanctions.

Thus, through Packer's analysis, it is evident that drug nullification is occurring in New Zealand, as discretion to minimise the impact of prohibition is legislated in the prohibiting Act itself.[96] To make good and socially accepted law, it must be accepted that prohibiting consensual use of cannabis sits beyond the limits of criminal sanctions.

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[93] Coomber *The Control of Drug and Drug Users: Reason or Reaction?* above n 39, at 126; Misuse of Drugs Act 1975 s 7(2)(b); and s 7(5).

[94] Packer *The Limits of Criminalisation*, above n 87, at 339.

[95] Misuse of Drugs Amendment Act 2019 s 6.

[96] Misuse of Drugs Act s 7(2)(b); and s (7)(5).

F Conclusion

When analysing the law through a theoretical view, it is evident that many legal theories do not support cannabis prohibition and instead reveals the failings of cannabis prohibition laws in meeting the standards of good law under these theories.

It is also evident that the theories which prohibitionists have used to support their claims have been applied not as proper theories but as justifications for their own politicised views. The theories which prohibit cannabis, if applied as widely as the theories themselves state, would prohibit a greater area of daily life. When these theories were used to justify cannabis prohibition, they were qualified not by reasonable and unbiased personal liberties, but of subjective personal views of prohibitionists.

Legal theories therefore support the legalisation of marijuana and the end of prohibition to avoid the harms caused by the persistence of bad law.

V Conclusion

The 2020 Cannabis Referendum was a great opportunity for New Zealand to begin an effective transformation of cannabis prohibition laws into a more pragmatic and effective approach. The failure to pass the referendum means that New Zealand will continue to have the current cannabis laws with all its flaws.

Historically cannabis prohibition has been poorly researched and has been influenced by both domestic and international racism. These factors are what led to the creation of

cannabis prohibition in New Zealand. The continued existence of cannabis prohibition in s 7 of the MODA, shows that the core function of prohibition in the laws initially made with improper influences still exists today. This should raise the standard for inspection on the effects of the modern law. These cannabis prohibition laws that have faulty foundations may result in injustice through its application.

Injustice and bias are present in the current application of the law. The enforcement of cannabis prohibition is not only uncertain, but there is also disproportionality in punishment. Police and prosecutors only prosecute a fraction of cannabis possession offences, and when prosecution is undertaken, it is disproportionately against Māori.[97] Furthermore, judges when exercising their discretion may hold antiquated ideas of drug consumption and have subjective views which are critical of drug users.[98] This is a failure of s 7 of the MODA and should be changed as s 7 provides for this use for discretion. The possible biases of judges cause not only uncertainty but also unfair punishment against individuals who are caught under the harsh view of the judges. This fails to reflect the goals of the current National Drug Policy, such as harm minimisation, the current application of cannabis prohibition in New Zealand continues to cause harm whilst failing to reduce drug consumption.[99]

Theoretically the law is also subject to valid criticism. The theories do not satisfy various legal theorist's opinions on good law. Furthermore, the legal theories used to justify

[97] NZ Drug Foundation *State of the Nation* above n 48, at 51.
[98] MacLennan, above n 60, at 16.
[99] Coomber *The Control of Drug and Drug Users: Reason or Reaction?* above n 39, at 126

prohibition only justify prohibition because of the prejudice against cannabis. These theories if applied equally would just as easily support the prohibition of alcohol or tobacco use, or legal substances that are detrimental to health, such as processed fats or sugars, yet these harmful substances remain legal and accessible. Thus, theoretically, not only is cannabis prohibition contrary to good law, but theoretical support for cannabis is also only possible through preconceived notions that are not relevant to legal theory.

There will be no perfect solution to the problem of harmful drug use in a society, including cannabis consumption. However, as evident within the last century, prohibition does not solve this issue, it attempts to deal with an ultimately societal issue with criminal sanctions creating more harm. The current cannabis prohibition laws must be abolished and discarded. There is no justification to keep these prohibitive laws. The legal narrative, modern empirical evidence, and theory all show the complete failure of the cannabis prohibition.

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