The Decline of Prohibition: Human Rights and the Medicalization of Cannabis in the Contemporary West

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Outline

Chapter 1 - From Prohibition to Medicalization to Legalization (And Places in Between)

This chapter surveys the history of international cannabis prohibition, its implementation, and reception in Canada, the United States of America, and the United Kingdom. To contextualize these sources of law it is necessary to consider the political contexts of each country. In such a way, it is possible to locate the roots of resistance to prohibition and the legal arguments used to justify and sustain the system. Policy cross-pollination played a role in framing the debates over medical and recreational cannabis across jurisdictions,[1] but "legal and constitutional arrangements" forced legislators and judiciaries to adjudicate cannabis laws in different ways.[2] Indeed, there are just as many idiosyncrasies as there are similarities when it comes to the enforcement of cannabis prohibition. Aside from widespread support for international prohibition, no uniform approach to the cannabis issue has been adopted. But as cannabis for therapeutic purposes (CTP) became more accepted as a legitimate medical treatment in several jurisdictions the tenor of the debate shifted. At this point, those who had long deemed cannabis to have wrongly been stigmatized began challenging its criminalization. Invoking their right to liberty and autonomy, activists challenged prohibition using the language of human rights in the courtroom.

[1] On the interaction between the policies of the United States and Canada, see German Lopez, "Canada is moving to legalize marijuana – and it may violate international drug law to do it," *Vox*, 13 April 2017, accessed 17 May 2018, https://www.vox.com/2017/4/13/15219524/canada-marijuana-legalization-bill/.
[2] Caitlin Hughes, "The Trajectories of Cannabis and Tobacco Policies in the Unites States, Uruguay, Canada and Portugal: Is More Cross-Substance Learning Possible Outside the United States?" *Addiction* 113 (2017), 603-4.

Through an analysis of case law from the late 1990s and early 2000s the current trend toward liberalization in Canada and the US can be explained.[3] Thereafter, arguments that seemed to be esoteric or downright ludicrous reflected, more and more, the views of much of the public. In the US, the public has been clear about their views in the ballot box. Several states saw referenda on increasing access to medical and/or recreational cannabis pass in 2016, following the example of successful states like Colorado, Washington, Oregon, and Alaska.[4] Of course, there remains significant conflict between state and federal law, an issue that will be addressed below. Conversely, the retrograde steps to increase restrictions on cannabis in the UK in the 2010s proves that it is in the political sphere that real change comes about. But without the agitation of litigants, as well as human rights campaigners and cannabis business interests[5] many of whom also happened to be cannabis users, the wave of decriminalization and legalization underway at present might not have come about at all.

Chapter 2 - Juridical Science and the Science of Psychoactive Substances

The use of scientific arguments regarding the individual, social, and moral harm of cannabis in legal claims impugning prohibition have established that there is a paucity of evidence to justify cannabis being classified with other, more dangerous psychoactive

[3] It was in the 1990s that medical cannabis really came to prominence. Lester Grinspoon, "Cannabis: Wonder Drug of the '90s," in Lorenz Bölinger (ed), *Cannabis Science: From Prohibition to Human Right* (Frankfurt am Main: Peter Lang, 1997), http://www.bisdro.uni-bremen.de/boellinger/cannabis/10-grins.pdf.

[4] Sam Levin, "California, Nevada and Massachusetts vote to legalize recreational marijuana," *The Guardian*, 9 November 2016, accessed 15 May 2018, https://www.theguardian.com/us-news/2016/nov/08/state-ballot-initiative-election-results-live-marijuana-death-penalty-healthcare. See too Melia Robinson et al., "This map shows every state that has legalized marijuana," *Business Insider*, 20 April 2018, accessed 15 May, 2018, http://www.businessinsider.com/legal-marijuana-states-2018-1?op=1.

[5] In Washington, by way of illustration, human rights advocates lobbied for changes to state law while "the bulk of [actual] legal and regulatory activity surrounds cannabis marketplace management." Business has played a key role in the process of rolling out legalization while "social justice remed[ies]" have been sidelined. On the US, see Eric L. Jensen and Aaron Roussell, "Field observations of the developing legal recreational cannabis economy in Washington State," *International Journal of Drug Policy* 33 (2016): 96-101. On Canada see Paul Webster, "Debate over recreational cannabis use legalisation in Canada," *Lancet* 391 (February 24, 2018), 726.

substances. Even though this has been recognized as legal fact in several judicial decisions there is little the judiciary can actually do to change government law and policy. This is because the legislative and executive branches of government generally have the jurisdiction to make choices on moral issues. But it also has to do with the international treaty regime governing drugs, which more or less binds states to prohibitionist policies.

Human rights claims made on the basis of a lack of evidence of cannabis' harmfulness have largely been unsuccessful in Canada, the UK, and US. This applies to both CTP and recreational cannabis. Of particular importance in this debate was John Stuart Mill's harm principle, which framed how the courts interpreted the evidence. In the realm of CTP, there has been limited recognition that cannabis should be recognized as a medicine and available as of right to those whom it has been prescribed by a physician. Sometimes this right has been won in the courtroom, but public campaigning has been just as important in convincing legislators to grant access to CTP. Surveying the evidence presented in court to establish cannabis' therapeutic value, this chapter looks at how the medico-scientific debate and case law on CTP led to the legalization cannabis for medical purposes.

Overall, medical science did not convince the judiciary that the prohibition of cannabis was unwarranted. Conversely, insufficient data was presented to suggest that it was warranted. Each jurisdiction dealt with these issues in different ways, but they have one key detail in common. That is, the Catch-22 that calls for more evidence to support cannabis' medical use were straitjacketed by prohibition. This made it difficult, if not impossible, to undertake the research necessary to make any concrete determinations regarding benefits and harm. The conundrum led to conflicting evidence being considered which neither proved, nor disproved, that there were public health reasons for its prohibition.

Chapter 3 - The Liberty Interest v. Prohibition

The focus of this chapter is the use of the right to liberty, autonomy, and security of person in litigation against cannabis prohibition and the receptiveness of the judiciary to such argumentation. Most of the cases discussed are related to criminal charges for the possession, production, or distribution of cannabis, but freestanding challenges to prohibition are also analysed. Legal discussions as to whether governments have the legal and moral authority to prevent individuals from choosing to take cannabis is a key part of this narrative.

In their reasoning, the courts have not denied that there are constitutional bases upon which drugs prohibition and criminal sanctions rest. Nonetheless, there are hints that many within the judiciary were less than enamoured with this policy choice. From a human rights perspective, many judges voiced their concern that these laws are reactionary and, though not indefensible, not exactly justifiable. But their position required them to enforce the law, not rewrite it.

In the end, it has been the liberty interest that most convinced courts and the public that cannabis policy should be re-evaluated in Canada and the US. Conversely, the UK has been hesitant to legitimize cannabis use and rejected what has been accepted in its sister jurisdictions. With similar legal systems and values, these three jurisdictions stand out when compared to the progressive—depending on one's point of view—policies adopted in other contexts.[6] A detailed analysis of case law in these contexts will help explain the divergent paths these countries have

[6] See, for example, the country reports on cannabis law and policy for Jamaica, Uruguay, and The Netherlands in Niamh Eastwood, Edward Fox, and Ari Rosmarin, "A Quiet Revolution: Decriminalisation Across the Globe," *Release: Drugs, The Law & Human Rights*, March 2016, accessed 17 May 2018, https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf.

taken towards either a medical CTP regime, full legalization of CTP and recreational cannabis, continued prohibition, or a compromise in between.

Introduction
Prohibition, Human Rights, and Cannabis Use

> "The glaring hypocrisy of the war on 'some' drugs and the obvious effectiveness of cannabis will ensure users are never going to back down, and that we intend to out-grow the 'low-functioning' stigma foisted upon us and assume our rightful place as the 'mellow and imaginative' section of society."[7]
> - David Malmo-Levine, Canadian Cannabis Activist

Introduction

The twentieth century was *the* century of cannabis prohibition. International organizations and governments around the world legislated to keep the plant out of reach of both medical patients and recreational users. The United Nation's 1961 Single Convention set the standard for prohibition and, along with other treaties, has been the primary justification for banning cannabis.[8] These documents presaged the War on Drugs, which has been carried out with zeal across the globe. But the increased use, decriminalization, and legalization of cannabis has transformed a formerly illicit drug into a "de jure" and "de facto legitimate substance".[9] Things have moved quickly. As recent as 2000, the American psychiatrist and cannabis activist Lester Grinspoon was less than optimistic about the future: "There are no signs that we are moving away from absolute prohibition to a regulatory system that would allow responsible use of marijuana."[10] In the last decade and a half, however, attitudes toward cannabis, as well as cannabis law and policy, have radically changed.

[7] *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571, para 174.
[8] See K.B. Zeese, "Marijuana in the 20th century: a chronology of use and regulation," *International Journal of Drug Policy* 10 (1999): 339-346 and Stephen B. Duke, "Cannabis Captiva: Freeing the World from Marijuana Prohibition," *Georgetown Journal of International Affairs* 11, no. 2 (2010), 88-9.
[9] Melissa L. Bone, "How can the lens of human rights provide a new perspective on drug control and point to different ways of regulating drug consumption?" PhD Diss., University of Manchester, 2015, 25.
[10] Lester Grinspoon, "Whither Medical Marijuana," *Contemporary Drug Problems* 27 (2000), 14.

As the *British Medical Journal* made clear in a 2017 editorial: "The war on drugs is failing…Evidence now supports decriminalisation of non-violent drug use, as do a growing number of health and human rights organisations."[11] This trend can only partially be explained by the culture war and political engagement. It has been in the courtroom that cannabis activists have spoken their truth to power through human rights arguments. And such a connection is legitimate. As Thomas Szasz, the late psychiatrist and critic of the concept of mental illness, put it: "The right to…smoke a plant that grows wild in nature, such as hemp (marijuana), is anterior to and more basic than the right to vote."[12] Szasz believed this to be the case because of the emphasis on "bodily self-ownership" found in the US Constitution. Indeed: "What does it profit a man if he gains all the rights politicians are eager to give him, but loses control over the care and feeding of his own body."[13] Self-determination, in and out of the medical context, is an important human right and fundamental freedom.

The use of human rights language in the cannabis debate, and across the spectrum of human rights, has led to "extravagant formulations and impractical demands, as citizens are increasingly asserting individual or egotistical claims".[14] Perhaps human rights were not meant to be used to defend personal choices like the decision to take drugs. All claims of this sort might be asserting the "wrong rights" and "devaluing our rights through the prevalence of rights discourse."[15] But the use of more traditional rights-based arguments related to liberty and autonomy suggest this is not the case. Even though the more florid language of drug activists has been rejected by the courts, they could not do easily dismiss human rights claims.

[11] Fiona Godlee, "Treat addictions with evidence, not ideology," *BMJ* 357, j1925 (20 April 2017), accessed 13 March 2018, available at http://www.bmj.com/content/357/bmj.j1925.
[12] Thomas Szasz, *Our Right to Drugs: The Case for a Free Market* (Syracuse: Syracuse University Press, 1996), xvi.
[13] Ibid, 5.
[14] Bone, 40.
[15] Ibid.

The twentieth century "career cycle" of cannabis saw it portrayed as both a danger to health and society and a legitimate medical treatment. To some, it was the cause of illness; for others, the cure. This thesis seeks to contribute to the understanding of cannabis' "career cycle" by examining the legal frameworks used to curtail its use and, conversely, grant access to it for therapeutic purposes.[16] What is clear from cannabis' "career cycle" is that the world is turning away from prohibition and seeking a "third way."[17] The case law under examination delved into this debate, contributing, for better or worse, to the transformation of attitudes toward, and the policy and law of, cannabis.

Jurisdictions

Though they are all common law jurisdictions with a common heritage, the approaches of Canada, the UK, and US have diverged when it comes to cannabis prohibition. Each acceded to the prohibitionist post-war paradigm while simultaneously experiencing the 1960s counterculture, focused as it was on drug-taking and non-conformity. Resistance to prohibition was evident from the fore, but it took some time for the views of the hippies and ne'er-do-wells to go mainstream.

As cannabis became more acceptable as a medicine in the early 2000s, those who long wanted to see full-scale legalization utilized the budding human rights discourse around liberty, autonomy, et al. to reframe the debate. Taking their views to court, individuals challenged prohibition and criminal sanctions as a violation of their fundamental freedoms. Judges in Canada, the US, and UK addressed novel arguments in different ways, largely dependent on the

[16] On the "career cycles" of drugs, see Stephen Snelders et al., "On Cannabis, Chloral Hydrate, and Career Cycles of Psychotropic Drugs in Medicine," *Bulletin of the History of Medicine* 80, no. 1 (2006), esp. 113-4 and Tom Obokata, "Illicit Cycle of Narcotics from a Human Rights Perspective," *Neth Q Hum Rts* 25, no. 2 (2007): 159-87.
[17] See Cyrille Frijnaut Brice, *The Third Way: A Plea for a Balanced Cannabis Policy* (Leiden: Brill Nijhoff, 2015).

way in which claimants could defend themselves in view of the rights enshrined in domestic constitutional instruments.

Previous Scholarship

This thesis is not preoccupied with the interplay of international legal instruments related to drugs prohibition and their incompatibility with emerging cannabis-related domestic law and policy.[18] Instead, it is an attempt to situate the place of human rights discourse within the narrative of cannabis prohibition and legalization. Recent scholarship on the history of cannabis is rich,[19] but an analysis of the legal arguments related to its prohibition is wanting. The focus has mostly been on the scientific and medical history of its use, as well as an abundant literature on its health implications and public policy considerations. Medicine and health certainly take pride of place in the forthcoming thesis, but a look at classical civil and political rights discourse demonstrates that it was not health alone that convinced courtrooms cannabis should be available for therapeutic purposes. Life, liberty, security of the person, privacy, and the interplay between state and federal law, in the US in particular, had as important a role to play in the relaxation of cannabis laws as any health-based claims.

The Gap

Case law comprises the primary material in this thesis, as it is judges who engage directly with the sometimes spurious but genuine claims of cannabis activists and those subject to criminal penalties. The courts are where these legal battles took place, and their decisions have been

[18] For a history of the international drugs prohibition regime see William B. McAllister, *Drug Diplomacy in the Twentieth Century: An International History* (London: Routledge, 2000).
[19] See, to name just a few titles, James H. Mills, *Cannabis Britannica: Empire, Trade, and Prohibition, 1800-1928* (Oxford: Oxford University Press, 2005); idem, *Cannabis Nation: Control and Consumption in Britain, 1928-2008* (Oxford: Oxford University Press, 2012); John Hudak, *Marijuana: A Short History* (Washington, D.C.: Brookings Institution Press, 2016); Martin Booth, *Cannabis: A History* (New York: Picador, 2003).

under-analyzed in the literature on cannabis; whether used for medicinal or recreational purposes. Using the language of human rights, access to cannabis for therapeutic purposes was won in Canada while in the United States and United Kingdom it was either dismissed or given short shrift. But a comparative perspective sheds light on the types of arguments that can be used to win the right to use cannabis for medical and recreational purposes as well as other psychotropic substances. Just a few decades earlier, the idea that human rights were connected to drug control and prohibition "would have been viewed as extremely odd, if not downright laughable."[20] Access to controlled substances for therapeutic purposes is a human rights issue,[21] but so too is the restriction of access for non-therapeutic purposes. This thesis explores the link between medicinal and recreational cannabis litigation and how the language of human rights was used, successfully and unsuccessfully, to reframe the way we think about its use and abuse.

[20] Saul Takahashi, *Human Rights and Drug Control: The False Dichotomy* (Oxford: Hart Publishing, 2016), 1.
[21] Marie Elske C. Gispen, "A human rights view on access to controlled substances for medical purposes under the international drug control framework," *European Journal of Pharmacology* 719 (2013): 16-24.

Chapter 1
From Prohibition to Medicalization to Legalization (And Places in Between)

Instruments of the Modern International Drugs Prohibition Regime

At the core of drugs policy is the basic conflict between those who want to prohibit the consumption of psychoactive substances and those who consume them regardless.[22] Both human rights law, domestic and international, and the international drugs control regime had their roots in the early twentieth century.[23] Since the first international regulations on drug control were drafted in the late nineteenth century, four general principles have underwritten the regime: some psychoactive substances are dangerous to public health and morality; these substances must be prohibited; the drugs trade is dominated by criminals; and cutting off the source of drugs is the most efficient way to end the drugs trade.[24] In the legislative framework that developed out of these ideas, "limiting distribution and consumption to medical and scientific needs, controls on international trade and international limitations on domestic manufacturing" of drugs were the central goals.[25] As the United Nations became more involved in regulating the drugs market the focus shifted "to suppress illicit production, manufacturing, trafficking and possession" of illicit substances.[26] Suppression became the core of international drug policy.

In the post-World War II era, cannabis was first prohibited along with other substances, like opium and coca, in the United Nations' Single Convention on Narcotic Drugs, 1961. The regime separated drugs with a legitimate medical purpose from those deemed illicit.[27] A balance

[22] Bone, 56 and chapter 2.
[23] Ibid, 93.
[24] Julia Buxton, "Introduction," in Julia Buxton (ed), *The Politics of Narcotic Drugs: A Survey* (London: Routledge, 2011), 3-4, cited in Bone, 92.
[25] Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge: Cambridge University Press, 2017), 17.
[26] Ibid.
[27] Article 4(c) and Bone, 93-4.

with public health required access to narcotics in some instances along with the general prohibition on drugs, including cannabis. That said, the Single Convention gave "States themselves primary responsibility for implementing control measures within domestic law".[28] There was, from the beginning, some room for independent policy.

In 1971, the Convention on Psychotropic Substances limited access to Schedule I substances to cases of medical and scientific application alone.[29] This includes tetrahydrocannabinol (THC) and its derivatives, the psychoactive components of cannabis.[30] There is no mention of human rights in this instrument. But the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances does address human rights issues. It requires, under Article 14(2), that state parties: "respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use". Richard Lines holds that 14(2) "must *by definition* not only be dynamic, but dynamic *and* human-rights based" as "human rights norms…are generally agreed to be evolutive."[31] Human rights should not only apply in the context of drug offences in the criminal justice, but health rights too.[32] The UN Office on Drugs and Crime (UNODC), for instance, outlined something of this approach in a 2012 position paper on state obligations under the drug control regime. They must: "Respect rights (to avoid violating rights)"; "Protect rights (to prevent others from violating rights)"; and "Fulfil rights (to provide positive assistance or services necessary for the claims of the individual to be met)".[33] Unfortunately, the UNODC is more concerned with the increase in use and

[28] Lines, *Drug Control and Human Rights*, 35.
[29] Articles 5 and 7.
[30] See Schedule I.
[31] Lines, *Drug Control and Human Rights*, 144.
[32] Ibid, 146.
[33] UN Office on Drugs and Crime, *UNODC and the Promotion and Protection of Human Rights: Position Paper* (2012), 4-5.

purported harms of cannabis use than its potential benefits.[34] The body responsible for enforcing the drugs treaties, the International Narcotics Control Board, has likewise taken little interest in "ensuring access to controlled substances for medical uses, which is itself a matter of human rights."[35] This is inconsistent with the approach outlined in the treaties themselves.

These obligations, including respect for human rights, were reaffirmed by the Commission on Narcotic Drugs (CND) in 2008, while still maintaining a commitment to "countering the world drug problem".[36] The CND further noted in another Resolution that "legislative differences between some States with regard to the levels of penalties for cannabis-related offences may be perceived as reducing the restrictions on cannabis".[37] It reminded states to "ensure national restrictions on narcotic drugs and psychotropic substances in relation to cannabis" and "comply fully" with the "international drug control conventions with regard to cannabis."[38] While there appears to be some "flexibility" in the treaty regime—with calls for respect of human rights and exemptions for scientific research—the regulation of cannabis has in practice "clearly contravene[d] the treaties."[39] Individuals have a right to access medicines under the international framework, but the focus on criminal sanctions for illicit drug use deprives them of "the right to health and the right to enjoy the benefits of scientific progress."[40] States themselves do not really know how to balance these competing obligations. Canada's Minister of

[34] UN Office on Drugs and Crime, *World Drug Report 2017 – Market Analysis of Plant-Based Drugs: Opiates, cocaine, cannabis* (2017), https://www.unodc.org/wdr2017/field/Booklet_3_Plantbased.pdf, 51-2.
[35] Rick Lines et al., "The Case for International Guidelines on Human Rights and Drug Control," *Health and Human Rights Journal* 19, no. 1 (2017), 233.
[36] Commission on Narcotic Drugs Vienna, Resolution 51/12 (2008), article 1.
[37] Commission on Narcotic Drugs Vienna, Resolution 51/17 (2008), recital 1.
[38] Ibid, articles 1 and 2.
[39] New York City Bar Association, A Report of the Special Committee on Drugs and the Law, *Charting a Wiser Course: Human Rights and the World Drug Problem* (19 April 2016), 34-5. The Report itself recommends relaxing international restrictions. Ibid, 48.
[40] Naomi Burke-Shyne et al., "How Drug Control Policy and Practice Undermine Access to Controlled Medicines," *Health and Human Rights Journal* 19, no. 1 (2017), 237.

Health, for example, presented government plans regarding the legalization of cannabis to the 2016 UN General Assembly Special Session on the World Drug Problem, but "did not specify what approach [it] would take with respect to its obligations under the UN [drug] conventions."[41] Despite not knowing how to stay in line with the prohibitionist regime, states have pursued independent drug policies—from decriminalization to legalization—regardless of the non-legality of their choices.

Part of what prompted increased attention to cannabis was the "number of young people reported to have sought treatment for substance abuse due to cannabis use in some countries";[42] "recent research correlating cannabis use with some mental health disorders"; and "research demonstrating the adverse respiratory effects of smoking cannabis, including the risk of lung cancer".[43] The CND requested that states "further examine the scientific and medical data available on the health consequences of cannabis use", especially vis-à-vis its effects on children, youth, and pregnant women.[44] These concerns did not arise in a vacuum. Indeed, these questions arose with regularity in each of the jurisdictions discussed below. There are legitimate public health issues at stake, especially regarding the marketing and sale of cannabis products, like

[41] Robin MacKay and Karin Phillips, Legal and Social Affairs Division, Parliamentary Information and Research Service, "The Legal Regulation of Marijuana in Canada and Selected Other Countries (Background Paper)" (Ottawa: Library of Parliament, 2016), 5.
[42] Though evidence from Portugal indicates that the decriminalization of drugs combined with a view of addiction as a medical condition decreases substance abuse. See Nicholas Kristof, "War on Drugs: Portugal may be winning the battle against drug abuse through decriminalisation," *Independent*, 14 October 2017, accessed 5 June 2018, https://www.independent.co.uk/news/long_reads/portugal-drug-laws-problems-abuse-decriminalised-results-success-study-cocaine-marijuana-heroin-a7996896.html and Susana Ferreira, "Portugal's radical drugs policy and working. Why hasn't the world copied it?" *The Guardian*, 5 December 2017, accessed 5 June 2018, https://www.theguardian.com/news/2017/dec/05/portugals-radical-drugs-policy-is-working-why-hasnt-the-world-copied-it.
[43] Commission on Narcotic Drugs Vienna, Resolution 51/2 (2008), recitals 7-9. See also the statistics in U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, "Key Substance Use and Mental Health Indicators in the United States: Results from the 2016 National Survey on Drug Use and Health," September 2017.
[44] Commission on Narcotic Drugs Vienna, Resolution 51/2 (2008), articles 1-8.

candies and other confectionaries, to minors.[45] But not all of these concerns have been based on evidence. As will be seen, where evidence failed to provide justification for prohibition, rhetoric of the sort resorted to by the CND sufficed.

Domestic Political Contexts

The pushback against the Single Convention on Narcotic Drugs and unrelenting increase in drug use led many jurisdictions to quickly re-evaluate their domestic drugs regime. While many continued to see psychotropic substances as harmful, others used comparators, like alcohol and tobacco, to make the case for a more laissez-faire approach to drugs.[46] The political situation in each jurisdiction shaped the way prohibition was implemented. Addressing domestic politics is an important part of understanding whether or not a given jurisdiction was receptive to pleas for less stringent cannabis regulation.

Canada

In 1972, Prime Minister Pierre Trudeau's Liberal government published the findings of the Le Dain Commission – a group of experts tasked with evaluating the country's cannabis laws. Recent Liberal policy had, in Trudeau's words, "knocked down a lot of totems and overridden a lot of taboos."[47] As Justice Minister in 1967, Trudeau oversaw the revision of Canada's criminal code, which decriminalized homosexuality and capital punishment and reformed abortion and divorce laws. This push fit with his personal views on individual rights, prizing liberty over

[45] Some scholars argue that edible cannabis products should be prohibited or regulated to avoid these dangers. See Paul Larkin Jr., "Marijuana Edibles and 'Gummy Bears'," *Buffalo Law Review* 66, no 2. (2018), 381.
[46] McAllister, *Drug Diplomacy*, 218-20.
[47] "Trudeau: 'There's no place for the state in the bedrooms of the nation'," *CBC Digital Archives*, accessed November 23, 2017, available at http://www.cbc.ca/archives/entry/omnibus-bill-theres-no-place-for-the-state-in-the-bedrooms-of-the-nation.

uninvited interference by the authorities.[48] But the Liberals pursued change in the political arena, leaving the courts to merely interpret the law.[49] The Le Dain Commission, officially known as the Commission of Inquiry into the Non-Medical Use of Drugs, was appointed in 1969 to assess the efficacy and utility of prohibition.[50] Contributors included John Lennon, who offered testimony to the Commission. He stated that: "I don't know what's going on in the rest of the world...towards drugs, but this seems to be the only [country] that is trying to find out what it's about with any kind of sanity."[51] The Commission's final report did not disappoint. It recommended "that the prohibition against [cannabis] use be removed from the *criminal* law."[52] Trudeau's government subsequently tabled Bill S-19, "which would have removed penal sanctions for possession of marihuana for a first offence and substituted a monetary fine in its place."[53] Though the Bill did not make it into law, members of the Liberal Party continued to advocate for a less strict approach to cannabis regulation throughout the 1970s.[54] But cannabis use was one taboo the government was unable to override.

Prohibition remained the policy of the day. Canada's international commitment to cannabis prohibition originated in the Single Convention on Narcotic Drugs, 1961 and was solidified a decade later by the Convention on Psychotropic Substances, 1971. Long before, however, cannabis was listed as a "scheduled drug" in The Opium and Narcotic Drug Act, 1923. The impetus for including it was the histrionic description of cannabis users in the Canadian

[48] See Trudeau's comments on liberalism in John English, *Just Watch Me: The Life of Pierre Elliott Trudeau, 1968-2000* (Toronto: Vintage, 2010), 292-3.
[49] Unlike in the US where the courts "led the way…in the American culture wars." See ibid, 250.
[50] *R v Malmo-Levine; R v Caine*, para 44.
[51] Led Zeppelin, The Grateful Dead, and Allen Ginsburg also testified. See Kate Allen, "Why Canada banned pot (science had nothing to do with it)," *The Star*, 1 December 2013, accessed 17 May 2018, https://www.thestar.com/news/canada/2013/12/01/why_canada_banned_pot_science_had_nothing_to_do_with_it.html.
[52] *R v Malmo-Levine; R v Caine*, para 21.
[53] Ibid, para 21.
[54] See the excerpt from the 1980 Throne Speech cited in ibid, para 21.

jurist and women's rights activist Emily Murphy's 1922 book *The Black Candle*, which suggested users "lose[e] all sense of moral responsibility…are immune to pain…[and] become raving maniacs…liable to kill…using the most savage methods of cruelty."[55] The reaction to Murphy's monograph was such that Parliament did not even bother to debate whether cannabis was really as dangerous as she made it out to be. It simply accepted that cannabis was a threat to Canadians.[56] As such, prohibition was well-established in Canada before the international community took a real interest in drugs regulation. Severe penalties meant to deter the simple possession of cannabis were included in the Narcotic Control Act from the early 1960s.[57] And they have remained in place since that time.

By the 1990s, even Liberal policy had changed. Few were interested in knocking down totems. The Controlled Drugs and Substances Act, SC 1996, c 19 (CDSA), replaced previous regulations and was "designed to discharge Canada's more recent international obligations with regards to narcotics."[58] The government also continued to rely on agreements like the Single Convention on Narcotic Drugs, 1961 to justify restricting access to cannabis into the late 2000s; well after it was accepted as a legitimate treatment option.[59] Part of its international obligation was, of course, to ensure that the criminalization of cannabis and its users was "necessary" and respected "fundamental human rights."[60] The 2002 Senate Special Committee on Illegal Drugs, too, made clear that cannabis policy "be structured around the guiding principles respecting the life, health, security and rights and freedoms of individuals, who…seek their own well-being and

[55] *The Black Candle* (Toronto: T. Allen, 1922), at 332-333, cited in *R v Malmo-Levine; R v Caine*, para 43.
[56] Ibid, para 31.
[57] SC 1960-61, c 35, cited in ibid, at para 33.
[58] Ibid, para 34. See, for example, the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.
[59] See the trial judgment in *Sfetkopoulos v Canada (Attorney General)*, at paras 13 and 17, cited in *R v Beren and Swallow*, 2009 BCSC 429, paras 120 and 122.
[60] *R v Parker*, (2000) 49 OR (3d) 481 (CA), para 71.

development".[61] Prohibition, however, was firmly entrenched at this point and it would take more than government reports to challenge it.

Though the Le Dain Commission recommended decriminalizing cannabis for personal use and advocated increased research into its medical utility, nothing of import was done to address the panel's conclusions until cannabis was decriminalized for medical purposes in 2001. A year later, the Senate Special Committee reiterated many of claims put forward by previous bodies, concluding that "the state of knowledge supports the belief that, for the vast majority of users, cannabis use presents no harmful consequences for physical, psychological or social well-being".[62] Still, the Committee added that "more research is needed" to understand the effects of cannabis use on vulnerable groups.[63] It was unclear exactly who needed protecting from the drug, but the idea that more research was needed became a well-worn retort to those alleging a right to consume cannabis.

At this point, the courts were faced with more and more challenges to prohibition. Judicial activism in drugs policy was possible thanks to the Canadian Charter of Rights and Freedoms, which "played an increasingly significant role in Canadian political life" since it came into force.[64] When asked to delimit the extent to which the state may interfere with the rights of individuals, the courts did their best to balance the competing interests of public health and fundamental freedoms. From the early 2000s, however, the judiciary accepted the government's justifications for prohibition less and less.[65] Courts, however, do not make policy.

[61] Report of the Senate Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy*, Vol. 1 (September 2002), 3-4.
[62] Vol. 1, at 165, cited in *R v Malmo-Levine; R v Caine*, para 55.
[63] Ibid, paras 57 and 61.
[64] Report of the Senate Special Committee on Illegal Drugs, Vol. 1, 58-9.
[65] See Carolynn Conron, "Canada's Marihuana Medical Access Regulations: Up In Smoke," LLM Thesis, Western University, 2012.

Prime Minister Stephen Harper's (2006-2015) Conservative Party remained committed to prohibition. In 2015, in the run-up to the federal election, he commented that "Tobacco is a product that does a lot of damage – marijuana is infinitely worse and is something we do not want to encourage."[66] In 2014, his administration oversaw a Health Canada anti-cannabis campaign informing, or misinforming, the public that cannabis use was linked to low IQ and "increased risk of mental health issues, such as psychosis and schizophrenia" despite a lack of scientific proof to substantiate its claims.[67] Harper even publicly criticized the Supreme Court for its recent judgments, including its decision against the government's restrictive medical marijuana laws.[68] But the Conservatives could do little as the Court struck down regulations throughout the 2000s.

USA

In the US, too, the roots of prohibition manifested in the early twentieth century. "Less than a hundred years ago," wrote Thomas Szasz, "Americans regarded the production, distribution, and consumption of drugs as a fundamental right."[69] Things changed rather quickly. Case law from the US Supreme Court recognized the Federal Government's power to regulate drugs "injurious to the public health" under Article 1, section 8(3) of the Constitution, known as the Commerce Clause.[70] The Court also affirmed the Federal Government's ability to use "its police power to

[66] "'Marijuana is infinitely worse' than tobacco, Harper says he encourages pot debate to go up in smoke," *National Post*, 3 October 2015, accessed 15 April 2018, http://nationalpost.com/news/politics/marijuana-is-infinitely-worse-than-tobacco-stephen-harper-says-as-he-encourages-pot-debate-to-go-up-in-smoke.

[67] Ibid. Some researchers posit that cannabis containing low or no THC may be safely "recommended" for patients with a history or predisposition to psychosis or bipolar disorder. See Gordon D. Ko et al., "Medical cannabis – the Canadian perspective," *Journal of Pain Research* 9 (2016), 741.

[68] Kathleen Harris and Rosemary Barton, "'Shocked': Retiring chief justice was blindsided by Stephen Harper's public attack," *CBC News*, 14 December 2017, accessed 15 April 2018, http://www.cbc.ca/news/politics/mclachlin-supreme-court-harper-battle-1.4433283.

[69] Szasz, *Our Right to Drugs*, 95-6. On the roots of such beliefs see Lewis A. Grossman, "The Origins of American Health Libertarianism," 13 *Yale J Health Pol'y L & Ethics* 76, 134 (2013).

[70] See *McDermott v Wisconsin*, 223 U.S. 115 (1913), cited in Szasz, *Our Right to Drugs*, 10.

regulate…dangerous and habit-forming drugs…in the interest of public health and welfare."[71] The combination of these powers, argued Szasz, gave "quasi-papal immunity to legal challenge" to the Federal Government.[72] From this point on, prohibition gained momentum.

On the legislative front, the Harrison Narcotics Tax Act, 1914, designed to regulate and tax "the production, importation, and distributions of opiates and coca products", was soon applied in conjunction with the Pure Food and Drug Act, 1906 to ban products containing cannabis.[73] Federal regulations sought to suppress the international and inter-state trade in cannabis, as the federal government could not intervene at the state level. "Smokable marijuana," however, "didn't qualify as a narcotic…and remained in legal limbo [at the federal level] until 1937".[74] That year, the Marijuana Tax Act "made the possession or transfer of cannabis [across state lines] illegal, while allowing states to enforce their own marijuana laws".[75] The Act was more symbolic than practical, as it "[duplicated] existing state laws."[76] About half of the states already treated cannabis as a dangerous substance and associated it with "crime, pauperism and insanity". Of course, there was a racial element to this too. Cannabis-smoking Mexicans, increasingly immigrating to the US, were seen as corrupters of white youth.[77] Cornered by the law, cannabis users began distrusting government and moral authorities. They suffered from

[71] See *Whipple v Martinson*, 256 U.S. 41 (1921), cited in Szasz, *Our Right to Drugs*, 41.
[72] Ibid.
[73] Emily Dufton, *Grass Roots: The Rise and Fall and Rise of Marijuana in America* (New York: Basic Books, 2017), 3.
[74] Ibid. Though states such as California had already passed anti-cannabis laws as early as 1913. For a list of pre-1937 cannabis laws see Appendix B in Dale H. Gieringer, "The forgotten origins of cannabis prohibition in California," *Contemporary Drug Problems* 26 (1999): 237-88.
[75] The Act also allowed states "to tax hemp and marijuana cultivation and distribution." See Dufton, *Grass Roots*, 3.
[76] John F. Galliher and Allynn Walker, "The Puzzle of the Social Origins of the Marihuana Tax Act of 1937," *Social Problems* 24, no. 3 (1977), 375.
[77] Such fears were, in part, the impetus behind the drafting of the Uniform Narcotic Drug Act. See Richard J. Bonnie and Charles H. Whitebread, II, "The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition," *Virginia Law Review* 56, no. 6 (1970), 1026-8ff.

"alienation" as they were turned from "law-abiding citizens into serious criminals."[78] This led to legal and civil pushback.

The Marijuana Tax Act laid the groundwork for total prohibition in the US.[79] At this point the federal government was most concerned with the cannabis trade. In the 1960s, Timothy Leary, psychologist and psychedelic drug proponent, was convicted of "knowingly" transporting cannabis into the US from Mexico at the Texas border "without having paid the transfer tax imposed by the Marihuana Tax Act".[80] The Act, according to the US Supreme Court, at once allowed Leary to "acquire the drug legally, provided he paid the $100 per ounce transfer tax" while "simultaneously…according to the Government, [prohibiting] him from acquiring marihuana under any conditions."[81] Leary, as a result, was "justified in giving precedence to the higher authority: the statute" and the regulations were deemed "so out of keeping with the statute as to be *ultra vires*."[82] The Court also held that the "'knowledge' inference" drawn to establish guilt regarding the "source of the drug" was inconsistent with previous case law.[83] Even though, as one customs agent informed the Senate, "A good marihuana smoker can probably tell good marihuana from bad", it was impossible to establish provenance on that basis alone.[84] For Leary to self-incriminate himself by admitting he knew the origins of the cannabis in his possession was a violation of his Fifth Amendment rights.[85] For these reasons, Leary's conviction was

[78] Geoffrey Richard Wagner Smith, "Possession of Marijuana in San Mateo County: Some Social Costs of Criminalization," *Stanford Law Review* 22, no. 1 (1969), 119-21.
[79] Michael Schaller, "The Federal Prohibition of Marihuana," *Journal of Social History* 4, no. 1 (1970), 73.
[80] *Leary v United States*, 395 U.S. 6 (1969), 1535.
[81] Ibid, 1542.
[82] Ibid, 1543.
[83] Ibid, 1549-57.
[84] Ibid, 1556.
[85] See Devin R. Lander, "'Legalize Spiritual Discovery': The Trials of Dr. Timothy Leary," in Beatriz Caiuby Labate and Clancy Cavnar (eds), *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use* (New York: Praeger, 2014): 165-87.

reversed and remanded while portions of the Marijuana Tax Act were deemed unconstitutional.[86] Leary set a precedent. Very shortly, challenges to prohibition were taken up by civil society organizations.

In 1970, cannabis activism took off in the United States. R. Keith Stroup, a Georgetown Law School graduate and libertarian, founded the National Organization for the Reform of Marijuana Laws (NORML). The group set up shop in Washington, D.C. to lobby Congress to change its prohibitionist policies.[87] NORML used litigation as part of its strategy, seeking to have synthetic cannabinoids rescheduled[88] and decriminalize private possession of cannabis.[89] Unfortunately, President Richard Nixon was busy in 1970 too, ensuring the enactment of the Comprehensive Drug Abuse and Control Act and its Controlled Substances Act. The latter instrument included cannabis as a Schedule I substance, "deeming it as dangerous and addictive as heroin and LSD" and criminalizing it. This was meant to be a temporary classification until evidence of cannabis' harmfulness or harmlessness was determined.[90]

To this end, Nixon set up the Shafer Commission, named after its chairman Raymond P. Shafer, and officially called the National Commission on Marijuana and Drug Abuse. It examined patterns of usage, laws, the health effects, bodily and mental, on users, whether criminality and cannabis were connected, whether it acted as a "gateway" drug, and made recommendations to control it. The Commission published its findings in 1972. Nixon was

[86] *Leary v United States*, 1557.
[87] Dufton, *Grass Roots*, chapter 2.
[88] Arguing that they were not prohibited under the 1961 Single Convention. See *Nat. Organization for Reform, Etc. v Drug Enforcement*, 559 F.2d 735 (1977).
[89] *Nat. Org. for Reform of Marijuana Laws v Bell*, 488 F.Supp. 123 (1980).
[90] Dufton, *Grass Roots*, 47 and 51. Cannabis' inclusion as a Schedule I drug can thus be seen "as a historical artifact and ongoing artifice." There was, and is, little scientific basis for its being Scheduled. Indeed, "Many, if not most, of these [Scheduled] drugs are hallucinogens. LSD, peyote, DMT…and marijuana do not present major biological risks of harm to the user". See Margaret P. Battin et al., *Drugs and Justice: Seeking a Consistent, Coherent, Comprehensive View* (Oxford: Oxford University Press, 2008), 18 and 172.

displeased with the results. This was because the Commission advocated for the decriminalization of cannabis, pointed out the inaccuracy of the reasons used to prohibit it, and suggested cannabis was mostly harmless. Nixon, whose White House conversations were recorded, demanded "a goddamn strong statement on marijuana" in response to the Commission's report. He saw the decriminalization recommendation as part of a conspiracy: "You know it's a funny thing. Every one of the bastards that are out for legalizing marijuana is Jewish…I suppose it's because most of them are psychiatrists".[91] As this excerpt reveals, the basis for prohibition in the US was not reason but prejudice.

Even so, Nixon successfully kept cannabis classified as a Schedule I substance.[92] NORML, however, took the Drug Enforcement Agency (DEA) to federal court to have cannabis reclassified as a Schedule II substance in 1972. The issue remained unsettled for more than two decades. It was only in 1994 that "the Court of Appeals for the District of Columbia Circuit upheld the DEA's categorization of marijuana as a Schedule I drug."[93] States were not wholly compliant with the regime and did not allow the federal government to control drug policy without a fight. But after a brief period of liberalization in several states during the 1970s,[94] Congress' review of prohibition, and President Jimmy Carter's flirtation with the idea of federally decriminalizing cannabis, his successor President Ronald Reagan re-engaged in the

[91] John Thomas, "The Past, Present, and Future of Medical Marijuana in the United States," *Psychiatric Times* 28, no. 1 (January 2010), 2 and 4.
[92] Dufton, *Grass Roots*, 51-6. The War on Drugs initiated by Nixon was part of a strategy to combat "the antiwar left and black people." For more on this narrative see Dan Baum, "Legalize it all: How to win the war on drugs," *Harper's Magazine*, April 2016, accessed 22 May 2018, https://harpers.org/archive/2016/04/legalize-it-all/ and Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012).
[93] Andrew J. LeVay, "Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense," *Boston College Law Review* 41, 3:3 (2000), 704.
[94] For more on this period see Albert DiChiara and John F. Galliher, "Dissonance and Contradiction in the Origins of Marihuana Decriminalization," 28 *Law Soc'y Rev* 41 (1994).

War on Drugs.[95] Opponents of the latter remained vocal. Critics of Nancy Reagan's "Just say no to drugs" campaign described the comment as a "ritual incantation" based on ideology, not fact.[96] The DEA's own Chief Administrative Law Judge, Francis L. Young, even "ruled favorably on the therapeutic use of marijuana in 1988" based on "evidence submitted regarding its health benefits." His recommendation to reclassify cannabis as a Schedule II substance, however, was rejected by the DEA and federal government.[97] The prohibitionists, it seemed, has won the argument.

By 1990, the American Bar Association rescinded its decriminalization of simple possession of cannabis policy because, reported the *National Drug Policy Network's Newsbriefs*, "marijuana and other harmful drugs…have become one of the nation's most serious and growing public health concerns."[98] During this period, cannabis once again became a criminal justice issue.[99] Cannabis activists had lost the debate on recreational use, so they changed tack and began advocating for the medical use of cannabis. California lead the revolution, passing its Compassionate Use Act in 1996.

"The primary purpose of [the Compassionate Use Act]," according to lawyer and bioethicist George Annas, "is to provide a specified group of patients with an affirmative defense to the charge of possession or cultivation of marijuana, the defense of medical necessity."[100]

[95] See Dufton, *Grassroots*, esp. chapters 4 and 5 and Battin et al., *Drugs and Justice*, 35. There was optimism in the late 1960s and early 1970s that "the most potent force for change in the drug laws is the incredible increase in drug use, especially among the middle-class young. No society can long afford to define so large a segment of its population as criminal." Such positivity underestimated the resolve of the federal government. See for example Bonnie and Whitebread, The Forbidden Fruit and the Tree of Knowledge," 1176.
[96] Szasz, *Our Right to Drugs*, 77.
[97] Cathryn L. Blaine, "Note: Supreme Court 'Just Says No' To Medical Marijuana: A Look at United States v. Oakland Cannabis Buyers' Club," 39 *Hous L Rev* 1195 (2002), 1213.
[98] Ibid, 108.
[99] See Peter Reuter, "Why Has US Drug Policy Changed So Little over 30 Years?" *Crime and Justice* 42, no. 1 (2013): 75-140.
[100] George J. Annas, "Reefer Madness – The Federal Response to California's Medical-Marijuana Law," *N Engl J Med* 337, no. 6 (1997), 435.

Under federal law cannabis remained illegal, but "qualified patients and their primary care givers can possess and cultivate their own marijuana for personal medicinal purposes, without violating state laws."[101] The federal government was not pleased with California's position and began "efforts to shut down [marijuana] dispensaries through the California federal courts."[102] The Oakland Cannabis Buyers' Cooperative challenged these efforts, succeeded in federal court, but lost when the federal government appealed to the Supreme Court.[103] The latter held "that there is no medical necessity exception to the CSA [Controlled Substances Act's] prohibitions on manufacturing and distributing marijuana." This meant that "the critically ill individual's right to an exception from prosecution for marijuana charges goes up in smoke under the Court's ruling."[104] Justice Clarence Thomas, writing for the Court, "emphasized that federal crimes are defined by statute, not common law."[105] The issue before the Court was "whether a medical necessity exception is contrary to the terms of the CSA."[106] Because there was "no medical benefit worthy of an exception…the medical necessity exception is not a viable option as a defense."[107] New arguments were needed to keep the federal government out of California's business.

Physicians challenged the federal government's move to "[revoke] a class-member physician's DEA registration [allowing them to prescribe drugs] merely because the doctor recommends medical marijuana to a patient based on a sincere medical judgment and…from initiating any investigation solely on that ground."[108] The Federal District Court enjoined the

[101] Ibid.
[102] Blaine, "Supreme Court 'Just Says No' To Medical Marijuana," 1198.
[103] See *U.S. v Oakland Cannabis Buyers' Cooperative*, 121 S.Ct. 1711 (2001).
[104] Blaine, "Supreme Court 'Just Says No' To Medical Marijuana," 1198-9.
[105] Ibid, 1203.
[106] Ibid, 1204.
[107] Ibid.
[108] *Conant v McCaffrey*, 2000 WL 1281174 (N.D.Cal., 2000), not reported in F.Supp.2d, 16.

government from undertaking either of those actions against doctors, "whether or not the physician anticipates that the recommendations will…be used by the patient to obtain marijuana in violation of federal law."[109] This was a free-speech issue: "The chilling effect caused by the government's DEA de-registration policy is alone a sufficient injury for the purposes of an overbreadth challenge."[110] The First Amendment allows physicians to speak with candour in front of their patients and they cannot be censored by the state. The Court found that there is no necessary connection between recommending cannabis to patients and the commission of a federal offence. Physicians need to be able to communicate their professional opinion to patients. As the Court put it: "In the marketplace of ideas, few questions are more deserving of free-speech protection than whether regulations affecting health and welfare are sound public policy."[111] Cannabis was no exception.

This position was reaffirmed in *Conant v Walter*, where the Court wrote: "It is well established that the right to hear—the right to receive information—is no less protected by the First Amendment than the right to speak."[112] But it was not physicians who suffered significant harm by the government's attempt to muzzle them: patients with "horrible disabilities" like cancer and AIDS suffer too when they are denied information on cannabis. At the very least, the government and the applicant "agree that marijuana is a powerful and complex drug, the kind of drug patients should *not* use without careful professional supervision."[113] Yes, doctors acted as gatekeepers, "determining who is exempt from punishment under state law" when

[109] Ibid.
[110] Ibid, 10.
[111] Ibid, 14.
[112] *Conant v Walters*, 309 F.3d 629 (9th Cit. 2002)
[113] Ibid, 644.

recommending medical cannabis.[114] But they had to maintain professional standards so as not to become "drug dealers" by carefully considering the patient's best interests: "If a doctor abuses this privilege by recommending marijuana without considering the patient's medical history or without otherwise following standard medical procedures, he will run afoul of state as well as federal law."[115] Having resolved that issue, the Court moved onto the more complex question of whether federal law trumped state law.

The Supremacy Clause of the Constitution, Article 6 Clause 2, "provides that rules prescribed by the federal government are enforceable with first priority in all U.S. courts."[116] The Controlled Substances Act "dominate[s] the [drug law] field to the exclusion of state law" and, where a conflict arises, federal law "preempts", or supersedes, the exemption provided for in state legislation.[117] In the case of California's Compassionate Use Act, however, the doctrine that "where state and federal law collide, federal law prevails" was not so readily accepted.[118] As the Court put it: "In the circumstances of this case…I believe the federal government's policy runs afoul of the 'commandeering' doctrine announced by the Supreme Court".[119] In practice, this meant that "much as the federal government may prefer that California keep medical marijuana illegal, it cannot force the state to do so."[120] Federal law may reign supreme over state law, but the federal government cannot compel states to pass laws. But this was what the federal government was trying to do in its "attempt to target doctors", which constituted "a backdoor

[114] Ibid, 647. The issue of the physician as "gatekeeper" has come up in Canada too. See Nola M. Ries, "Prescribe with Caution: The Response of Medical Regulatory Authorities to the Therapeutic Use of Cannabis," 9:2 *McGill JL & Health* 215 (2016), 241-7.
[115] *Conant v Walters*, 647.
[116] Blaine, "Supreme Court 'Just Says No' To Medical Marijuana," 1218.
[117] For an explanation of "preemption" see ibid, 1217-9.
[118] *Conant v Walters*, 645.
[119] Ibid.
[120] Ibid, 645-6.

attempt to control or influence the manner in which States regulate private parties."[121] The Constitution's police power gives states the direction to decide what is criminal and what is not. The Tenth Amendment "prevents the federal government from directing states to enact specific legislation" on criminal law matters.[122] Whenever the federal government oversteps its powers the courts are there to protects states' rights.

Cannabis was part of medical practice in California by the early 2000s and other states began to legalize cannabis for medical purposes too. The federal government remained committed to prohibition during the tenure of President George W. Bush, but things changed during President Barrack Obama's second term in office. The Cole Memo, released by Deputy Attorney General James Cole on 29 August 2013, instructed US Attorneys to prosecute "persons or organizations whose conduct interferes with any one or more of [the federal government's] priorities, regardless of state law" permitting "the possession of small amounts of marijuana and provid[ing] for the regulation of marijuana production, processing, and sale."[123] This essentially meant the "blanket enforcement of marijuana prohibitions under the CSA will no longer be a federal priority".[124] Then, the Rohrabacher-Farr Amendment passed in the House of Representatives in 2014. The law prevented "the Justice Department from spending even a cent

[121] Ibid, 646.
[122] On the conflict of state and federal cannabis laws, see Todd Garvey and Brian T. Yeah, "State Legalization of Recreational Marijuana: Selected Legal Issues," Congressional Research Services, 13 January 2014, accessed 16 May 2018, https://fas.org/sgp/crs/misc/R43034.pdf, 12-4.
[123] These priorities include preventing minors from obtaining cannabis, keeping profits out of the black market, ensuring legal cannabis is not traded across state lines, etc. See U.S. Department of Justice, Office of the Deputy Attorney General, James M. Cole, "Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement," 29 August 2013, available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf, 1-2.
[124] Abby Harder, "Comment: Reclaiming the Right of Beneficial Use," 87 *U Colo L Rev* 963 (2016), 988-9.

to prosecute medical marijuana users and sellers operating legally under state laws."[125] For pot advocates, these were significant federal steps towards a more tolerant approach to cannabis.

The Trump administration, however, issued a memo rescinding the Cole Memo policy in early 2018. Attorney General Jeff Sessions reminded US Attorneys that the CSA and related "statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime."[126] *The New York Times* concisely summed up the legal situation: "The dissonance between federal laws that outlaw marijuana and a growing number of state laws that allow and regulate it make uncertainty a fact of life for marijuana businesses and consumers."[127] Now that cannabis is a multi-billion-dollar industry in California alone,[128] it is difficult to see an expensive policy like prohibition maintaining support. Nevertheless, there are many committed hardline prohibitionists who will do what is necessary to maintain the policy and deny it has been a failure.

UK

The United Kingdom was an enthusiastic supporter of prohibition well before the Single Convention.[129] In response to an upswing in the use of illicit drugs during the 1960s the British government combined a "punitive approach to individual users" with "tighter domestic controls"

[125] Evan Halper, "29 states have legal pot. Jeff Sessions wants to stamp it out, and he's closer than you think," *LA Times*, 9 October 2017, accessed 27 May 2018, https://www.latimes.com/politics/la-na-pol-congress-pot-20171007-story.html.
[126] U.S. Department of Justice, Office of the Attorney General, Jefferson B. Sessions, "Memorandum for All United States Attorneys: Marijuana Enforcement," 4 January 2018, available at https://www.documentcloud.org/documents/4343764-Sessions-marijuana-memo.html, 1.
[127] Charlie Savage and Jack Healy, "Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement," *The New York Times*, 4 January 2018, accessed 31 March 2018, available at https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html.
[128] Rory Carroll, "Hippy dream now a billion-dollar industry with California set to legalise cannabis," *The Guardian*, 30 December 2017, accessed 27 May 2018, https://www.theguardian.com/us-news/2017/dec/30/california-legalise-cannabis-hippy-dream-billion-dollar-industry.
[129] See Mills, *Cannabis Britannica* and idem, *Cannabis Nation*.

of drugs when it passed the Misuse of Drugs Act 1971.[130] The government wished to prevent social and individual ills and classified drugs based on their relative harm.[131] But the picture of the UK as an arch-prohibitionist is misleading, as there were moves to change cannabis policy. Throughout the 1970s and 80s, the government's Advisory Council on the Misuse of Drugs (ACMD) met to discuss the possible reclassification of cannabis and its potential medical utility. The ACMD established a Working Group on Cannabis (WGC), which recommended it be downgraded to a Class C substance during its 1977-1979 inquiry. The WGC also noted how ineffective the criminal justice system was in regulating drugs and drug-takers, leading some to back decriminalization.[132] Like the work of the Le Dain Commission in Canada and the Shafer Commission in the US, calls for a renovation of cannabis law and policy went unheeded at the time. Changing attitudes towards cannabis, however, could not be ignored.

In the 1990s, British youth regarded cannabis as a soft drug on the same plane as alcohol and tobacco. Its properties as a relaxation enhancer, stress reducer, sleep inducer, and social substance separated it from hard drugs, like cocaine and heroin, which were seen as significantly more dangerous.[133] Even those who did not take drugs believed their fellow youth had a "right" to use them.[134] On the medical front, anecdotal evidence from patients convinced many physicians and the British Medical Association to advocate for further research into cannabis' medicinal qualities and "enhanced access to cannabinoids in clinical practice."[135] Before any of this could be done, however, some of the myths related to cannabis use had to be examined.

[130] McAllister, *Drug Diplomacy*, 222.
[131] Bone, 99-100.
[132] Suzanne L. Taylor, "Evidence-based policy? The re-medicalization of cannabis and the role of expert committees in the UK, 1972-1982," *International Journal of Drug Policy* 37 (2016): 129-35.
[133] Howard Parker, Judith Aldridge, and Fiona Measham, *Illegal Leisure: The Normalization of Adolescent Recreational Drug Use* (London: Routledge, 1998), 132.
[134] Ibid, 101.
[135] Philip Robson, "Cannabis as medicine: time for the phoenix to rise? The evidence suggests so," *BMJ* 316, no. 7137 (1998): 1034-5.

Questions related to physical and psychological harm, dependence, whether or not it is a "gateway drug", and its influence on automobile operators needed to be settled by the medical community.[136] Empirical data was—and still is—needed to say whether cannabis is helpful or harmful, for "Individual cases cannot prove that marijuana creates any result."[137] These problems were highlighted by Canadian and American physicians and lawmakers, too, and the British proved no better at resolving them.

Cannabis and its derivatives are Class B substances under the Misuse of Drugs Act 1971 [MDA].[138] Possession of cannabis is unlawful[139] as is its cultivation.[140] Very briefly, cannabis was reclassified as a Class C substance, but this was reversed in 2009.[141] Importantly, under the MDA the Secretary of State may make "it lawful for persons to do things which under…this Act…it would be otherwise be unlawful to do."[142] The Secretary may also "by regulations make provision…for excluding in such cases as may be prescribed…the application of any provision of this Act which creates an offence".[143] The Act permits the Secretary to issue licences for particular substances.[144] As such, the Secretary may allow individuals to both possess and cultivate cannabis. The framework is thus in place for the government to allow for the selected use of CTP, but it remains at its discretion to do so.

[136] John Strang et al., "Improving the Quality of the Cannabis Debate: Defining the Different Domains," *BMJ* 320, no. 7227 (2000): 108-10.
[137] Mitch Earleywine, "Thinking Cleary About Marijuana Policy," in idem (ed), *Pot Politics: Marijuana and the Costs of Prohibition* (Oxford: Oxford University Press, 2007), 4-5. See too Jonathan P. Caulkins et al., *Marijuana Legalization: What Everyone Needs to Know* (Oxford: Oxford University Press, 2012), chapters 5-7.
[138] Misuse of Drugs Act 1971 (c. 38), Schedule 2, Part I, §1. For a definition of cannabis, see ibid, §37(1).
[139] MDA, § 5.
[140] Ibid, § 6.
[141] Mark Monaghan, "Drug Policy Governance in the UK: Lessons from changes to and debates concerning the classification of cannabis under the 1971 Misuse of Drugs Act," *International Journal of Drug Policy* 25 (2014): 1025-30.
[142] MDA, § 7(1)(b).
[143] Ibid, § 22(a)(i).
[144] Ibid, §30.

The recent Psychoactive Substances Act 2016 [PSA] also contains exemptions: one for healthcare professionals "acting in the course of his or her profession" when they prescribe or recommend psychoactive substances to patients; and another for "approved scientific research."[145] No connection is made between these exemptions and human rights. The only mention of human rights in the PSA is made in reference to the general exemption from liability of state authorities. The latter may only be held liable for "an act or omission on the ground that the act or omission was unlawful by virtue of section 6(1) of the Human Rights Act 1998 [HRA]."[146] The latter provision holds that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."[147] The rights protected by the HRA include the right to life,[148] liberty and security,[149] and privacy.[150] The problem with these rights, however, is that they are not absolute. Indeed, when it comes to the right to liberty and security, individuals may be detained on the sole basis they are "drug addicts".[151] No definition of "drug addicts" is included in the legislation. And with a definition of "psychoactive substance" in the PSA as "any substance which…is capable of producing a psychoactive effect in a person who consumes it"[152] there is a problem of overbreadth in the legislation. Any synthetic substance, including those mimicking THC or CBD, could be included in this definition.[153] And anyone using such a substance labelled a "drug addict." The construction of the PSA speaks to the government's

[145] Psychoactive Substances Act 2016 (c. 2), Schedule II, §1-4.
[146] Ibid, §25(3).
[147] Human Rights Act 1998 (c. 42), §6(1). There are exceptions to liability where "primary legislation" means "the authority could not have acted differently" or where "primary legislation…cannot be read or given effect in a way which is compatible with the Convention rights" and the authority acted "to give effect to or enforce those provisions." See ibid, §6(2)(a) and (b).
[148] Ibid, Schedule 1, Part I, art. 2(1).
[149] Ibid, Schedule 1, Part I, art. 5(1).
[150] Ibid, Schedule 1, Part I, art. 8(1).
[151] Ibid. Schedule 1, Part I, art. 5(1)(e).
[152] PSA, §2(1)(a).
[153] In a Court of Justice of the European Union case, for example, synthetic cannabinoids were not considered a "medicinal product". See *D and G*, C/-358/13 (CJEU), cited in Rudy Fortson, "The Psychoactive Substances Act 2016, the 'medicinal product' exemption and proving psychoactivity," *Crim L R* 3 (2018), 231-2.

continued support for the prohibition of psychoactive substances, of which cannabis is one. Of course, cannabis is criminalized under the Misuse of Drugs Act 1971, but the PSA is representative of the general approach the government takes toward drugs. There is no sign of a more relaxed legislative framework in the future and the debate in the UK is less publicized than in Canada or the US.

Chapter 2
Juridical Science and the Science of Psychoactive Substances

> We must, as a collective, find a way to address the barriers that prevent ill Canadians from having access to cannabis for their medicinal needs without fear of prosecution, as is their right, and if it is their informed choice.[154]
> - Canadian Aids Society

One of the strongest elements in the case for legalizing cannabis has been the way the courts have treated the scientific evidence used to back up claims it is a harmless substance individuals should have the right to consume. Data related to the relative harmlessness of cannabis presented in court has come to be accepted as legal fact in Canada and the US. Thus, courts have noted that there is little justifying treating cannabis any different from alcohol or tobacco. But the "public health perspective" has dominated mainstream cannabis discourse. This view downplays "the positive benefits of psychoactive drug use except to the extent they conform with conventional notions of physical health and medical treatment."[155] In the end, the courts have resorted to a balancing act between those positing the right to make the choice to use CTP against the state's interest in protecting public health.

A comparative harm-based perspective has led judges to conclude that, while it is within the power of the legislature to prohibit cannabis, there is little to indicate their decision is substantiated by evidence. But courts cannot do much with this information, no matter the evidence of the harmlessness of cannabis, because of the strictures of the constitution. Their primary duty is to interpret the law, not to rewrite it.

[154] Lynne Belle-Isle, "Cannabis as Therapy for People Living with HIVS/AIDS: 'Our Right, Our Choice'" (Canadian Aids Society, June 2006), ix.
[155] Ethan A. Nadelmann, "Thinking Seriously about Alternatives to Drug Prohibition," *Daedalus* 121, no. 3 (1992), 100-1.

Context: The Politics of Addiction

From the perspective of consumption, cannabis has been categorized as a problematic substance. It has been stigmatized as something causing "a loss of control" over the self, reflecting a hedonistic inability of the consumer to control their free will and leading to the social ills of dependency and addiction.[156] This view is present in the literature on drug control and human rights. Saul Takahashi, for instance, painted addiction as a condition that "destroys—or at least suspends—the free will of the addict." But he did admit that not "all persons who abuse drugs have lost their capacity to make reasoned decision."[157] Takahashi's work initiated debate, as Simon Flacks challenged his use of generalizations regarding willpower without reference to the capacity or consent of individual users.[158] Some, after all, freely choose to take drugs without serious consequences.

Thomas Szasz, introduced above, believed this to be the wrong way to address drugs. Prohibition treats individuals as "lacking adequate internal control over [their] behaviour" which requires "external restraints" "for the protection of society."[159] Instead, drugs should be seen "as neither panaceas or pathogens" and persons as bearers of "inalienable rights and irrepudiable duties."[160] "It is a grievous mistake," he wrote, "to conceptualize certain drugs as a 'dangerous enemy' we must *attack* and *eliminate*, instead of *accepting* them as potentially helpful as well as harmful substances, and learning to *cope* with them competently."[161] This does not entail that

[156] Roberta Sassatelli, "Self and Body," in Frank Trentmann (ed), *The Oxford Handbook of the History of Consumption* (Oxford: Oxford University Press, 2012), 650-1.
[157] Saul Takahashi, "Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health," 31 *Hum Rts Q* 748 (2009), 775-6.
[158] Simon Flacks, "Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: A Reply to Saul Takahashi," 33 *Hum Rts Q* 856 (2011), 871-2.
[159] Thomas Szasz, *Ceremonial Chemistry: The Ritual Persecution of Drugs, Addicts, and Pushers* (Garden City, NY: Anchor Press, 1974), 179.
[160] Ibid, 180-1.
[161] Szasz, *Our Right to Drugs*, xv.

advocates elaborate a wholesale "right to use [or abuse] drugs" without government regulation or intervention.[162] Harm reduction is important, as taxpayers in developed countries foot the bill for healthcare. Granting absolute access to drugs, including cannabis, is at the other end of the extreme to prohibition. But even those "against the legalisation of drugs" admit that cannabis legalization "may have a relatively small impact on society as a whole".[163] In the judicial arena, however, a middle ground advocated by those seeking access to CTP has been used to win the right to use cannabis.

After all, the international legal prohibition of drugs, including cannabis, is not absolute. "From a human rights perspective," according to the Commission on Narcotic Drugs, states "have an obligation to provide essential medicines…as part of their minimum core obligations under the right to health."[164] The cases below sifted through the scientific evidence to determine whether cannabis is, in fact, an essential medicine individuals have a right to use. Though cannabis has always had its advocates, it was in the 1990s that prominent physicians began to substantiate colloquial claims and anecdotal evidence with hard data.[165] That the jurisdictions under review reached different conclusions on cannabis' utility is an indication the issue is far from settled.

Canada: Science and the Harm Paradigm

In 2000, the Supreme Court of Canada recognized that individuals had a right to use cannabis for therapeutic purposes and should be exempt from criminal penalties.[166] The federal government

[162] Flacks, "Drug Control, Human Rights," 874-6. On the idea of a "human right to abuse drugs" see Takahashi, *Human Rights and Drug Control*, chapter 6.
[163] Takahashi, *Human Rights and Drug Control*, 189.
[164] Commission on Narcotic Drugs Vienna, *Drug control, crime prevention and criminal justice: A Human Rights perspective*, Fifty-third session, 8-12 March 2010, E/CN.7/2010/CRP.6*-E/CN.15/2010/CRP.1*, para 47.
[165] See Lester Grinspoon and James B. Bakalar, *Marihuana: The Forbidden Medicine* (New Haven: Yale University Press, 1997).
[166] Terrance Parker cultivated and used cannabis to control his epileptic seizures. See *R v Parker*, para 3.

was given one year to provide for a medical exemption to the prohibition of cannabis and came up with the Marihuana Medical Access Regulations (MMAR). These allowed for a narrow class of persons to grow and use cannabis for medical purposes.[167] The exemption came into effect on 30 July 2001. Included in the exemption were those suffering from "any symptom treated within the context of compassionate end-of-life care", sever nausea, cachexia, anorexia, weight loss, persistent muscle spasms, seizures, and severe pain. The diseases associated with these symptoms included cancer, HIV/AIDS, multiple sclerosis, spinal cord injury, epilepsy, and severe forms of arthritis.[168] Exceptions were also made for those with "a debilitating symptom" not explicitly included in the MMAR.[169] Despite the recognition that cannabis has medicinal properties, it has never been approved by Health Canada for medical purposes.

The Ontario Court of Appeal stated, in 2000, that the "scientific evidence is overwhelming" that cannabinoids like tetrahydrocannabinol (THC) and cannabidiol (CBD) have "medicinal value."[170] Of course, cannabis has an "intoxicating or psychoactive effect," but that is not the only reason individuals consume it.[171] The defendant in the case, Terry Parker, presented "a great deal of scientific and other evidence" to prove the medical utility of his cannabis use.[172] Unfortunately, this mountain of data was not convincing either way. The question of whether it is THC or CBD that assuaged Parker's epilepsy divided legal counsel. The government argued that the study put before the court, in support of Parker's belief that it was CBD that was effective for him rather than THC, was inconclusive. A decade and a half later, the courts were

[167] Peter W. Hogg, *Constitutional Law of Canada: 2013 Student Edition* (Toronto: Carswell, 2013), 47-27.
[168] These symptoms were referred to as "category 1". See Marihuana Medical Access Regulations, SOR/2001-227, s 1(1) and Schedule (Section 1). Available at http://lois-laws.justice.gc.ca/eng/regulations/SOR-2001-227/20060322/P1TT3xt3.html.
[169] These symptoms were deemed "category 2". See ibid, s 1(1).
[170] Ibid, para 2.
[171] Ibid.
[172] Ibid, para 5.

still not sure about this issue: "All that is known," stated the judge in *Allard v Canada*, "is that THC to CBD ratios result in different levels of psychoactivity."[173] Even though it was found that the study "marginally supports the theory" presented by Parker, it was accepted as justification for his smoking cannabis.[174] But overall the science put before the court was open to interpretation. Both parties simply emphasised different facts and figures to support their case.[175] The only thing that was clear is that experts agreed on the need for "better studies" on long-term use and the medicinal value of cannabis.[176] This unhappy state of affairs has dogged cannabis litigation ever since. Uncertainty does not make good law.

Part of the problem with science and medicine has been that it can only do so much to convince courts of law on the harmfulness and/or effectiveness of cannabis. Establishing the "hard evidence" is a difficult task as the "hard evidence" is constantly changing. And "reconciling scientific proof with proof in litigation" is not easily done.[177] The factual record, established at trial, is made "on the basis of the record placed before [judges] by the parties".[178] It is a snapshot of the scientific field at a particular moment and little more. And even more problematically, it is ultimately open to the interpretation of laypersons: judges.

In the *Malmo-Levine* case, the trial judge held "that while marihuana is a psychoactive drug, it is not (medically speaking) a narcotic. It is deemed to be a 'narcotic' only for the parliamentary purposes of the NCA [now the Controlled Drugs and Substances Act] schedule."[179] The unfortunate classification of cannabis as a narcotic did not detract from the fact, according to the Supreme Court of Canada, that it presented a real risk to youth, motor

[173] *Allard v Canada*, 2016 FC 236, para 91.
[174] *R v Parker*, paras 33-5.
[175] Ibid, para 37.
[176] Ibid. For a thorough discussion of the state of research on cannabis at the time of the trial see ibid, paras 42-57.
[177] *R v Parker*, para 41.
[178] Ibid.
[179] *R v Malmo-Levine; R v Caine*, para 38.

vehicle operators, long-term users, and may lead to experimentation with other drugs. These were all identified as issues in the Le Dain Commission report. And even though "[r]esearch and further studies in the intervening 30 years" concluded that some of these fears were unfounded, the Court stated that it did not wish to engage in political or scientific debate: "The question before us," it stated, "is purely a matter of law."[180] Nonetheless, the Court could not help but look at the science and politics behind cannabis prohibition.

At trial in *Caine*, the judge reassessed several claims regarding cannabis' purported harmfulness and determined that the "moderate use of marihuana by a healthy adult is not ordinarily harmful to health"; "there is no conclusive evidence…[of] irreversible organic or mental damage to the user"; "there is no evidence that marihuana use induces psychosis in ordinary healthy adults"; "marihuana is not addictive"; "physical dependence is not a major problem" as it is with "heroin or cocaine"; "there is no evidence that marihuana is a gateway drug"; it "does not make people aggressive or violent"; "there have been no deaths from the use of marihuana"; and lastly, that "the health related costs of marihuana use are very, very small in comparison with those costs associated with tobacco and alcohol consumption."[181] The latter point had already been made in *R v Parker*.[182] The harms associated with cannabis use, it was concluded at trial, "arise primarily from the act of smoking rather than from the active ingredients in marihuana."[183] Combustion, not cannabis, was the real health issue.

Despite the overwhelming indications that cannabis is not, on the whole, a harmful substance, fact did not win over morality. Even after *R v Malmo-Levine; R v Caine* was released, commentators continued to pedal myths about cannabis, including that one of the harms of

[180] Ibid, paras 44-5 and 23 respectively.
[181] Ibid, paras 46 and 138.
[182] *R v Parker*, paras 39 and 48.
[183] *R v Malmo-Levine; R v Caine*, para 48.

"marijuana use is cancer".[184] This state of affairs had already been discussed by the 2002 Senate Special Committee on Illegal Drugs. Wary of the information peddled by so-called "experts", the Committee recommended that a return to fundamental questions was needed. It was less important to know what psychoactive substances *did* to the body and more pressing to "explain the reasons underlying drug use in our society."[185] The health of the body politic could not be assessed, however, without some knowledge as to what individuals were taking cannabis for.

Without a healthy research culture, experts could offer little more than indications of what cannabis does and does not do. Certain products, like cannabis resin[186] and "baked goods", were understudied and it remained unclear even at the end of the 2000s what the appropriate dosage was. All Dr. Harold Kalant, a physician and professor with the University of Toronto, could offer the court in *R v Beren* on this point was that "baked goods require more marihuana than smoking to deliver the relief sought."[187] And the harms associated with smoking cannabis, he posited, could be "ameliorated by using different ingestion methods, such as baked goods, sprays and vaporization."[188] While alternative methods of consumption might be less harmful than smoking, it was unclear when, if at all, cannabis should be used in a therapeutic manner.

Evidence tendered by epidemiologist Lynne Belle-Isle in *R v Beren* related to the treatment of those with HIV/AIDS suggested that "certain strains of cannabis provide greater relief for specific medical conditions".[189] But with only one strain available through the MMAR program many were left without adequate treatment. Dr. Kalant agreed that this was possible, but that, because "research into the efficacy of cannabis is really in its infancy", more proof was

[184] See Croft Michaelson, "*R. v. Malmo-Levine; R. v. Caine* – A Case Comment," *National Journal of Constitutional Law* 16, no. 1 (2005), 168.
[185] Report of the Senate Special Committee on Illegal Drugs, Vol. 1, 45-9, quotation at 48.
[186] The government, however, chose not to include resin under the MMAR. See *R v Beren*, para 31.
[187] *R v Beren*, para 110.
[188] Ibid, para 41.
[189] Ibid, para 109.

needed before Belle-Isle's statements could be accepted as fact.[190] Dr. Kalant indicated that different strains of cannabis do contain "different levels of cannabinoids", which invariably have diverse effects on specific symptoms.[191] That said, the placebo effect, based on patient "expectation and belief", could not be discounted.[192] Taking into account this expert testimony, the Supreme Court of British Columbia held that, for government regulations to comply with the Charter of Rights and Freedoms, they had to allow for more "research on the efficacy of varying strains of cannabis".[193] Those with a need for CTP had a right to the best available treatment, which meant access to the right strain of cannabis to treat their symptoms.

The therapeutic value of cannabis has, grudgingly, been accepted by scientific and medical experts as well as by the Canadian government.[194] But further clinical research is necessary and physicians remain wary of the health consequences for Canadians.[195] And though research has never really pleased Canadian courts, it has been established that: "All experts agree that cannabis is safer than many existing prescription drugs and some over the counter medication."[196] Even Health Canada accepted that, aside from the risks of smoking cannabis, "the adverse effects are within the range tolerated for other medications."[197] Cannabis, the courts seemingly indicated, should be treated like other medicines.

[190] Ibid, para 102.
[191] Some having more "anti-inflammatory or anti-seizure effects" for example. See ibid, para 110.
[192] Ibid.
[193] Ibid, para 133.
[194] *R v Beren*, para 36.
[195] See Pierre Beaulieu et al., "Medical cannabis: considerations for the anesthesiologist and pain physician," *Can J Anesth* 63 (2016): 608-24; Blair Henry et al., "Medical marijuana: A Canadian perspective," *J Pain Manage* 9, no. 4 (2016): 521-4; Harold Kalant and Amy J. Porath-Waller, "Clearing the Smoke on Cannabis: Medical Use of Cannabis and Cannabinoids – An Update," (Canadian Centre on Substance Abuse, 2016); Scott McLeod, "Marijuana is not an all-purpose medical cure," *CBC News*, 14 October 2017, accessed 3 June 2018, http://www.cbc.ca/news/opinion/marijuana-medical-cure-1.4354196.
[196] *R v Beren*, paras 37 and 39.
[197] Ibid, para 40.

By 2015, it seemed that science was less important to the courts than the liberty interest. All applicants needed to do was prove their choice to consume cannabis in whatever form best suited them was "medically reasonable".[198] The science behind why this was thought to be so was less important. While science and medicine played an important part in assessing the utility and danger of cannabis it became less and less important as access to cannabis and its derivatives was extended. The act of smoking became more concerning for the judiciary than cannabis itself.[199] If the government was so concerned with public health and safety, the courts asked, why was it that they permitted dried cannabis alone when there were safer alternatives.[200] Overall, the science of cannabis was not as important in the story of the liberalization of access to cannabis as the juridical science scrutinizing the implications for human rights and fundamental freedoms.

USA: Science and the Harm Paradigm

A 1970 review of the state of American scientists' knowledge of cannabis made several conclusions that hold to this day: "marijuana is not physically habit-forming" (and less habit-forming than tobacco use); it is not a gateway drug; the physical effects are "acute…relatively short-lived, and there are no known lasting physical effects" besides the negative impact of "prolonged smoking"; the "psychomotor effects" are "acute" and last only for "between 30 minutes and 1 hour"; cannabis "is definitely distinguishable from other hallucinogenic drugs such as LSD, DMT, mescaline, peyote, and psilocybin" which alter consciousness to a greater extent; it has "pleasurable psychological effects"; and "the possibility of depression, panic and psychoses depends entirely on the circumstances of use and the personality of the user".[201]

[198] *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602, para 20.
[199] Ibid, para 25.
[200] Ibid.
[201] Bonnie and Whitebread, "The Forbidden Fruit and the Tree of Knowledge," 1104-10.

Canadian scientists and a parliamentary committee came to similar conclusions as their American counterparts at about the same time. But when cannabis science came to the courtroom, claims of its harmlessness and utility became much more contentious.

Robert Randall, of Sarasota, Florida, was the first to challenge cannabis prohibition using the argument of "medical necessity" to win the right to use it for therapeutic purposes in 1976.[202] Randall was able to meet the legal test by demonstrating that he "did not intentionally bring about the circumstances that precipitated the unlawful act" of possession; that he "could not accomplish the same objective using a less offensive alternative"; and "that the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it." Randall needed cannabis to treat his glaucoma and deteriorating eyesight, so "the court balanced [Randall's] interest in health against the state's interest in enforcing drug laws that protect the public."[203] A win in the courts did not convince the medical establishment to support CTP.

Anti-cannabis physicians, like Dr. Gabriel Nahas of Columbia University, made scientific claims about the substance's harmfulness from the 1980s. He argued "that pot could stunt children's physical and mental growth"; "complicate puberty, causing boys to grow breasts and rendering girls infertile"; "and…destroy chromosomes, resulting in multiple generations impaired by the drug." It also, Nahas suggested, "made young smokers 'amotivational'."[204] But in 1982, the National Academy of Sciences produced a report, funded by the federal government, finding there was a paucity of "conclusive evidence" that cannabis "was either as safe or as dangerous as some have claimed."[205] Mixed messages proliferated and, with President Ronald Reagan renewing the War on Drugs, there was little chance a drugs-neutral message would be

[202] Ibid, 208. See *United States v Randall*, 20 Cr.L. 2299 (decided Nov. 24, 1976).
[203] LeVay, "Urgent Compassion," 715-6.
[204] Dufton, *Grass Roots*, 95.
[205] Ibid, 151.

pedalled by the federal government. It took the better part of a decade before the political situation in the US was receptive to new approaches to drug policy. Of course, government had to be dragged into altering cannabis policy and law in the courtroom.

Dr. Marcus Conant, a San Francisco-based physician and professor with a "large private AIDS practice", and several other medical practitioners took the federal government to court when it threatened to take away his and other doctors' prescription license for recommending medical cannabis to patients under the Compassionate Use Act.[206] In his professional opinion, cannabis was "the best if not the only viable, treatment option" for the adverse effects of anti-retroviral drugs, which included "severe nausea and vomiting…[as well as] wasting syndrome, which causes a steady, uncontrolled weight loss."[207] More "traditional anti-nausea drugs and appetite stimulants are effective" for a large number of patients, but not for all.[208] Keith Vines, for example, told the Court that "Marinol, a synthetic [and FDA-approved] derivative of THC", was too powerful and "[made] him feel 'stoned' for several hours such that he could not function competently."[209] He asked for medical advice and was told "that for many AIDS patients, smoking marijuana stimulated appetite better than Marinol, and did so without many of the side effects."[210] Vines was not keen to take an illegal substance but did so out of desperation. Not only was smoking cannabis a quicker way of getting relief, "he did not need to get stoned in order to eat."[211] The Court did not examine whether there was sufficient evidence to support the recommendation of cannabis. What it did conclude was that "doctors are entitled to be confident that their good-faith recommendations based on medical judgments" will not lead to sanctions.[212]

[206] *Conant v McCaffrey*, 4.
[207] Ibid.
[208] Ibid.
[209] Ibid, 5.
[210] Ibid.
[211] Ibid.
[212] Ibid, 16.

It was a matter of professional discretion for physicians to recommend cannabis in California, not the federal government.

Two years later, Conant and his fellow physicians received another federal court decision regarding the federal government's threat to de-register their prescription privileges should they recommend cannabis to patients. This decision focused more on the scientific justification for permitting access to medical cannabis.[213] As noted above, California had legalized "medical marijuana" after Proposition 215 was passed by 56% of the electorate.[214] The Compassionate Care Act, 1996 followed, changing the debate on cannabis from one about harm to its medical utility and "impact on the lives of the sick and dying".[215] Shortly thereafter, the White House Office of National Drug Control Policy requested that the "National Institute of Medicine of the National Academy of Sciences (IOM)…review the scientific evidence of the therapeutic application of cannabis."[216] In *Conant v Walters*, the Court noted that the IOM report confirmed cannabis' "potential therapeutic value…for pain relief, control of nausea and vomiting, and appetite stimulation."[217] Patients in diverse disease categories, including those with "metastic cancer, HIV/AIDS, multiple sclerosis (MS), spinal cord injuries and epilepsy" benefitted from the therapeutic use of cannabis. For this reason, "the IOM Report cautiously endorsed the medical use of marijuana."[218] This was not the end of its analysis.

The Court looked further afield in determining whether there was sufficient evidence for physicians to recommend cannabis to patients. It cited the UK's House of Lords' own

[213] *Conant v Walters*, 309 F.3d 629 (9th Cit. 2002).
[214] Dufton, *Grass Roots*, 208-9.
[215] Financial support for reform initiatives even came from George Soros. See ibid, chapter 12, esp. 222. The Open Society Foundation's Global Drug Policy Program has had a significant impact on reform efforts elsewhere. See Takahashi, *Human Rights and Drug Control*, 7-8.
[216] *Conant v Walters*, 641.
[217] Ibid.
[218] Ibid.

investigation in the late 1990s—"a body not known," according to the Court, "for its wild and crazy views"—which found that "cannabis almost certainly does have genuine medical applications" and suggested British physicians be given the ability to "prescribe an appropriate preparation of cannabis…as an unlicensed medicine."[219] The Court also mentioned Canada's Marihuana Medical Access Regulations of 2001, which permitted "certain persons to cultivate and possess marijuana for medical use, and authorize doctors to recommend and prescribe [it] to patients who are suffering from severe pain, muscle spasms, anorexia, weight loss or nausea, and who have not found relief from conventional therapies."[220] But even with other jurisdictions noting the medical utility of cannabis, the Court determined: "The evidence supporting the medical use of marijuana does not prove that it is, in fact, beneficial."[221] Nonetheless, "obtaining candid and reliable information about a possible avenue of relief is of vital importance" for patients.[222] It was a free speech issue—the right to receive information—that tilted the balance in favour of Conant, not science.

Despite state laws permitting access to medical marijuana, "Federal law reflects the proposition that medical marijuana has no accepted medical use."[223] But cannabis can be decriminalized and accepted as a therapeutic medicine at any time. The DEA, working with the Department of Health and Human Services (HHS), has the capacity to reschedule or deschedule any substance.[224] The DEA Administrator must consider eight factors before making such a decision:

[219] Ibid, 641-2.
[220] Ibid, 642.
[221] Ibid, 643.
[222] Ibid.
[223] LeVay, "Urgent Compassion," 700.
[224] 21 U.SC. §811(b), cited in *Americans for Safe Access v Drug Enforcement Administration*, 2012 WL 1943845 (C.A.D.C.), Final Brief for Respondent, United States Court of Appeals, District of Columbia Circuit, No. 11-1265 (29 May 2012), 5. The Respondent's brief conveys the federal government's position regarding medical cannabis in detail. For this reason, the Final Brief for the Respondent is used to explain its approach to scheduling drugs. See the

(1) [The drug's] actual or potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug[.]

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.[225]

In 2002, the Coalition for Rescheduling Cannabis (CRC), an intervenor in *Americans for Safe Access, et al., v Drug Enforcement Agency*, requested the DEA reclassify cannabis as a "schedule II, IV, or V" substance, a plea refused by the DEA Administrator.[226] The CRC suggested "that marijuana does not have a high potential for abuse" and is less likely to lead to abuse than other "legal drugs," citing "dozens of domestic and foreign documents" in support of "'access to therapeutic cannabis,' additional research or decriminalization."[227] It wasn't enough.

HHS retorted that, though the Controlled Substances Act "does not define 'abuse,'" there are "indicators with respect to determining whether a drug has a potential for abuse." For one, cannabis use is "a hazard to [the] health or to the safety of other individuals or to the community" because of the "short-term adverse effects of smoked marijuana on cognitive performance or psychomotor skills that are critical to, *e.g.*, driving…the exacerbation of psychosis in vulnerable individuals…confusion, anxiety, and impaired judgment…cardiovascular effects…respiratory effects from chronic use…and the risk of

final decision too: *Americans for Safe Access v. Drug Enforcement Administration*, 706 F.3d 438 (C.A.D.C., 2013), 5-6.

[225] 21 U.SC. §811(c), cited in *Americans for Safe Access*, Final Brief of Respondent.

[226] Ibid, 1. In 1997, George Annas suggested that: "There is certainly sufficient evidence to reclassify marijuana as a Schedule II drug." See Annas, "Reefer Madness," 439.

[227] *Americans for Safe Access*, Final Brief of Respondent, Part II(A).

physical withdrawal symptoms and psychic dependence or addiction from long-term use."[228] Of course, only impaired driving poses a real risk to others and the community. It was the individual risk factors, apparently, that led HHS to conclude "that marijuana did not have a currently accepted medical use in treatment in the [US]."[229] The analysis did not stop there.

HHS also looked to the "DEA's five-prong test" to establish whether there was sufficient evidence to support a change in cannabis' scheduling. This test "requires a known and reproducible drug chemistry, adequate safety studies, adequate and well-controlled studies demonstrating efficacy with respect to the treatment of a specific disorder, acceptance of the drug by qualified national experts, and widely available scientific evidence."[230] Since cannabis is a Schedule I substance, it is no surprise that HHS found there was a paucity of empirical data to meet the DEA's threshold.[231] The DEA Administrator agreed with HHS's conclusion, namely "that the evidence [presented by the CRC] did not meet the five-prong test that established currently accepted medical use" with an emphasis on the fact that there were no "well-controlled studies" to establish medical utility.[232] This was despite the "more than two hundred peer-reviewed published studies suggesting marijuana's efficacy for various medical uses".[233]

The final decision on the CRC et al.'s application was finally rendered in 2013. The question before the US Court of Appeals in Washington, D.C., was "whether the DEA's decision declining to initiate proceedings to reschedule marijuana under the CSA was arbitrary and capricious."[234] The Court held "that the DEA's denial of the rescheduling petition survives review under the deferential arbitrary and capricious standard…and find that substantial

[228] Ibid, 13-5.
[229] Ibid, 15.
[230] Ibid, 15-6.
[231] Ibid, 16-7.
[232] Ibid, 21-2.
[233] *Americans for Safe Access v. Drug Enforcement Administration*, 706 F.3d 438 (C.A.D.C., 2013), 24.
[234] Ibid, 4.

evidence supports its determination that such studies [on cannabis' 'currently accepted medical use'] do not exist."[235] What the studies presented by the petitioners proved was the "potential therapeutic utility of cannabinoids" rather than its "*accepted medical use*".[236] Part of the problem in establishing the latter, as the DEA pointed out, was the absence of Phase II and III studies confirming the medical utility of cannabis under Food and Drug Administration (FDA) supervision.[237] To get to Phase II and III, however, researchers need "FDA approval for the study, and then DEA, HHS, and NIDA [National Institute on Drug Abuse] approval for receipt and possession of marijuana."[238] Getting to through these hurdles is nearly impossible:

> This landscape creates a catch-22: The rescheduling of marijuana out of Schedule 1 requires fairly rigorous and extensive clinical research showing the drug's medical efficacy. But a uniquely arduous approval process and a shortage of marijuana, due to its designation as a Schedule I substance, prevent the research necessary to reschedule.[239]

Even when litigants point out the inconsistency between scheduling cannabis at the federal level as a substance that "has no medical use" and the fact it is available for therapeutic purposes at the state level they have failed to convince the courts to intervene.[240] This state of affairs, however, hasn't prevented states from taking the initiative on cannabis. And it seems they are winning in the court of public opinion.

A 2015 study on Oregonians' "perceptions of the relative harmfulness of marijuana and alcohol" found that just over half "considered alcohol to be more harmful to a person's health

[235] Ibid, 4 and 27.
[236] Ibid, 24.
[237] Some Phase I trials had been carried out. For more detail regarding the FDA's clinical trial process see ibid, 25.
[238] Alexander W. Campbell, "The Medical Marijuana Catch-22: How the Federal Monopoly on Marijuana Research Unfairly Handicaps the Rescheduling Movements," *American Journal of Law & Medicine* 41 (2015), 209.
[239] Ibid.
[240] See *Steven Kadonsky v Steve C. Lee, Acting Director of the Division of Consumer Affairs*, Docket No. A-3324-14T4, N.J. Super. Ct. App. Div. (October 31, 2017).

than marijuana."[241] From a medical standpoint, such views are out of touch with what the data suggests. In 2017, researchers at National Academies of Sciences, Engineering, and Medicine concluded that there is a need "To develop a comprehensive evidence base on the short- and long-term health effects of cannabis use (both beneficial and harmful effects)" to fill in the current knowledge gaps.[242] A history of "conflicting and impeded scientific research, and legislative battles have fueled the debate" up to this point.[243] Hard evidence is "elusive," and when legislators, judges, and others "who have been charged with influencing and enacting policies, procedures, and laws related to cannabis use" are presented with the science as it stands it does nothing to inform them: "often," according to the National Academies, "these research conclusions are not appropriately synthesized, translated or communicated".[244] If the best scientists in the US cannot make heads or tails of cannabis research now, what are judges and lawyers to do with the medico-scientific arguments used by litigants?

UK: Science and the Harm Paradigm

In 2007, a group of British scientists created a "rational scale" evaluating the "the harm of drugs of potential misuse". The scale was meant "to employ uniform methods to scrutinize both legal and illegal drugs." Uniformity was needed because the Misuse of Drugs Act 1971 (MDA) failed to adequately assess the risks of "psychedelic-type drugs" compared to "socially acceptable substances" like alcohol and tobacco. Instead, "prejudice and assumptions" were the basis on which drugs were classified. Cannabis, for instance, according to the rational scale, was listed as

[241] 52.5% to be exact. Views were also split on lines of sex, age, and political affiliation. See Jane A. Allen et al., "Perceptions of the relative harmfulness of marijuana and alcohol among adults in Oregon," *Preventive Medicine* 109 (2018), 34.
[242] National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannibinoids: The Current State of Evidence and Recommendations for Research* (Washington, D.C.: National Academies Press, 2017), S-7.
[243] Ibid.
[244] Ibid, 1-1.

less harmful than alcohol and tobacco, but more harmful than LSD and Ecstasy.[245] This might be true, but British courts have not had the benefit of such a scale. Instead, they have adjudicated on the basis on the MDA, however non-rational and unscientific its classifications are.

In their defence, legislators have looked at the evidence for cannabis' medical utility without resorting to "prejudice and assumptions". In 1998, a House of Lords Select Committee on Science and Technology report, "Cannabis, the Scientific and Medical Evidence,"[246] found that "Although cannabis is not in the premier league of dangerous substances, new research tends to suggest it may be more hazardous to health than might have been thought only a few years ago".[247] The risks, nearly identical to those identified by the Le Dain and Shafer commissions, included "impairment of psychomotor and cognitive function, important…for those driving a car…delusions and hallucinations…and that cannabis may also exacerbate the symptoms of those suffering from schizophrenic illness."[248] The most significant harm associated with cannabis use was—no surprise— identified as smoking.[249] Given that Canadian, American, and British investigators reached the same conclusions vis-à-vis cannabis' harmfulness, it is safe to say the risks are known and have been for decades.

When it came to the benefits of cannabis things got more complicated. The Select Committee decided "that, in all the evidence we have received, there is not enough rigorous scientific evidence to prove conclusively that cannabis itself has, or indeed has not, medical

[245] David Nutt et al., "Development of a rational scale to assess the harm of drugs of potential misuse," *Lancet* 369 (2007): 1047-1053, esp. 1052, cited in Battin et al., *Drugs and Justice*, 252.
[246] House of Lords Select Committee on Science and Technology, "Cannabis, the Scientific and Medical Evidence," 9th Report, 1997-98, HL Paper 151, Session 1997-8, 4 November 1998, cited in *Quayle & Ors v R*, [2005] EWCA Crim 1415 (27 May 2005).
[247] *Quayle*, para 17.
[248] Ibid.
[249] Ibid.

value of any sort".[250] Just two years later, however, the Runciman Report[251] recommended cannabis be reclassified to Class C from Class B. It further elaborated "that the therapeutic benefits of cannabis use by people with certain serious illnesses outweigh any potential harm to themselves or to others."[252] Contradictory findings from two respectable British institutions did not make things any easier for the courts. Regardless, judges had to make sense of cannabis-related claims based on incomplete science from the mid-2000s.

Barry Quayle, an amputee, smoked cannabis to relieve pain and treat insomnia. He was caught and convicted of cultivating cannabis. Conventional treatments, Quayle claimed, were insufficient and his cannabis use was a matter of necessity. Expert testimony from Dr. Reynolds, a Fellow of the Royal College of Anaesthetists and Pain Society member, presented evidence that Quayle's pain was genuine. Reynolds did not want to engage in the "debate around legality" but noted that "there is no question in my mind that this patient has taken cannabis with benefit to his chronic symptoms."[253] Bolstering the claim was pharmacologist and toxicologist Victoria Jenkins, who testified that cannabis has medicinal properties and "currently available analgesic drugs have serious side effects". Quayle's pain "is…likely to respond well to cannabis" despite the fact that there was "no reliable clinical evidence to support this".[254] The defence cited several other experts who supported the contention that cannabis was medically effective.[255] To deprive Quayle of CTP was, according to his legal team, a human rights violation.

[250] Ibid, para 18.
[251] Police Foundation, *Drugs and the Law: Report of the Independent Inquiry into the Misuse of Drugs Act 1971* (2000).
[252] *Quayle*, para 23.
[253] Ibid, para 2.
[254] Ibid.
[255] Ibid.

Unfortunately, the Court of Appeal did not find that the MDA violated Quayle's right to privacy under article 8 of the Human Rights Act 1998 [HRA].[256] Were the claim recognized, the Court would have had to evaluate:

> the medical and scientific evidence, a weighing of the competing arguments for and against the immediate change recommended…a greater understanding of the nature and progress of the tests of cannabis which have taken and are taking place, and a recognition that, in certain matters of social, medical and legislative policy, the elected government of the day and Parliament are entitled to form overall policy views about what is best not just for particular individuals, but for the country as a whole, in relation to which the courts should be cautious before disagreeing.[257]

Other cases similarly found no violation of the HRA, which meant the scientific evidence would not be examined.[258] As Bone and Seddon have written, British courts have not been receptive to the medic-scientific debate on cannabis. Instead they have focused on the legal status of the substance and deferred to legislators to decide whether it is an acceptable medical treatment.[259] This did not mean the courts would not hear the case for access to CTP.

Expert testimony related to cannabis' subjective medical efficacy or lack thereof has been considered in UK court decisions. In a 2011 case, evidence related to whether "there is a general perception amongst drug users that cannabis use if effective to manage or alleviate the symptoms of epilepsy" was deemed to have been wrongly excluded by the court of first instance.[260] This evidence would have supported the appellant's claim "that the large quantities of cannabis in his possession were for his personal use".[261] Cannabis was part of "his self-medication for his epileptic condition" and the Court of Appeal could not "rule out the possibility that it would have

[256] To be discussed below. Ibid, para 69.
[257] Ibid, para 68.
[258] See *R v Altham*, [2006] EWCA Crim 7, [2006] 1 WLR.
[259] Melissa Bone and Toby Seddon, "Human Rights, public health and medicinal cannabis use," *Critical Public Health* 26, no. 1 (2016): 51-61.
[260] *R v Jasun Dale*, [2011] EWCA Crim 1675, 2011 WL 2582674, paras 20-1.
[261] Ibid, para 20.

assisted him."[262] The expert in question surmised that he "would not be surprised if a heavy user had had such an amount in his possession."[263] It should therefore have been admitted as evidence as part of the appellant's defence.[264] Belief in cannabis' medical utility has been recognized as a legitimate part of defending against cannabis possession charges in the UK. Anecdotal evidence is not irrelevant in the courts, nor has it been ignored by activists in convincing the public to support a change to prohibition.

Charities like the MS Society, for example, support the use of cannabis by those suffering from multiple sclerosis claiming there is now sufficient evidence to grant access. These individuals, according to *The Guardian*, "should be able to take the drug without fear of prosecution."[265] That said, professional organizations, like the Royal College of GPs and The Royal College of Physicians, have neither endorsed nor refuted claims of cannabis' utility.[266] And with the medical community divided, politicians of all stripes can claim expert evidence supports whatever view they have vis-à-vis medical cannabis. But there is also bipartisan support for changing the law to allow for medical cannabis. In 2016, the All Party Parliamentary Group on Drug Policy Reform recommended reclassifying "herbal cannabis" so as to allow its use for medical purposes. The Group cited increasing evidence of cannabis' effectiveness as the reason behind its decision. Baroness Molly Meacher characterized "the UK scheduling of cannabis as a

[262] Ibid, para 22.
[263] Ibid, paras 13 and 20.
[264] Ibid, para 23.
[265] Denis Campbell, "Legalise cannabis as treatment of last resort for MS, says charity," *The Guardian*, 27 July 2017, accessed 26 May 2018, https://www.theguardian.com/society/2017/jul/27/legalise-cannabis-as-treatment-of-last-resort-for-multiple-sclerosis-says-charity.
[266] Ibid. Concerns about cannabis' effect on mental health, particularly the link between heavy use and psychosis, remains an issue for researchers. This is one reason caution has been called for by many researchers. See Caulkins et al., *Marijuana Legalization*, 73 and Hannah Devlin, "Smoking skunk cannabis triples risk of serious psychotic episode, says research," *The Guardian*, 16 February 2015, accessed 26 May 2018, https://www.theguardian.com/society/2015/feb/16/skunk-cannabis-triples-risk-psychotic-episodes-study.

substance that has no medical value [as] irrational."[267] The group also supported the proposition that Article 8 of the European Convention of Huma Rights—the right to private and family life—could be used by cannabis users as a defence.[268] These recommendations are important but pressing domestic issues have put pot on the backburner. With Brexit looming, among other major issues, drug reform seems a remote possibility despite increasing support from the medico-scientific community and politicians on both sides of the aisle.

In Sum

Since the early 2000s, Canadian courts have been the most receptive to claims that cannabis has therapeutic value. Similar cases in the US and UK proved less convincing, but great and small victories were won; often for reasons other than scientific.[269] What really unites the three jurisdictions is the presence of a narrative of pain and relief. Litigants argued that individual and social harm was nothing compared to the daily suffering they went through. Governments have no right to interfere with the choice to consume cannabis, they posited. The next chapter examines how the language of human rights was used to challenge the regulation of drugs, whether for medical or recreational use. These arguments were closely related to the medical debate, as scientific evidence was applied so as to substantiate claims cannabis is not as harmful as the establishment and prohibitionists make it out to be.

[267] Michelle Roberts, "MPs call for medical cannabis to be made legal," *BBC News*, 13 September 2016, accessed 26 May 2018, http://www.bbc.com/news/health-37336678.
[268] David Barrett, "Taking drugs is a human right, say MPs and peers," *The Telegraph*, 19 August 2015, accessed 26 May 2018, https://www.telegraph.co.uk/news/uknews/crime/11810347/Taking-drugs-is-a-human-right-say-MPs-and-peers.html.
[269] The *Conant* cases in the US, for example.

Chapter 3
The Liberty Interest v. Prohibition

The Harm Paradigm

The cannabis debate, and public discussion of drugs more generally, often revolves around whether it causes harm to individuals and/or society at large.[270] Melissa Bone contends that engaging in the harm reduction discourse from a human rights perspective "legitimises the prohibitionist paradigm" and "can only ever perpetuate the system" with all its inherent deficiencies.[271] Her argument is verified by characterizations of cannabis and cannabis users. The Canadian Centre for Addiction and Mental Health (CAMH), for instance, suggested that a public health approach is the only way to mitigate the damage caused by drug use. It also claimed that "Cannabis is not a benign drug" and encouraged users "to seek treatment."[272] The Canadian government accepted the CAMH's findings but noted that "there is significant debate about how to proportionality mitigate marijuana's risk to public health."[273] Harm, risk, and abuse are the watchwords of the public health approach to cannabis.

These views confirm that many of the issues raised regarding harm are "value laden".[274] Other equally important values at stake include "compassion and justice" for the sick and those in pain.[275] Of course, there are many legitimate questions to be asked regarding the acceptable level of harm individuals may inflict on themselves and others, especially when the latter's rights are engaged. Scientists, policymakers, and lawyers should consider things like the likelihood of

[270] Bone, 26.
[271] Ibid, 28.
[272] Centre for Addiction and Mental Health, "Submission to The Senate Special Committee on Illegal Drugs," June 2002, 2.
[273] MacKay and Phillips, "The Legal Regulation of Marijuana in Canada," 15.
[274] Battin et al., *Drugs and Justice*, 8 and
[275] Mitch Earleywine, "Values and the Marijuana Debate," in idem (ed), *Pot Politics*, 355-9.

harm occurring, who is being harmed and how (i.e. physically or mentally), whether the harm poses a threat to the "moral fabric" of society, the acceptable degree of the state limiting the harm in question, how to prevent it, and the means by which relative harmfulness is balanced with interests like fundamental rights.[276] These, and other, questions have been considered by the courts in Canada, the US, and UK. But the answers to them should not be used to justify the loss of liberty and violation of human rights.[277] There are some things individuals should be free to choose to do without the interference of government.

In contrast to the harm discourse and public health approach is the idea that individual should have the *right* to choose to consume psychoactive substances, whether for therapeutic or recreational purposes.[278] Activists in the US, especially, worked hard to change perceptions of cannabis by creating "an alternative frame of marijuana that emphasized not crime, deviance, and violence, but health, patient, rights, and compassion."[279] Key to the passage of the Compassionate Care Act, 1996 in California, by way of illustration, was the strength of the distinction made by proponents between medical and recreational cannabis use.[280] Acceptance of CTP, however, made the public think about cannabis itself in new ways. If it is a medicine recommended by physicians, why is it treated the same as heroin and other narcotics? These and other questions were posed to courts to win access to cannabis. Sometimes the claims succeeded, most often they failed. In the long run, it appears the liberalizers have the momentum. But it wasn't always thus. Litigants in all three jurisdictions have fought hard to protect their human rights and fundamental freedoms.

[276] Peter J. Cohen, "Foreword," in Battin et al., *Drugs and Justice*, xiii-xiv.
[277] Sue Pryce, *Fixing Drugs: The Politics of Drug Prohibition* (Basingstoke: Palgrave Macmillan, 2012), 145-6.
[278] Bone, 28.
[279] Kathleen Ferraiolo, "From Killer Wee to Popular Medicine: The Evolution of American Drug Control Policy, 1937-2000," *Journal of Policy History* 19, no. 2 (2007), 166.
[280] Ibid.

Medical Cannabis and Liberty in Canada

Advocates of a more laissez-faire regulatory regime challenged the government's cannabis laws and policies in Canadian courts with some frequency after *R v Parker*, discussed above. The Canadian Charter of Rights and Freedoms has played an important role in this process, allowing litigants to articulate their cannabis use in the language of human rights. Under section 7 of the Charter, an individual can only be deprived of his life, liberty, and security of the person "in accordance with the principles of fundamental justice [PFJs]."[281] The government needs to justify any interference with the rights and freedoms of citizens as consistent with these PFJs.

In the 1990s, litigants had few options when challenging the constitutionality of cannabis prohibition. The first case to question the regime failed.[282] It was only through the lens of CTP that courts began to listen. But, as Lynne Belle-Isle put it: "Without an emerging constitutional right to health, the strategy in the medical cannabis cases was to develop a 'right to choose medical treatment' based upon notions of autonomy and dignity".[283] Cases on assisted suicide and abortion had already established a jurisprudence that recognized a constitutional "right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction."[284] With these bases, litigants took prohibition to court. From the early 2000s, the courts were receptive to the argument that cannabis prohibition violated section 7, slowly wearing away at government regulations and increasing access to cannabis.

[281] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 7.
[282] See *R v Clay* (1997), 9 C.R. (5th) 349, 363 (Ont. Gen. Div.), discussed in Belle-Isle, "Cannabis as Therapy," 18. On the 1997 *Clay* decision see Andrew D. Hathaway, "Harm Reduction, Human Rights, and Canada's Cannabis Controversy," PhD Diss., McMaster University, 1999, 181-90.
[283] Belle-Isle, "Cannabis as Therapy," 17. For more on the right to health under the *Charter* see Emmett MacFarlane, "The Dilemma of Positive Rights: Access to Health Care and the *Canadian Charter of Rights and Freedoms*," *Journal of Canadian Studies* 48, no. 3 (2014): 49-78.
[284] Belle-Isle, "Cannabis as Therapy," 17-8.

Access to medical cannabis came as a result of *R v Parker*, discussed above. Since "he [faced] the threat of imprisonment to keep his health", Parker argued, the Charter of Rights and Freedoms was engaged.[285] Without cannabis, Parker asserted, his life would be put at risk.[286] This conflict, the court agreed, violated Parker's section 7 right to liberty and security of the person. For this reason, "the prohibition of the cultivation and possession of marijuana" for medical purposes was held to be unconstitutional.[287] Parker had the right to make the decision to take cannabis to treat his medical condition. One of the principles of fundamental justice is that individuals "possess an autonomy to make decisions of personal importance".[288] To deprive Parker of his autonomy over his health and subject him to criminal prosecution for taking "a relatively safe drug that has demonstrated therapeutic benefit to him" was wrong.[289] As the trial judge put it: "For [Parker] to be deprived of his smokable marijuana is to be deprived of something of fundamental personal importance."[290] This fit with the Supreme Court's jurisprudence on health rights and personal autonomy.[291] Medical cannabis was thereafter subject to an exception from criminal prosecution.

In the case of *Hitzig v Canada*[292] the applicant challenged the federal government's MMAR on the basis that those who were approved for the program did not, in practice, have access to a legal source of cannabis.[293] Many people had to get their cannabis from illicit sources

[285] *R v Parker*, paras 5 and 83.
[286] Ibid, para 84. The government, needless to say, did not agree that "Parker's physical or mental integrity" was compromised in this way. See ibid, para 86.
[287] Ibid, para 10.
[288] Ibid, para 69.
[289] Ibid, para 70.
[290] Ibid, at para 69. See too the discussion of the liberty interest at para 103.
[291] See especially the discussion of *R v Morgenthaler* on abortion in ibid, paras 88, 94, 106, 108, and 115-6.
[292] 2003 CanLII 30796 (ON CA), 231 DLR (4th) 104, leave to appeal refused (2004) 112 CRR (2d) 376(n) (SCC).
[293] Cannabis could be legally accessed "from one of three possible sources: (1) Health Canada…(2) by growing pursuant to a licence from Health Canada; or (3) by designating someone to grow for them pursuant to a licence from Health Canada." See *R v Beren*, para 20.

even though they had a right to take the substance. About 80% of those entitled to take cannabis did not get it from the government supplier Prairie Plant Systems.[294] The Canadian court's response was to strike the provisions preventing a market from forming out so that individuals approved to use cannabis could get it legally.[295] To deprive them of the right to access medical treatment was a violation of their section 7 right to security of the person.[296] And to force individuals to seek medical cannabis on the black market by not providing adequate access to a legal source and, as a result, put themselves at risk of criminal prosecution, constituted a violation of the section 7 right to liberty.[297] The Charter forced the government to meet its human rights obligations, but they refused to do anything other than what was strictly required by law.[298]

By 2009, little had changed with regard to access to government-sourced cannabis. Litigants were still fighting for the "easing of all government regulation of the availability of marijuana for medical purposes" under section 7 of the Charter of Rights and Freedoms.[299] Matthew Beren, who had been growing cannabis for the Vancouver Island Compassion Club in British Columbia, was charged in 2004 and convicted with "production for the purposes of trafficking". The decision was upheld on appeal.[300] This is despite the fact that the Supreme Court of British Columbia severed provisions from the MMAR found to be contrary to section 7 and, therefore, unconstitutional.[301] Beren's defence was that he was producing cannabis for

[294] See the trial judgment in *R v Hitzig*, para 12, cited in *R v Beren*, para 118.
[295] Hogg, *Constitutional Law of Canada*, 47-27-47-28.
[296] *Hitzig v Canada*, para 104.
[297] Ibid, para 98.
[298] The resultant regulations brought in by the government were later challenged in Ontario. On appeal, the court held that the "circumstances that resulted in s. 4 of the *CDSA* being found unconstitutional [in *Hitzig*] have been remedied." See *R v Long*, 2008 CanLII 64389 (ON CA), paras 16-7 and 39.
[299] *R v Beren*, paras 1 and 6.
[300] Ibid, paras 1 and 136.
[301] Ibid, para 127.

"medical and research purposes".[302] Indeed, members of the Club had an Authorization to Possess cannabis for medical purposes or a physician's support to take it as part of their therapy.[303] The judge further determined that, because so few users had access to a legal supply of medical cannabis, they sought it out on the black market.[304] Forcing Canadians to compromise their liberty in the pursuit of health created a serious human rights issue.[305] The MMAR program's utility and "the exemption created by the regulations" from criminal prosecution it contained was, in the judge's words, "illusory."[306] Nearly a decade after the government was required to provide access to medical cannabis, it continued to resist the nudges of the courts and those fighting for increased access.

Litigation has not only challenged the restriction of medical cannabis, but the prohibitionist model as a whole. A key decision in the legal history of cannabis in Canada is the 2003 appeal of *R v Malmo-Levine; R v Caine*. Malmo-Levine's case originated in British Columbia while Caine's came from Ontario. Because they both concerned the prohibition of cannabis the Supreme Court considered them together.

A self-described "marihuana/freedom activist", Malmo-Levine was a "chronic user" who ran a "Harm Reduction Club" in Vancouver and wanted to extend "the personal autonomy of…citizens" to include the right to consumer cannabis.[307] In oral arguments, he claimed to be "part of a growing number of such activists, who view cannabis re-legalization as a key part of protecting human rights and our Mother Earth".[308] When his Club was raided by police, they

[302] Ibid, para 1.
[303] Ibid, para 10.
[304] Ibid, para 21. The same was held in *Sfetkopoulos v Canada (Attorney General)*, at para 19, cited in *R v Beren*, para 126.
[305] This applies not only to CTP uses, but individuals with a drug dependence. See Takahashi, "Drug Control, Human Rights," 769-70.
[306] *R v Beren*, para 21.
[307] *R v Malmo-Levine; R v Caine*, paras 7 and 41.
[308] Ibid, para 7.

"seized 316 grams of marihuana". He was subsequently "charged with possession of cannabis…for the purpose of trafficking."[309] Caine, by contrast, was caught by the RCMP with "a partially smoked cigarette of marihuana that weighed 0.5 gram" and charged with simple possession.[310]

Caine's legal counsel asserted that John Stuart Mill's harm principle constituted a PFJ and that, since cannabis caused no harm to others, his conviction was unconstitutional and in violation of the Charter. This claim was rejected by the trial judge, who determined that cannabis "is not 'a completely harmless drug for all users'."[311] Further, the harm principle is not recognized as a PFJ.[312] The main risks of harm were driving under the influence, which posed a threat to the public at large, and the possibility that increased use of cannabis, in the event it were legalized, would impose a "cost to society, both to the health care and welfare systems."[313] The "evil or injurious or undesirable" effects of cannabis, a "'psychoactive drug' that causes alteration of mental function'", are such that the state has a legitimate state interest in protecting "public health and safety" through prohibition.[314] Parliament was therefore entitled to use its criminal law power to regulate cannabis use.[315] Caine's appeal of conviction was, as such, dismissed.[316]

Malmo-Levine contended that cannabis use was part of his "preferred lifestyle" and that its criminalization was an "infringement on his personal liberty."[317] Caine, too, mentioned that

[309] Ibid, para 9.
[310] Ibid, para 10.
[311] *R v Malmo-Levine; R v Caine*, para 47.
[312] Ibid, para 130.
[313] Ibid, para 48.
[314] Ibid, paras 73 and 77.
[315] Ibid, para 78.
[316] Ibid, para 186.
[317] *R v Malmo-Levine; R v Caine*, para 81.

cannabis was "fun" and a key part of his social life.[318] Why, he posited, should cannabis be treated any different from other choices one makes that pose a threat to health? Smoking a joint, Caine suggested, "is analogous to the decision by an individual…whether or not to eat fatty foods".[319] As one commentator put it: "Why *shouldn't* pleasure count as a benefit" of cannabis use?[320] Though this line of reasoning has its merits, it is not a legal argument. The right to liberty and personal autonomy, in the Supreme Court's view, did not extend to "afford protection to whatever activity an individual chooses to define as central to his or her lifestyle."[321] Only "basic choices going to the core of what it means to enjoy individual dignity and independence" are protected.[322] In sum, "[t]here is no free-standing constitutional right to smoke 'pot' for recreational purposes".[323] The Court concluded that Malmo-Levine's claim "does not attract *Charter* protection" and his appeal against conviction was dismissed.[324] The conclusions drawn vis-à-vis the liberty claim fit with the Court's narrow interpretation of section 7 rights.[325]

To his contention that "prohibition is simply ineffective", the Court responded that just because Malmo-Levine refused "to comply with the law" did not render it inoperative.[326] The latter did not constitute a legitimate legal defense.

A majority of the Supreme Court rejected Mill's dictum that "over his own body and mind, the individual is sovereign".[327] Canada, in the Court's words, "continues to have

[318] Ibid, para 84.
[319] Ibid. This argument is identical to Thomas Szasz's suggestion that "Every Man Has a Right to Eat as He Pleases." See Szasz, *Our Right to Drugs*, 25-6. Cannabis activist Keith R. Stroup presented this argument to the US Senate Judiciary Committee in May 1975 as well. See Dufton, *Grass Roots*, 67-8.
[320] Caulkins et al., *Marijuana Legalization*, 91-2.
[321] *R v Malmo-Levine; R v Caine*, para 86.
[322] Ibid.
[323] Ibid, para 87.
[324] Ibid, paras 87 and 186.
[325] Though some, like Justice Wilson, argued for broader and more robust interpretations of the rights to life, liberty and the security of the person. See Vanessa A. MacDonnell, "The Protective Function of Section 7 of the *Canadian Charter of Rights and Freedoms*," 17 *Review of Constitutional Studies* 53 (2012), 62-3.
[326] Ibid, paras 176 and 178.
[327] *R v Malmo-Levine; R v Caine*, para 118.

paternalistic laws" and will probably always have them.[328] Many acts "that do not cause harm to others" are criminalized, such as cannibalism, bestiality, cruelty to animals, incest, and duelling.[329] But such moralism, according to the dissenting opinion of Justice Arbour, must be based on something more than "[t]he prevention of 'dirt for dirt's sake'".[330] Cannabis use, in her view, was not akin to any of the moral legislation cited by the majority. The other cases involved others, whether human or animal. Individuals should not be threatened with prison for engaging in what amounts to "conduct that is harmless to them" individually.[331] And when compared to alcohol and tobacco, the social harm inflicted on society by cannabis use was "negligible" or "very, very small".[332] The cost of enforcing prohibition, by contrast, as established by the trial judges, was "very high" "to prevent a low quantum of harm to society".[333] For these, and other, reasons, Arbour would have held that the criminalization of possession of cannabis for personal use violated the section 7 of the Charter.[334] She would therefore have allowed Caine's appeal and "set aside the conviction for simple possession."[335]

Arbour's dissent fit with a line of jurisprudence holding "that criminal sanctions should not be treat persons as mere means to broader social ends" such as the protection of vulnerable groups.[336] Justice Deschamps, dissenting as well, believed that cannabis use constituted "socially neutral conduct" and its prohibition lead "[c]itizens…not to take the criminal justice system

[328] Ibid, para 124.
[329] Ibid, paras 117-118.
[330] Ibid, para 241.
[331] Ibid, para 258.
[332] Ibid, para 265.
[333] Ibid, para 266.
[334] Ibid. Arbour, on the issue of the constitutionality of the criminalization of "possession of marihuana for the purpose of trafficking" noted that "it is virtually impossible to determine whether [it] causes more than little or no harm to others." Because the interests to be balanced are different from those regarding simple possession, Arbour would have held that there was no section 7 infringement in Malmo-Levine's case. See ibid, paras 266, 268, and 273-4.
[335] *Ibid*, para 275.
[336] R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada," 70 *Sask L Rev* 1 (2007), 6.

seriously and lose confidence in the administration of justice."[337] Even judges had "become reluctant to impose the sanctions attached to such laws."[338] Deschamps, too, would have set aside Caine's conviction on the basis that the possibility of incarceration for simple possession violated section 7 of the Charter. In clear disagreement with the majority of the Court, Deschamps went so far as to state that "the inclusion of cannabis in the schedule to the *Narcotic Control Act*" in and of itself "infringes the appellants' [section 7] right to liberty."[339] If the dissenters had had their way, the simple possession of cannabis would not be a criminal act.

Christopher Clay, "something of a crusader for the legalization of marihuana", also challenged the prohibition of cannabis before the Supreme Court in 2003.[340] The decision reiterated that cannabis use is not without risk, but that it does have a place in medicine.[341] But Clay's challenge alleged that he had a right to consume cannabis within the privacy of his residence. To criminalize such behaviour, he alleged, violated the principles of fundamental justice by limiting his autonomy.[342] This was rejected by the court, as "smoking marijuana for recreation" does not comport with "what it means to be an autonomous human being blessed with dignity and independence."[343] Clay, like Malmo-Levine and Caine, was not entitled to Charter protection.[344] His appeal was dismissed.[345] These three cases were rejected by the Supreme Court, but the fact they had to countenance such arguments in the first place indicates there was something of merit in them.

[337] *R v Malmo-Levine; R v Caine*, para 290.
[338] Ibid.
[339] Ibid, para 284.
[340] *R v Clay*, 2003 SCC 75, [2003] 3 SCR, para 5.
[341] Ibid, paras 12-3.
[342] Ibid, para 26.
[343] Ibid, paras 31-2.
[344] Ibid, para 33.
[345] Ibid, para 58a.

Though cases challenges to the prohibition of cannabis for recreational purposes failed to lead to the end of its criminalization, applicants fighting for increased access to medical cannabis continued to erode the MMAR. Owen Smith, employed at the Cannabis Buyers' Club of Canada in British Columbia, won the right to sell edible and topical cannabis medical products in 2015. These included "cookies, gel capsules, rubbing oil, topical patches, butters and lip balms."[346] The THC in these items was not approved under the MMARs and Smith was charged with possession and possession for the purposes of trafficking under the CDSA.[347] He argued that prohibiting the production of cannabis products containing THC, and limiting the medical exemption to dried cannabis, violated section 7 of the Charter.[348] At trial, the judge determined the government's policy was arbitrary and contrary to the right to liberty.[349] . It deprived users of medical cannabis of the ability to choose how to consume their medicine and threatened them with imprisonment should they disregard the law.[350] The Supreme Court declared those sections of the CDSA limiting individual rights of "no force and effect" and affirmed Smith's acquittal.[351] Then Health Minister Rona Ambrose told the media was "outraged by the Supreme Court" because only Health Canada "has the authority and expertise to make a drug into medicine".[352]

In 2016, the cases regarding medical cannabis and government regulation were characterized as removing "the various barriers and impediments to accessing this necessary drug."[353] This was not entirely true. Stigma, controversy, availability, and affordability remained

[346] *R v Smith*, para 5.
[347] Ibid, para 6.
[348] Ibid, para 7.
[349] Ibid, para 8.
[350] Ibid, paras 17-8.
[351] Ibid, paras 33-4.
[352] Trinh Theresa Do, "Medical marijuana legal in all forms, Supreme Court rules," *CBC News*, 11 June 2015, accessed 3 June 2018, http://www.cbc.ca/news/politics/medical-marijuana-legal-in-all-forms-supreme-court-rules-1.3109148.
[353] *Allard v Canada*, 2016 FC 236, para 3.

significant obstacles to individuals accessing CTP.[354] The courts were not, apparently aware of these issues. In *Allard v Canada*, the judge could not refrain from reiterating that: "There is limited research and scientific knowledge on marihuana as a medicine."[355] But the paucity of evidence supporting medical cannabis had not stopped Canadian courts in the past. And because section 7 of the Charter is engaged whenever a threat of penal sanction is involved individuals have the ability to frame their defense in the language of human rights.

The court in *Allard*, noted that a "generous and liberal" interpretation of these rights is appropriate and that "a 'rights enhancing' approach is to be conducted when assessing these rights."[356] The plaintiffs argued that the new government regulations, the Marihuana for Medical Purposes Regulations, SOR/2013-119 (MMPR), deprived them of the right to grow their own cannabis.[357] The court accepted that this was an unjustifiable infringement in of their rights and held that the MMPR violated section 7 of the Charter.[358] This decision was not surprising. It was in line with previous jurisprudence, as it removed one more obstacle to access from the government's regulations. Step by step, the prohibition of cannabis, when taken for therapeutic purposes, was weakened.

Discrimination and Pot as "Lifestyle Choice" in Canada

Malmo-Levine also alleged that the criminalization of simple possession of cannabis constituted discrimination under section 15 of the *Charter*. He claimed to have a "substance orientation" that constituted "a personal characteristic analogous to…grounds such as sexual orientation".[359] To

[354] Lynne Belle-Isle et al., "Barriers to access for Canadians who use cannabis for therapeutic purposes," *International Journal of Drug Policy* 25 (2014), 697-9.
[355] *Allard v Canada*, para 66.
[356] Ibid, para 172.
[357] They also alleged it deprived them of the liberty to choose their preferred cannabis strain. Ibid, para 173.
[358] Ibid, para 289.
[359] *R v Malmo-Levine; R v Caine*, para 184.

punish his natural inclination to take cannabis amounted to persecution. Cannabis use, put more bluntly, was just "harmless hedonism".[360] The Supreme Court dismissed these arguments: "A taste for marihuana is not a 'personal characteristic' in the sense required to trigger s. 15 protection".[361] Indeed, "[i]t would trivialize this list to say that 'pot' smoking is analogous to gender or religion".[362] To protect cannabis users under anti-discrimination legislation "would simply be to create a parody of a noble purpose."[363] Smoking pot is a personal choice, not an immutable characteristic. It therefore does not attract Charter protection.

Discrimination claims have not succeeded in the CTP context either. A 2018 decision from the Nova Scotia Court of Appeals, for instance, reversed a finding that the "non-coverage…of medical marijuana" in a "private drug plan…constituted discrimination under the Nova Scotia *Human Rights Act*."[364] The plan did not cover "drugs not approved by Health Canada" which left the complainant without insurance.[365] The complainant claimed this constituted discrimination, but the Court of Appeals held that the policy was neutral and "not 'based on' [his] disability."[366] And cannabis users are not members of "an enumerated group" under human rights legislation.[367] The Court was sympathetic to the complainant, for "he cannot afford regular purchases of medical marijuana."[368] Nonetheless, there was no contravention of his human rights. He would have to wait for "Health Canada…to approve some type of medical marijuana" to be covered by his insurance plan.[369] Similar allegations of discrimination against

[360] Ibid.
[361] Ibid, para 185.
[362] Ibid.
[363] Ibid.
[364] *Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSCA 31, 2018 CarswellNS 287, paras 1 and 120.
[365] Ibid, para 87.
[366] Ibid.
[367] Ibid.
[368] Ibid, para 119.
[369] Ibid.

CTP users on the basis of disability have been filed elsewhere.[370] But those with a need for CTP will have to wait for Health Canada to endorse it before being covered by insurance, and the issue that won't be resolved with the legalization of cannabis for recreational purposes. More discrimination claims seem likely until the government accepts cannabis as a legitimate medical therapy.

UK

When challenging prohibitionist drugs legislation and policy under the human rights framework, litigants in the UK have been unable to convince the courts of the medical utility of psychoactive substances.[371] Challenges to the Misuse of Drugs Act 1971's prohibition of cannabis have been systematically dismissed where similar arguments raised in other jurisdictions, like Canada, had succeeded.

In *Quayle*, five appeals were heard together regarding contraventions of the MDA for the "cultivation, production, importation and possession of cannabis."[372] The appellants sought to use the defence of necessity to justify their cannabis-related activities.[373] After a lengthy investigation into the content of the defence of necessity the Court found that "its role cannot be to legitimise conduct contrary to the clear legislative policy and scheme" in the MDA.[374] The court refused to interfere in what was essentially "social, medical and legislative policy" wholly within the purview of legislators.[375] Deference ruled the day.

[370] See Tamara Khandaker, "Is Medical Marijuana a Human Rights in Canada?" *Vice News*, 10 November 2015, accessed 3 June 2018, https://news.vice.com/article/is-medical-marijuana-a-human-right-in-canada.
[371] Bone, 120.
[372] *Quayle*, para 1.
[373] Ibid, para 35. The appellants also claimed that not allowing the defence of medical necessity contravened their Article 8 right to private life under the European Convention on Human Rights. Ibid, para 59.
[374] Ibid, para 67.
[375] Ibid, para 89, cited in Bone, 126-7.

Fitzgerald, one of the appellants, raised the *Parker* case's finding that "an absolute prohibition on possession of cannabis without any medical exemption violated the accused's right to liberty."[376] The Court of Appeal cited the Ontario Court of Appeal's (ONCA) finding that "the side effects of marijuana use are almost trivial compared to the side effects of the conventional medicine Parker uses."[377] The findings of Canadian courts, however, could not guide the Court of Appeal. Legislation in the two jurisdictions provided for different approaches to finding laws incompatible with human rights standards.[378] Further, the ONCA did not have to consider the medical necessity defence because Parker hadn't raised it.[379] *Parker* was therefore distinguishable from the case before the Court of Appeals on more than one ground. Other cases focused solely on British human rights instruments.

Lee Altham, for example, was involved in a "serious road traffic accident" which left him with chronic pain for over a decade. He found that cannabis resin, which he smoked, worked well after he "tried a number of pain relief strategies" to no avail. In 2002, he was arrested for possession of cannabis resin.[380] Altham alleged that the government had violated article 3 of The Convention of the Human Rights Act 1998 [Convention], which prohibits torture and inhuman or degrading treatment or punishment.[381] Specifically, that he suffered inhuman and degrading treatment, given that "there are circumstances where severe medical symptoms can amount to inhuman or degrading treatment". In this instance, the state forced Altham to choose between breaking the law and possibly going to prison for using what he claimed was a medicine.[382] This,

[376] *Quayle*, para 62.
[377] Ibid, para 63.
[378] Ibid, para 65.
[379] Ibid.
[380] For the facts, see *Altham*, paras 3-9.
[381] HRA, Schedule 1, Part I, art. 3.
[382] This is a regular theme across jurisdictions. A 2003 study found that many medical cannabis users in the UK "strongly resented what they saw as being forced to break the law to obtain pain and other symptom relief." See

he posited, amounted to inhuman or degrading treatment. He then claimed that the violation "can only be avoided by reading the Misuse of Drugs Act 1971 as if it is subject to the defence of medical necessity."[383]

The Court noted the similarity between Altham's case and that of *Quayle*, though the article 3 argument was not given due consideration in the latter.[384] The Court pointed out that there is not only a "negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction."[385] States must also sometimes "do something to prevent deliberate acts which would otherwise be lawful from amounting to ill-treatment".[386] The Court determined that Altham's "argument seeks to elevate the state's obligation under article 3 to something well beyond an obligation not to *subject* an individual" to ill-treatment.[387] The argument presumed that the state "has an article 3 obligation to permit [Altham] to take any steps that are necessary to alleviate his condition" regardless of cannabis' criminal prohibition.[388] Further, to allow the defence of medical necessity would defeat "the purpose and effect of the legislative scheme".[389] For these reasons, Altham's appeal was dismissed.[390]

The arguments used by Altham's legal counsel tacked closely to those used in Canada regarding prohibition forcing sick people to choose between their liberty and their health. How could such different conclusions therefore be reached given the similarities of the legal cultures? Ideas about deference to Parliament are one reason the legislation was upheld in Altham. In

Ross Coomber et al., "Using Cannabis Therapeutically in the UK: A Qualitative Analysis," *Journal of Drug Issues* 33, no. 2 (2003), 344.
[383] *Altham*, para 10.
[384] Ibid, para 13.
[385] Ibid, para 14.
[386] Ibid.
[387] Ibid, para 21.
[388] Ibid, para 25.
[389] Ibid, para 29.
[390] Ibid, para 30.

Quayle, Mance LJ noted that it was up to legislators to decide that the "disbenefits" of permitting access to cannabis were "of sufficient strength [and] in the national interest to require general prohibition."[391] Judges should not rewrite legislation. That's for politicians to do. This, too, is similar to the reasoning of Canadian courts. The latter, however, gave less latitude to legislators to do as they pleased, recognizing rights violations in circumstances not much different from those in the UK. It is also true that the legal threshold for a violation of the prohibition of torture and inhuman and degrading treatment differs from that in a violation of the right to liberty. Had Altham's lawyer used a different defence strategy, a different outcome may have been reached.

Challenges to UK drugs regulation framed as a "human right to use psychoactive substances under a broad freedom of thought conceptualisation" also failed to gain traction with the judiciary.[392] Like Malmo-Levine, Casey Hardison believed himself to be "a victim of society's war on drugs".[393] He went a bit further, though, arguing "that all persons had the right to alter their consciousness by taking drugs with hallucinogenic qualities."[394] Hardison had been sentenced to 20 years' imprisonment for the manufacture and distribution of LSD and other Class A synthetic drugs under the Misuse of Drugs Act. The professionalism and expertise with which he produced these substances struck the court. It was convinced that any argument about freedom of consciousness— "despite the lofty ideas which the appellant was claiming to espouse, and his mission to enlighten others about the benefits of using hallucinogenic drugs"— was a cover for Hardison's avarice.[395]

[391] Ibid, para 28.
[392] Bone, 32.
[393] *R v Hardison*, [2006] EWCA Crim 1502, [2007] 1 Cr. App. R.(S.) 37, paras H3 and 8. See too Bone, 32.
[394] *R v Hardison*, H3.
[395] Ibid, paras 2-3, 24, and 30.

For his part, Hardison convinced the judge that his views "were sincerely held".[396] Hardison did not believe he was guilty of any crime. He pointed to the use of psychedelics by "medicine healers in primitive societies" as evidence of a "bond between man and…plants".[397] In producing synthetic drugs, Hardison believed "he was doing no more than enabling members of the human race to alter their own consciousness" to "free the mind".[398] Individuals, he posited, had a "human right to have autonomy over their own person."[399] The jury was instructed that this "was not a defence in law".[400] The Court of Appeal held this to have been the correct decision. As such, the appeal of his 20 years' sentence was upheld.[401]

In the sentencing of individuals convicted of possession and cultivation charges in the UK the presence of a medical condition has been accepted as a mitigating factor. Terence Burke, "a man of impeccable character," had a "sophisticated automatic hydroponics system" in his home where police discovered cannabis worth "£18,000 to £54,000" on the street.[402] Burke pleaded guilty at the court of first instance, but submitted a written caveat stating "that only a small amount of the cannabis would have been used and only to alleviate his medical condition and that the remainder would have been destroyed."[403] He appealed the eight month prison sentence imposed on him by the Crown Court.[404] The trial judge and the Court of Appeal accepted that Burke had "an extremely painful condition of the foot, plantar fasciitis,"[405] and that he would likely not have supplied the cannabis to others.[406] Burke himself was very diligent in

[396] Ibid, para 30.
[397] Ibid, para 8.
[398] Ibid, para 9.
[399] Ibid.
[400] Ibid.
[401] Ibid, para 32.
[402] *R v Terence Burke*, [2012] EWCA Crim 2025, 2012 WL 4050274, para 2.
[403] Ibid.
[404] Ibid, para 1.
[405] Ibid, para 2.
[406] Ibid, para 7.

proving conventional treatments had failed, even "obtaining…GP's records to trace the history of his unsuccessful treatment".[407] Further circumstances, like his mother's deteriorating health and family drama,[408] contributed to the Court of Appeal allowing the appeal and quashing the eight-month prison sentence. Burke had already served four months, and the Court of Appeal felt "it would be wrong for there to be anything further hanging over him."[409] Nothing was said as regards the legitimacy of Burke's claims regarding his medical use of cannabis, but it was taken for granted that he used it for pain relief alone and had no intention of purveying it on the black market.

A similar case came to the Court of Appeal a year later. Mark Scott also had a large growing operation, characterized by the Crown Court as "a domestic cannabis factory".[410] Like Burke, Scott was "a man of good moral character" and had a "significant illness and disabilities."[411] Scott claimed the cannabis "was for personal medicinal consumption" and even though the Court was skeptical, given the scale of the enterprise, it found that more attention should have been given to "the serious medical difficulties from which he suffers."[412] Burke had Hodgkin's Lymphoma and required "aggressive chemotherapy" which had "many adverse consequences" including "chronic pain…chest and skin infections…constant bowel and urinary problems and chronic indigestion."[413] He used cannabis to manage the symptoms. The Court of Appeal held that the Crown Court should have taken these factors more seriously at sentencing. Scott's appeal was allowed and his prison sentence reduced by one year.[414] While his cannabis

[407] Ibid, para 13.
[408] Ibid, para 6.
[409] Ibid, para 15.
[410] *R v Mark Scott*, [2013] EWCA Crim 1762, 2013 WL 5338192, para 1.
[411] Ibid, para 13.
[412] Ibid.
[413] Ibid, para 14.
[414] Ibid, paras 15-16.

use was not recognized as legitimate, the Court of Appeal accepted that his medical condition played a part in his criminal activities.

More serious charges were considered in Noel George Edwards' case. He was convicted of possession of cocaine with intent to supply and possession of cannabis with intent to supply under the MDA.[415] Edwards claimed "cannabis helped him with his myasthenia gravis," a condition "similar to multiple sclerosis."[416] His appeal, which was allowed, was made on the basis the judge had not taken his medical condition seriously enough as a mitigating factor.[417] Once again, the Court of Appeal did not engage in whether Edwards' cannabis use was legitimate.

Burke, *Scott*, and *Edwards* all made the connection between cannabis possession and cultivation and a medical condition leading the convicted to take it for therapeutic purposes. The Court of Appeal has been unwilling to recognize the use of cannabis as legitimate, but it has shown understanding towards persons with severe illnesses in the sentencing process. All of the material is present in these decisions to accept medicinal cannabis use as unlawful but warranted in the circumstances. The medical necessity defence could be recognized by the courts. As one commentator put it when analyzing *Quayle*: "This body of jurisprudence is so inconsistent and policy themed that it seems to have come about by judicial divining rod."[418] There is nothing preventing judges from using this "diving rod" to accept medical necessity in the context of CTP use.[419]

[415] *R v Noel George Edwards*, [2015] EWCA Crim 814, 2015 WL 2190712, para 1.
[416] Ibid, para 5.
[417] Ibid, paras 9 and 20-1.
[418] Alan Reed, "Necessity: Supply of Cannabis for Medical Purpose," *The Journal of Criminal Law* 69, no. 6 (2005), 464.
[419] Ibid, 468.

But there are instances where more human rights language has been used to challenge sentencing in the criminal context. Caleb Charles John-Lewis was convicted of producing cannabis and of possessing "three-quarters of a kilo of skunk" (cannabis) with intent to supply in 2013. He received six months' imprisonment for each of the charges, to be served consecutively.[420] John-Lewis appealed the sentence on the ground that it was too severe and the Court of Appeal reduced the less serious charge's sentence to two months' imprisonment.[421] This was appropriate "in the particular circumstances of the case", for John-Lewis was "registered disabled…has a mobility scooter…suffers from sickle cell anemia for which he requires blood transfusions every four to six weeks…has Type 1 diabetes…[and] also has heart problems."[422] His counsel emphasized that her client "used cannabis…for pain relief".[423] Of equal import from John-Lewis' perspective was his religious belief, based on Rastafarianism, that cannabis is a "sacrament".[424] The latter fact also leant itself to reducing his sentence.[425] This decision sets a precedent for reducing cannabis-related criminal sentences based, in part, on both religious belief and medical grounds. The inclusion of a human rights element was recognized to some extent, though more successful cases would be needed to draw conclusions as to whether any change to cannabis laws could come to fruition through British courts. Lastly, strategic litigation could play a part in agitating for drug law reform, especially in cases concerning possession.

US and Liberty

Conservatives, including the famous writer William F. Buckley Jr., supported decriminalization of cannabis from the 1970s because "no human conduct should be prohibited by law unless that

[420] *R v John-Lewis*, [2013] EWCA Crim 2085, 2013 WL 6047376, paras 1-3.
[421] Ibid, para 10.
[422] Ibid, para 5.
[423] Ibid, paras 6-7.
[424] Ibid, paras 4.
[425] Ibid, para 8.

conduct causes positive harm to the innocent bystander or to society as a whole".[426] Thomas Szasz later described prohibition as a legal structure designed "*to protect legally competent adults from their own decisions to use certain drugs*."[427] Americans "possess inalienable rights as persons," he reminded readers, "not as the beneficiaries of a magnanimous state," but because of the Constitution.[428] It is there, in the Constitution, that the arguments against government intrusion in the lives of Americans are best grounded. Advocates in conservative and liberal circles agree on this.

Those charged with cannabis-related offences before 1970 often resorted to "the fundamental rights framework", citing the right to privacy as a defense against government intrusion. But the courts, state and federal, did not accept this argument.[429] In 1975, however, lawyer Irwin Ravin decided to test Alaska's prohibition of cannabis. During a routine traffic stop he knowingly allowed the police to find cannabis on his person. Ravin's challenge made it to the Alaska Supreme Court where he won, arguing the law violated his right to privacy. The latter "included an adult's ability to use, possess, and cultivate a small amount of marijuana in the home."[430] Of course, this was at the state level and did nothing to alter federal law. But it was a trailblazing decision.

Since 1975, medico-scientific research and social attitudes toward cannabis have backed up the Alaska Supreme Court's decision.[431] Nonetheless, case law since that time has refused to countenance challenges like Ravin's. Instead, the old tropes of "stoners wanting to get high" and

[426] Dufton, *Grass Roots*, 64-5.
[427] Szasz, *Our Right to Drugs*, 96-7.
[428] Ibid.
[429] Bonnie and Whitebread, The Forbidden Fruit and the Tree of Knowledge," 1145-7.
[430] *Ravin v State*, 537 P.2d 494 (Alaska 1975), discussed in Dufton, *Grass Roots*, 69-70.
[431] Matthew J. Routh, "Re-Thinking Liberty: Cannabis Prohibition and Substantive Due Process," *Kan J L & Pub Pol'y* 26, no. 2 (2017), 171.

myths about cannabis, discussed in chapter 2 of this thesis, have won the day.[432] Ravin's success did not lead to a rights revolution in the courts vis-à-vis cannabis. And since the early 2000s, questions regarding the conflict of state and federal law dominated the jurisprudence while other considerations, like individual constitutional rights, were largely, but not fully, ignored.

The Ninth Amendment, for instance, which provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people",[433] was seen as a means by which to advocate for "'a right to get high' or a right 'to use one's body as one wishes'" as "personal liberties" requiring "sound state interests" to be limited.[434] The Fourteenth Amendment, however, is more amenable to arguing for precluding the government from interfering with the individual's choice to consume cannabis. It holds that "No state shall…deprive any person of life, liberty, or property, without due process of law."[435] American academics have looked to this Amendment and the US Supreme Court's jurisprudence to frame arguments positing the unconstitutionality of prohibition.

Building on Justice Stevens' dissenting opinion in *McDonald v City of Chicago*,[436] Matthew Routh outlined a convincing case for finding the prohibition of cannabis violates the Fourteenth Amendment, specifically the right to bodily integrity.[437] The analysis should begin by asking whether a law or act "'violates values 'implicit in the concept of ordered liberty'" contained in the Fourteenth Amendment. Ordered liberty at its "conceptual core" includes:

[432] Ibid, 174. See too John P. Morgan and Lynn Zimmer, "Exposing Marijuana Myths: A Review of the Scientific Evidence," in Bölinger (ed), *Cannabis Science*, http://www.bisdro.uni-bremen.de/boellinger/cannabis/08-zi-mo.pdf.
[433] U.S. Constitution, amendment nine.
[434] Bonnie and Whitebread, The Forbidden Fruit and the Tree of Knowledge," 1147-9.
[435] U.S. Constitution, amendment fourteen, section 1.
[436] 561 U.S. 742 (2010).
[437] Routh, "Re-Thinking Liberty," 145. He states "that the government does not have a compelling interest to override this liberty interest through prohibiting cannabis consumption for recreational or medicinal purposes."

> 'the ability independently to define one's identity' … 'the individual's right to make certain unusually important decision that will affect his…destiny' … and the right to be respected as a human being. *Self-determination, bodily integrity, freedom of conscience…dignity and respect—these are the central values…implicit in the concept of ordered liberty*.[438]

Autonomy, or "the ability to define one's existence," is a central part of Stevens' conception of liberty. The state, of course, has an interest in regulating relations between individuals and can limit rights.[439] But limitations should not deprive people of their fundamental freedoms.

Applying this test to the possession and consumption of cannabis, posits Routh, leads to the conclusion that "cannabis' classification as a Schedule I narcotic under the [CSA] violates an individual's fundamental right to liberty under the 14th Amendment."[440] This is not a "right to smoke weed" or "right to get high." Instead it has to do with the fact that "the federal government has [no] compelling interest to forcibly prevent an individual within their home from voluntarily consuming cannabis for either recreational or medicinal purpose[s]."[441] Individuals have the right to make autonomous decisions of this nature without the interference of government as a matter of "physical and psychological bodily integrity".[442] With the pace of legislative change across the US at the state level, it is difficult to see this argument convincing federal courts before the political tide has turned and legalization sweeps hold across the nation. Nonetheless, a victory on these grounds would force the federal government to re-evaluate its prohibitionist policies.

[438] *McDonald v Chicago*, 879-80 (emphasis added), cited in Routh, "Re-Thinking Liberty," 155-6.
[439] Ibid, 156.
[440] Ibid, 157-8.
[441] Ibid, 158.
[442] Ibid, 159.

Alternative arguments were also presented in federal court on the ground of religious freedom. One set of cases explicitly argued for a "right to get high" based on belief.[443] In 2010, Michael Rex "Raging Bear" Mooney took the US Attorney General to Federal Court seeking "a declaration that [the Oklevueha Native American Church of Hawaii] be allowed to grow, use, possess, and distribute cannabis free from federal drug-crime prosecution."[444] The case failed the "ripeness" threshold, which holds that "a plaintiff must present evidence sufficient to allow a trier of fact to rationally find that the activities of the plaintiff are burdened by the Government action". The act itself must "substantially burden" the exercise of religion.[445] The case was subsequently dismissed because the federal government had not sought to enforce the Controlled Substances Act [CSA] or other federal laws against Mooney.[446] For this reason, no substantive analysis of the claim was deemed necessary.

Mooney returned to Federal Court two years later after an appeal sent the case back to the District Court on remand.[447] This time the court analyzed the plaintiff's religious claims. Again, no declaration was granted. On the allegation that the CSA inhibited the community's constitutional rights, the court held that "the Free Exercise Clause of the First Amendment does not prohibit the Government from burdening religious practices through generally applicable laws."[448] Mooney, unsatisfied with the result, brought another appealed.[449] The issue was "whether enough evidence exists to create a genuine factual dispute about whether Mooney's

[443] For a detailed analysis of these cases see "Religious Freedom Restoration Act – Substantial Burden – Ninth Circuit Holds that Federal Cannabis Prohibition is Not a Substantial Burden. - *Oklevueha Native American Church of Hawaii, Inc. v Lynch*, 828 F.3d 1012 (9th Cir. 2016)," 130 *Harv L Rev* 785.
[444] *Oklevueha Native American Church of Hawaii, Inc. v Holder*, 2010 WL 649753 (D. Hawaii, 2010), 1.
[445] Ibid, 3-4. On the substantial burden test, as applied in a later Native American Church case, see Tiernan Kane, "Right by Precedent, Wrong by RFRA: The "Substantial Burden" Inquiry in *Oklevueha Native American Church of Hawaii, Inc. v Lynch*, 828 F.3d 1012 (9th Cir. 2016)," *Harv J Law Public Policy* 40, no. 3 (2017): 793-808.
[446] *Oklevueha v Holder*, 2010, 4.
[447] *Oklevueha Native American Church of Hawaii, Inc. v Holder*, 2012 WL 6738532 (D. Hawaii, 2012), 1.
[448] Ibid, 9.
[449] *Oklevueha Native American Church of Hawaii, Inc. v Lynch*, 828 F.3d 1012 (9th Cir. 2016).

and Oklevueha's cannabis use amounts to an exercise of religion" to find the prohibition of cannabis in violation of their religious rights.[450] The US Court of Appeals was "skeptical that such a genuine issue of fact exists" and found there was "inadequate evidence to support the finding of a substantial burden."[451] Mooney "produced no evidence that [the government] denying them cannabis forces them to choose between religious obedience and government sanction."[452] After all, according to the Court, the community can use peyote, which serves "the exact same religious function as cannabis."[453] With a psychedelic alternative to cannabis available Mooney could not complain that a substantial burden was imposed on him by the prohibition of cannabis.

The court was not unsympathetic to Mooney's cause in any of these decisions, writing that his "position may ultimately win the day. That is, cannabis may one day cease to be a controlled substance. But it is not the court's task in this case to evaluate arguments against its present status as a controlled substance."[454] Congress was responsible for making that decision and the courts were unwilling to challenge their authority to do so. Legislative deference, referenced in all three jurisdictions under scrutiny in this thesis, was again used to uphold drug laws interfering with human rights and fundamental freedoms.

Another significant hurdle to those challenging prohibition is the division of powers between federal and state governments. At the center of this challenge is the Commerce Clause, which has been read by the US Supreme Court in a way that makes it difficult for states to resist federal cannabis regulations.

[450] Ibid, 8.
[451] Ibid, 8 and 10.
[452] Ibid, 11.
[453] Ibid.
[454] *Oklevueha v Holder*, 2012, 8.

In 2001's *U.S. v Oakland Cannabis Buyers' Cooperative*, the Cannabis Cooperative argued that the CSA, "shorn of a medical necessity defense…exceeds Congress' Commerce Clause powers, violated the substantive due process rights of patients, and offends the fundamental liberties of the people under the Fifth, Ninth, and Tenth Amendments."[455] The Supreme Court refrained from "consider[ing] the underlying constitutional issues" because they were not argued at the Court of Appeals.[456] This was unfortunate, as there were clear legal issues vis-à-vis constitutional freedoms. The relevant portion of the Fifth Amendment, for instance, reads as follows: "No person shall…be deprived of life, liberty, or property, without due process of law."[457] Because most patients accessing medical marijuana were seriously ill, the Court of Appeals considered "the serious harm in depriving patients of marijuana".[458] This, in its view, warranted judicial intervention. The Court of Appeals thus held that "district courts retain 'broad equitable discretion' to fashion injunctive relief" including the right to use the medical necessity defense.[459] But the Supreme Court, while recognizing the competence of lower courts to resort to equitable remedies, pointed out that they "cannot…override Congress' policy choice, articulated in a statute, as to what behaviour should be prohibited."[460] It was within Congress' power to outlaw cannabis and compel states to do the same. So, when it comes to drug policy and the application of the CSA, individual rights and common law defenses, the Supreme Court held, are

[455] *U.S. v Oakland Cannabis Buyers' Cooperative*, 1719. Citing *Oakland Cannabis Buyers' Cooperative*, the Federal Court in *Conant v Walters* noted that: "Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce." The federal government would be exceeding its powers by trying to regulate this field through the Commerce Clause. See *Conant v Walters*, 647.
[456] Ibid.
[457] U.S. Constitution, amendment 5.
[458] *U.S. v Oakland Cannabis Buyers' Cooperative*, 1716.
[459] Ibid.
[460] Ibid, 1721. For a review of Commerce Clause jurisprudence vis-à-vis medical cannabis before *Oakland Cannabis Buyers' Cooperative* see Alistair E. Newbern, "Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use after United States v. Lopez," *California Law Review* 88, no. 5 (2000): 1575-634.

not applicable. *U.S. v Oakland Cannabis Buyers' Cooperative* was turned into a division of powers case while fundamental freedoms were disregarded.

But not all of the justices fully believed in Congress' ability to override the states on cannabis. Justice Stevens, writing a concurrent judgment with Justices Souter and Ginsburg, noted that the majority decision was "overbroad". The Court, Stevens noted, needs to "[show] respect for the sovereign States that comprise our Federal Union…[and] avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to 'serve as a laboratory' in the trial of 'novel social and economic experiments without risk to the rest of the country.'"[461] Congress, in other words, had exceeded its constitutional powers under the Commerce Clause by seeking to regulate a wholly "intrastate activity".[462] As Californians voted to allow "seriously ill patients" an exemption from "prosecution under state laws for cultivating and possessing marijuana…to deprive *all* such patients of the benefit of the necessity defense" when subject to federal charges was unwarranted.[463] Though they concurred with the majority judgment, the concurring justices would have given more latitude to the states to regulate cannabis. In their opinion, states should decide for themselves whether medical necessity could be used as a defence.

The Supreme Court allowed for further federal regulation of cannabis in 2005's *Gonzales v Raich*.[464] Based on a reading of the Commerce Clause, it concluded the home cultivation of cannabis in California, where it was legal to grow and use for therapeutic purposes, had "a substantial effect on supply and demand" in the inter-state drug trade.[465] This gave the federal

[461] *U.S. v Oakland Cannabis Buyers' Cooperative*, 1723-4.
[462] Caroline Herman, "*United States v Oakland Cannabis Buyer's Cooperative*: Whatever Happened to Federalism?" *Supreme Court Review* 92, no. 1 (2002), 152.
[463] Ibid, 1724. Stevens did "agree that a distributor of marijuana does not have a medical necessity defense under the [CSA]."
[464] 125 S.Ct. 2195 (2005).
[465] Ibid, 2207.

government a legitimate reason to intervene in a matter that would otherwise be beyond its constitutional reach.[466] Writing for Renquist and Thomas, Justice O'Connor stated in her dissent that the majority decision was pulled from thin air: "There is no evidence that homegrown marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market".[467] More was needed to expand federal power. Citing Founding Father James Madison, O'Connor reminded the majority that "The powers delegated by the…Constitution to the federal government are few and defined."[468] The Court was taking the Commerce Clause too far: "This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently."[469] Though she did not herself support the use of cannabis, O'Connor and her fellow dissenters believed the Court was wrong to interfere with what was essentially a matter for the states to decide.[470] The majority decision has even been labelled by academics as "the U.S. Supreme Court's worst modern decision."[471] Even so, *Gonzales v Raich* "remains one of the predominant authorities" on states' rights.[472] The problem of conflict between federal and state law also remains a significant hurdle for those states legalizing medical *and* recreational cannabis.

[466] For a critique of this decision see Ashley Dorn, "The Untimely Death of the Commerce Clause: Gonzales v. Raich's Threat to Federalism, The Democratic Process, and Individual Rights and Liberties," 18 *Temp Pol & Civ Rts L Rev* 213 (2008), esp. 235ff. See, too, the commentaries and articles devoted to the case in "Symposium: Federalism After *Gonzales v. Raich*," *Lewis & Clark Law Review* 9, no. 4 (2005) as well as J. Mitchell Pickerill and Paul Chen, "Medical Marijuana Policy and the Virtues of Federalism," *Publius* 38, no. 1 (2008): 22-55.
[467] *Gonzales v Raich*, 2226.
[468] Ibid, 2229.
[469] Ibid.
[470] Ibid.
[471] Michael D. Ramsey, "American Federalism and the Tragedy of *Gonzales v Raich*," *University of Queensland Law Journal* 31, no. 2 (2012), 203.
[472] Saby Ghoshray, "From Wheat to Marijuana: Revisiting the Federalism Debate Post-Gonzales v. Raich," 58 *Wayne L Rev* 63 (2012), 71.

The Court did not, however, look into whether the Controlled Substances Act interfered with Raich's "right to medical care."[473] There is precedent for a "negative right to medical care" which could prevent the federal government from restricting access to controversial treatments.[474] There is no positive right to access any and all medical treatments, including unverified experimental therapies like cannabis.

In 2012, Colorado legalized cannabis for recreational purposes. Medical marijuana had already been legalized in 2000.[475] The state's legislation framed cannabis legalization as follows: "In the interest of…individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol."[476] The regulatory framework is similar to that of alcohol and designed to protect "the health and safety of [Colorado's] citizenry".[477] The personal use of cannabis, including possession of "one ounce or less", is now "not unlawful" and possession of "no more than six marijuana plants, with three or fewer being mature, flowering plants" permitted.[478] "Consumption of marijuana," however, is limited where it "is conducted openly and publicly or in a manner that endangers others."[479] The regulatory framework, however well composed, remains in conflict with federal law.[480]

[473] John A. Robertson, "Controversial Medical Treatment and the Right to Health Care," *The Hastings Center Report* 36, no. 6 (2006), 18.
[474] The *Abigail Alliance* case. See ibid, 16-8.
[475] Legalization of recreational cannabis does not "limit any privileges or rights of a medical marijuana patient, primary caregiver". See Colorado Revised Statues Annotated, Const. Art. 18, §16(7)(a).
[476] Colorado Revised Statues Annotated, Const. Art. 18, §16(1)(a).
[477] See ibid, Art. 18, §16(1)(b).
[478] Ibid, Art. 18, §16(3)(a) and (b).
[479] Ibid, Art. 18, §16(3)(d).
[480] On the federal government seeking to prevent cannabis dispensaries from carrying on their business in compliance with state-level regulations see *U.S.A. v Marin Alliance for Medical Marijuana*, 139 F.Supp.3d 1039 (N.D. Cal., 2015).

Even where courts have recognized that "State medical marijuana laws that provide limited state-law immunity may not conflict with the [Controlled Substances Act]" there is no guarantee individual rights will be protected.[481] In *Garcia v Tractor Supply Company*, an employee who used medical cannabis was terminated after failing a drug test. The District Court in New Mexico held that "To affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate [it] to permit the very conduct the CSA proscribes."[482] The Court's message is difficult to square with human rights. Yes, an individual may use CTP. But, they may lose their working rights in the process. Further, the decision "gives an employer undue influence over an employee's private medical decision[s]".[483] This puts CTP-using employees in a bind, having to choose between medical treatment and their livelihood. It reduces their autonomy and undermines their dignity. But what *Garcia* shows is that even when one successfully gets access to CTP there is no guarantee that stigma and discriminatory treatment will be prevented by the judiciary.

American courts have not recognized what some litigants have argued was a "God-given right to use cannabis" nor have they characterized cannabis use as a "human right".[484] Instead, other considerations like the constitutional division of powers have been decisive in protecting, and also detracting, from the right to use cannabis; especially in the therapeutic context. Arguments about liberty and religious freedom were put aside, though some in the judiciary accepted that these were real issues. It has been in the political realm, particularly at the state level, that cannabis law and policy has been liberalized. But cannabis litigation, at the very least,

[481] *Garcia v Tractor Supply Company*, 154 F.Supp.3d 1225 (D.N.M. 2016), 1230.
[482] Ibid.
[483] Lucía Moran, "Emerging From the Smoke: Does an Employer Have a Duty to Accommodate an Employee's Medical Marijuana Use After Garcia v. Tractor Supply Company?" 48 *NM L Rev* 194 (2018), 207-8.
[484] This was asserted by one Richard Hemsley in the context of criminal charges. See *United States v Hemsley*, 2017 WL 5192355 (E.D. Cal., 2017), 3.

brought the debate into the spotlight and made people think of the scheduled substance within the framework of rights-based language. Its influence should not be underestimated.

Drugs Policy

Canada

In Canada, the Senate Special Committee recognized a version of the argument put forward in *Caine* in their 2002 report. They stated that "only offences involving significant direct danger to others should be matters of criminal law."[485] Cannabis did not meet the "direct danger" criteria. The Senate's message went unheeded, though, and it was left to the courts to decide whether the legislature had overreached with their rules and regulations. The politics of "direct danger" was useful for those charged under the criminal law, however, as it afforded them a chance to point out the apparent hypocrisy of prohibition.

Litigants have regularly resorted to comparing the harms of cannabis with those of widely accepted intoxicants and stimulants like alcohol and tobacco. On the point of the latter two's legal status—and the attendant proven social harm they inflict—the Court refused to engage in the debate: "just because there are other substances whose health and safety effects could arguably justify similar legislative treatment" does not mean that the prohibition on cannabis is illegitimate. Parliament "does not lose jurisdiction" even if it legislates against the wishes of a segment of society.[486] Cannabis laws, as one legal historian has commented, "seem to lack rationality."[487] But reason is not the only basis upon which the law is formulated.

[485] Report of the Senate Special Committee on Illegal Drugs, Vol. 1, 45.
[486] *R v Malmo-Levine; R v Caine*, para 139.
[487] Edgar-André Montigny, "Introduction," in Edgar-André Montigny (ed), *The Real Dope: Social, Legal and Historical Perspectives on the Regulation of Drugs in Canada* (Toronto: University of Toronto Press, 2011), 5.

To Malmo-Levine's suggestion that "Parliament should proceed on the assumption that users will use marihuana 'responsibly'" the Court stated that it was not their place to evaluate the legislature's approach to drugs regulation. After all: "it is open to Parliament to proceed on the more reasonable assumption that psychoactive drugs will to some extent be misused."[488] And more importantly: "Members of Parliament are elected to make these sorts of decisions".[489] They "may, as a matter of constitutional law, determine what is *not* criminal as well as what is."[490] However, the Court made clear that "the criminalization of marihuana possession" is "the legitimate subject of public controversy" and the issues surrounding its prohibition "will undoubtedly be addressed in parliamentary debate."[491] What this view of the division of powers suggested was that the legislature has "carte blanche" to decide what is harmful and what is not and proscribe any conduct it deems fit.[492] But there are limits. The courts are not, in theory, to examine "the wisdom or expediency or policy" decided upon by legislators, but they do this via determining whether a given law reasonably limits Canadians' rights and "whether the law can be 'demonstrably justified in a free and democratic society'."[493] The way the courts interpreted the MMAR and MMPR suggests they did not, in practice, leave cannabis regulation up to the legislature.

Deferential as many of the courts' determinations sounded, Canadian judges did not suggest that politicians had made the right decisions vis-à-vis cannabis. On the contrary, government policy caused widespread "distrust of health and educational authorities who have 'promoted false allegations about marihuana'". It also created a "lawless sub-culture", entailed

[488] *R v Malmo-Levine; R v Caine*, para 100.
[489] Ibid, para 133.
[490] Ibid, para 140.
[491] Ibid, para 175.
[492] Alan Young, "Afterword: A Personal Reflection on the Law and Illicit-Drug Use," in Montigny (ed), *The Real Dope*, 294-5.
[493] Hogg, *Constitutional Law of Canada*, 12-7(g).

significant "financial costs associated with enforcing the law",[494] and limited the ability to engage in "meaningful research into the properties, effects and dangers of the drug, because possession of the drug is unlawful".[495] With few grounds on which to justify prohibition, cannabis laws were open to attack. But the defense of strict cannabis regulations had an equally important role in the maintenance of prohibition.

Despite the drawbacks of prohibition, experts like Dr. Harold Kalant remain wary of those advocating for full-scale legalization of cannabis. In a 2015 editorial, he wrote that "Legalization…represents an ideal that a democratic society might well aim at, because it proposes the least restriction of personal freedom compatible with the protection of those most vulnerable to the adverse effects of cannabis use."[496] The key, for Kalant, is that whatever policy is adopted must be "evidence-based".[497] But without significant knowledge on the benefits and harms of legalization—including the harms of cannabis use itself—decriminalization of cannabis possession at most can be supported from a health policy perspective.[498] Knowledge, and its absence, continues to play a significant role in the shaping of cannabis policy.

All of the drawbacks noted by the courts were avoidable. They resulted from a policy choice taken in recent history. According to expert testimony presented to British Columbian court, "the longstanding historical use of medical cannabis…predates the inception of cannabis

[494] Law enforcement agencies and correctional services, public and private, have an interest in supporting prohibitionist policies because of the resources allocated them by government. On the situation in the US, see Lee Fang, "The Real Reason Pot Is Still Illegal," *The Nation*, 2 July 2014, accessed 17 May 2018, https://www.thenation.com/article/anti-pot-lobbys-big-bankroll/ and idem, "Police and Prison Guard Groups Fight Marijuana Legalization In California," *The Intercept*, 18 May 2016, accessed 17 May 2018, https://theintercept.com/2016/05/18/ca-marijuana-measure/.
[495] *R v Malmo-Levine; R v Caine*, paras 180 and 200.
[496] Harold Kalant, "A critique of cannabis legalization proposals in Canada," *International Journal of Drug Policy* 34 (2016), 9.
[497] Ibid, 9.
[498] Ibid, 5.

prohibition by hundreds of years."[499] While it is ultimately up to government to legislate, the courts are to ensure that the laws are enforced. And to be enforceable they must be "consistent with the Charter". The courts have an obligation to "declare as invalid those that are not."[500] When it came to medical cannabis, they demonstrated the untenable nature of a restrictive regulatory regime and struck down rules that limited human rights and fundamental freedoms.

USA and the War on Drugs

As George Annas wrote in 1997 after the federal government "[threatened] California physicians who recommend marijuana to their sick patients with investigation and the loss of their prescription privileges" after the passage of California's Compassionate Care Act, 1996: "Doctors are not the enemy in the 'war' on drugs; ignorance and hypocrisy are."[501] There was enough evidence of medical marijuana's utility in 1997 to at least permit research and make it available to those with "life-threatening illnesses."[502] Such claims were not, unfortunately, taken very seriously.

In the US, federal courts have been unwilling to challenge the authority of the federal government to treat cannabis as a Schedule I substance. But cannabis policy has radically changed at the state level. The conflict between the federal government and the states has been protracted, but momentum is on the side of the states; for now at least. People power caused these changes. As Cathryn Blaine recognized in 2002:

> …citizens will need to continue their efforts to pass state voter initiatives, contact their representatives, and elect officials who are supportive of rescheduling efforts so that Congressional leaders will begin to

[499] *R v Beren*, para 35.
[500] Ibid, para 90.
[501] Annas, "Reefer Madness," 435 and 439.
[502] Ibid, 439.

> acknowledge the growing will of the people. After all, it is the people who are better suited to decide their own fate than the legislators on Capitol Hill.[503]

As the recent state referenda noted at the beginning of this thesis indicate, there is public support for a liberal cannabis regime. But the recent legalization trend can easily be reversed.[504] For example, the withdrawal of the Obama-era Cole Memo by Attorney General Jeff Sessions in 2018 took prosecutorial discretion away from federal lawyers. They must now apply the law without taking state laws on cannabis into account. As a result, physicians recommending cannabis for therapeutic purposes may be subject to federal prosecution, even when their actions are legal at the state level.[505] And their patients are at risk of prosecution too. This precarious situation needs to be remedied for legal certainty.[506] Forcing individuals to make such difficult choices is an unacceptable state of affairs. The prohibitionists, however, have not conceded an inch to their legalizing opponents. There may have been optimism for a big change during Obama's tenure in the White House, but the optimists have been rebuffed by the Trump White House.[507]

The enthusiasm with which the federal government has carried out prohibition has been curtailed by the courts. In 2004, federal court judges struck down DEA regulations aimed at the prohibition of non-psychoactive hemp products containing minimal amounts of naturally-occurring THC. Hemp is not a Schedule I substance under the Controlled Substances Act and attempts to include it on that list were found to be contrary to Congress' legislative intent.

[503] Blaine, "Note: Supreme Court 'Just Says No' To Medical Marijuana," 1230.
[504] See Dufton, *Grass Roots*, esp. conclusion.
[505] The DEA, for example, approached a number of physicians in Massachusetts and told them they risked losing their DEA registration, or right to prescribe medicine, if they continued to refer patients to cannabis dispensaries ahead of the legalization CTP. See George J. Annas, "Medical Marijuana, Physicians, and State Law," *N Engl J Med* 371, no. 11 (2014), 983.
[506] Lawrence O. Gostin et al., "Enforcing Federal Drug Laws in States Where Medical Marijuana Is Lawful," *JAMA* 319, no. 14 (2018), 1435-6. Gostin et al. argue for an evidence-based approach to cannabis law and policy.
[507] On optimism see Annas, "Medical Marijuana," 985.

Smokable marijuana, not tortilla chips and pretzels containing hemp seeds and oil, is the target of the CSA.[508] Expanding the scope of prohibition to include even trace amounts of THC in hemp products demonstrates the fervor with which federal agencies carry out their mission. From the DEA's point of view, anything cannabis-related must be eliminated. It is difficult to see their approach changing with the current administration, but the Republicans will not be in office forever.

UK Policy

British commentators on the right, like Peter Hitchens, characterize cannabis as "not merely a drug." According to him: "It is a cause." Hitchens sees cannabis consumption as the "unfettered indulgence in a chemical stupor" that "smothers thought and dilutes discontent, the very thing that real lovers of human liberty need and value."[509] These views are becoming a relic of the past, as policy organizations like Transform note that cannabis reform is increasingly seen as a public health and human rights issue.[510] The language of human rights has yet to lead to real change in the UK vis-à-vis cannabis, but momentum has been building.[511] Reform does not appear to be forthcoming from the judiciary, as they have dismissed the medical necessity defence for possession of cannabis. Not do politicians seem interested in change. For the near future, cannabis and other psychoactive substances will likely remain prohibited. The UK, it is fair to say, is the most committed prohibitionist country examined in this thesis. This is partly due to the deference British courts afford the legislature, but also out of a lack of legal challenges of the nature found in Canada and the US.

[508] *Hemp Industries v Drug Enforcement Admin.*, 357 F.3d 1012 (9th Cir. 2004), note 2.
[509] Peter Hitchens, *The War We Never Fought: The British Establishment's Surrender to Drugs* (London: Bloomsbury, 2012), 3-4.
[510] Transform, *How to Regulate Cannabis: A Practical Guide*, Second Edition (October 2016), 19.
[511] See the conclusion, below, on the public pressure exerted on the government in the Alfie Dingley case and the right to use CTP.

Conclusion
Cannabis and the Future of Psychoactive Substances

The history of cannabis prohibition is, as Canadian courts have noted, "very short…and lacks a significant foundation in our legal tradition."[512] But understanding this history gives greater context to the purported meteoric rise in support for the full-scale legalization of cannabis following now Prime Minister Justin Trudeau's promise to do so during the 2015 federal election. Indeed, the road toward legalization has been long, the debate is far from settled, and Canadians know little about cannabis beyond the fact that they will have a right to use it in 2018. But the return to a liberal framework for the regulation of cannabis fits, as the courts have accepted, with the nearly "4,000 years" of its reported use.[513] Prohibition is the anomaly in this history.

This thesis examined the history of cannabis prohibition in Canada, the United Kingdom, and the United States through the lens of human rights jurisprudence, government policy, and the debate surrounding drugs. It has looked at the justifications for prohibition and reasons for overturning restrictive policies. Some ideas were particularly important in this story.

Public health, especially, has been used as a justification for prohibition.[514] But a progressive reading of this idea must be attuned to "the principles of *social justice*, attention to *human rights* and *equity*, and *evidence-informed policy and practice*".[515] The long battle in

[512] *R v Beren*, para 126.
[513] Though that figure "may be questionable." See *R v Beren*, para 34. Other courts stated that cannabis had been used medicinally for about 2,600. See *R v Parker*, para 125.
[514] Public health is also the key guiding principle behind the upcoming legalization of cannabis. See Selena Ross, "All eyes on Canada as first G7 nation prepares to make marijuana legal," *The Guardian*, 6 June 2018, accessed 6 June 2018, https://www.theguardian.com/world/2018/jun/06/all-eyes-on-canada-as-first-g7-nation-prepares-to-make-marijuana-legal.
[515] Canadian Public Health Association, *A Public Health Approach to the Legalization, Regulation and Restriction of Access to Cannabis: Position Statement* (October 2017), 5.

Canadian courts over CTP was "costly and time-consuming" and the government's implacable attitude towards it did not take seriously "human rights, public health and evidence."[516] Persistence paid off, however, and Canadians' views of cannabis, public health, and morality evolved with the courts' jurisprudence.

The prohibition of cannabis in Canada, as well as the US and UK, has always been a policy choice. Though the government continually relied on its international legal obligations to prevent the proliferation and use of cannabis,[517] it had to admit that these instruments had "not been made part of the law of Canada as such".[518] And there is precedent for a flexible interpretation of international drug treaties.[519] Canadian law, government lawyers could not deny, "must always prevail over an unimplemented international treaty."[520] For this reason also, the Canadian Charter of Rights and Freedoms, as part of the constitution, trumps undomesticated international law.[521] That is why the Charter, especially section 7 with its right to life, liberty, and security of the person, played such an important role in wearing away at the edifice of prohibition. Looking to the US, Canadian courts have noted that increasing access to cannabis, especially for medical purposes, "would not be inconsistent with our international obligations."[522] Indications of this sort were, I contend, a nod to the legislative branch of government telling them they must do something about cannabis. The courts were not the place

[516] Canadian HIV/AIDS Legal Network et al., "Drug policy and human rights: the Canadian context – Submission to the Office of the UN High Commissioner for Human Rights, pursuant to Human Rights Council Resolution 28/28, UN Doc. A/HRC/28/L.22 (2015)," 15 May 2015, 7.
[517] *R v Parker*, para 124.
[518] See the trial judgment in *Sfetkopoulos v Canada (Attorney General)*, at para 17, cited in *R v Beren*, para 122.
[519] Daniel Bear, "From Toques to Tokes: Two challenges facing nationwide legalization of cannabis in Canada," *International Journal of Drug Policy* 42 (2017), 99.
[520] *Sfetkopoulos v Canada (Attorney General)*, at para 17, cited in *R v Beren*, para 122.
[521] Ibid.
[522] *R v Parker*, para 147.

to make such sweeping changes to criminal law. It was, and remains, up to politicians to craft controversial public policy.[523]

The 2000s saw the courts take charge of the conflict between individual and state and it became apparent the former was gaining momentum. Prohibition fatigue may have set in too. As the Liberal Party states on its website: "Canada's current system of marijuana prohibition does not work."[524] The Charter, brainchild of Prime Minister Pierre Trudeau, must be given credit for providing the language with which activists and those in need of cannabis for therapeutic purposes challenged prohibition. Gradually, the impediments to access were peeled away. At the same time, human rights discourse became fully entangled with the cannabis debate. It may only be a coincidence, but that his son, current Prime Minister Justin Trudeau, has continued to push for a liberal regime reflects a trend in Canada's liberal tradition: that the government has no place interfering in what Canadians decide to do with, and to, their bodies.[525]

Since now-Prime Minister Justin Trudeau made cannabis legalization a key part of the Liberal Party platform in the 2015 general election the decision has largely been taken out of the hands of the judiciary. Even so, the decisions rendered by Canadian courts set the tone of the debate around cannabis and framed the way Canadians thought about human rights and drugs. Trudeau recognized that Canadians saw cannabis prohibition as a violation of their human rights and fundamental freedoms and use it to his advantage. It was also a matter of realpolitik. According to former Toronto Police Chief Bill Blair, Canada has the highest rate of cannabis

[523] Young, "Afterword," in Montigny (ed), *The Real Dope*, 296.
[524] "Marijuana," accessed January 14, 2018, available at https://www.liberal.ca/realchange/marijuana/.
[525] Though other considerations, especially economic ones, no doubt influenced the decision. American businesses see Canada as a safe place to invest as it does not have a conflict between state and federal cannabis law, which causes uncertainty and increases risk. See Chloe Aiello, "US cannabis companies look to Canada when going public," *CNBC*, 24 January 2018, accessed 16 May 2018, https://www.cnbc.com/2018/01/24/us-cannabis-companies-look-to-canada-when-going-public.html.

consumption on the globe.[526] This voting bloc helped give Trudeau a significant parliamentary majority. Sometime during the summer of 2018 the Cannabis Act (Bill C-45) will be implemented, making Canada the second country in the world after Uruguay to permit the recreational consumption of cannabis.[527] This is a great leap forward for the cannabis movement, but it is not the only one on the horizon.

The future of US cannabis reform is not without its champions. New Jersey Senator Cory Booker has been at the forefront of marijuana reform on Capitol Hill. His proposed Marijuana Justice Act of 2017[528] would amend the Controlled Substances Act to not only de-schedule cannabis,[529] but expunge the records of those convicted for a "marijuana use or possession offense entered by a [Federal] court before the date of enactment of [the] Act."[530] The Act reflects many of the changes taking place across the US, including the legalization of cannabis at the state level, public support for national legalization (60% according to a 2016 Gallup poll), and "bipartisan federal bills" proposing the rescheduling or descheduling of cannabis.[531] There are benefits to taking cannabis out of the CSA. Federal legalization would, for example, allow for economic growth and open up banking services to cannabis businesses.[532] What Booker's Act would not do, according to a commentary in the *Harvard Law Review*, is go far enough to redress the inequality and disproportionate criminalization of minorities effected by prohibition

[526] Oliver Bennett, "Canada's rocky road journey to legalising cannabis," *Independent*, 16 October 2017, accessed 2 June 2018, https://www.independent.co.uk/news/long_reads/canada-cannabis-legal-justin-trudeau-decriminalise-weed-journey-a7996696.html and Kathleen Harris, "Marijuana use down among minors, up among older Canadians, StatsCan study finds," *CBC News*, 18 December 2017, accessed 3 June 2018, http://www.cbc.ca/news/politics/marijuana-cannabis-minors-1.4454477.
[527] For an overview of the issues related to legalization in Canada see Chelsea Cox, "The Canadian *Cannabis Act* legalizes and regulates cannabis use in 2018," *Health Policy* 122, no. 3 (2018): 205-9.
[528] S. 1689, 115th Congress, 1st Session.
[529] Ibid, §2(a).
[530] Ibid, §3(c).
[531] "Recent Proposed Legislation: Drug Policy – Marijuana Justice Act of 2017 – Senator Cory Booker Introduces Act To Repair The Harms Exacted By Prohibition – Marijuana Justice Act of 2017, S. 1689, 115th Cong.," 131 *Harv L Rev* 926 (Jan 10, 2018), 928.
[532] Ibid, 929.

and the attendant War on Drugs.[533] Booker's initiative gained momentum over the spring of 2018, though it has not, at the time of writing, been passed. Others, like New York Senator Chuck Schumer, have joined his campaign, arguing that legalization is "the right thing to do." Schumer posited that he had "seen too many people's lives ruined by the criminalization."[534] Something needed to be done, even if the long-term effects of the legalization and use remain unknown.

In the House of Representatives, too, there have been moves to remove cannabis from the CSA. The Ending Federal Marijuana Prohibition Act[535] was proposed by Republican Representative Thomas Garrett of Virginia. Garrett admitted that justice "isn't blind" and lower-income individuals have suffered because of prohibition. He added that "Virginia is more than capable of handling its own marijuana policy".[536] There is clear bi-partisan support for the descheduling of cannabis in Congress, even among many conservative thinkers.[537] At the time of writing, however, President Trump's Attorney General Jeff Sessions continues to prioritize combatting cannabis legalization in the states. That said, he has also made cannabis an issue around which Trump's opponents have been able to rally.[538] Taking a hardline on cannabis may

[533] Ibid, 933. The authors propose, among other remedies, a "direct cash transfer" to those "convicted of a marijuana offense in the United States" as a way of repairing this issue. They also suggest that a regulatory framework be included in Booker's Act that addresses the unequal access to the cannabis business market for minorities. Ibid, 930-2.
[534] Shawna Thomas, "Sen. Chuck Schumer to introduce bill to 'decriminalize' marijuana," *Vice News*, 19 April 2018, accessed 13 May 2018, https://news.vice.com/en_us/article/7xdjqz/sen-chuck-schumer-to-introduce-bill-to-decriminalize-marijuana.
[535] Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Congress, 1st Session.
[536] "Garrett Introduces Legislation to Remove Marijuana from Controlled Substances List," 27 February 2017, accessed 14 May 2018, https://tomgarrett.house.gov/media/press-releases/garrett-introduces-legislation-remove-marijuana-controlled-substances-list.
[537] Anthony Gregory, "The Right & the Drug War: Conservatives are the last prohibitionists, but that's changing," *The American Conservative* 11, no. 9 (Sept. 2012): 31-3 and Jeremy Berke, "Support for marijuana legalization reaches a record high – and even a majority of Republicans back it," *Business Insider*, 26 October 2017, accessed 28 May 2018, http://www.businessinsider.com/support-for-weed-legalization-just-hit-an-all-time-high-2017-10.
[538] Maria McFarland Sánchez-Moreno, "How anti-marijuana Jeff Sessions became the best thing to happen to pot legalization," *USA Today*, 6 May 2018, accessed 14 May 2018, https://www.usatoday.com/story/opinion/2018/05/06/marijuana-legalization-jeff-sessions-colorado-washington-controlled-substance-enforcement-column/573156002/.

be an inadvertent gift to the proponents of legalizing cannabis, who now have something to unite them in their fight to change federal law.

The UK, for its part, has continued to view cannabis as a threat to British health. But the case of Alfie Dingley may lead to a significant change in the way politicians and the public view cannabis. The six-year-old's severe epilepsy, which causes about 30 seizures a day, led to a public campaign requesting that Prime Minister Theresa May's government grant a license so Alfie can use cannabis oil to ameliorate his symptoms. The petition presented to May included 370,000 signatures, leading her to promise to "find a resolution for Alfie as quickly as possible".[539] The Home Office even supported the idea of giving Alfie access to cannabis oil as part of a medical trial.[540] Unfortunately for Alfie and his family, their application for a license to use cannabis oil was refused, though a spokesperson told the public "The Government has a huge amount of sympathy" for the situation and "wants to explore every option…that may be accessible for" Alfie.[541] Whether this leads to something or not, there is clearly public support for access to CTP. It is unclear whether the UK can continue its policy of prohibition as its friends and allies, including the US and Canada, change tack and either decriminalize or legalize cannabis for both medical and recreational use. Part of the problem with UK drug policy is that "an almost permanent state of electioneering" prevails in the country and "gaining political capital" is more important than coming up with an evidence-based, long-term solution to drugs regulation.[542] This could be a good thing for cannabis. Maybe the claim it could save the

[539] Jaymi McCan, "Theresa May pledges support for boy suffering from rare form of epilepsy," *Express*, 1 April 2018, accessed 14 May 2018, https://www.express.co.uk/news/uk/939834/Alfie-Dingley-PCDH19-epilepsy-Theresa-May-pledges-support-medical-cannabis.
[540] "Alfie Dingley: Home Office considers medical cannabis trial," *BBC News*, 1 March 2018, accessed 14 May 2018, https://www.bbc.com/news/uk-england-coventry-warwickshire-43236649.
[541] Alex Matthews-King, "Six-year-old with rare epilepsy could be given illegal medical cannabis in trial, Home Office says," *Independent*, 1 March 2018, accessed 15 May 2018, https://www.independent.co.uk/news/health/alfie-dingley-epilepsy-medical-cannabis-seizures-nhs-home-office-clinical-trial-marijuana-a8234391.html.
[542] Monaghan, "Drug Policy Governance," 1029-30.

National Health Service will be used to attract voters in future elections.[543] That said, it remains a committed prohibitionist and will continue to be so for the foreseeable future.

The international prohibition of cannabis has been a failure, causing "more problems than it solves" and depriving individuals of their health and liberty.[544] That is not to say that the decriminalization or legalization of cannabis has been a wholesale success.[545] But prohibitionists engage in delusional thinking when they ignore two "truths" about cannabis. First, that its use causes harm to individuals, not society. Second, that "drugs are here to stay."[546] Legalization may now be the "least-worst option".[547] States within the US and Canada as a whole have recognized a new approach toward cannabis is necessary. Others, like the UK, have doubled down on prohibition. Even though states are committed to the latter policy in their treaty obligations there is little the international community can do once a change has been decided besides the "wagging of fingers, diplomatic posturing, and stamping of feet." Nor has legalization "disturbed international relations or produced any meaningful retaliation."[548] Any change to drug policy affects the globe, and States should "think ahead" about what should be

[543] Alan Dawson, "Creating a legal marijuana market in the UK could offset the entire NHS deficit," *Business Insider*, 3 June 2018, accessed 3 June 2018, http://www.businessinsider.com/a-legal-cannabis-market-could-offset-nhs-deficit-2018-6.
[544] George P. Shultz and Pedro Aspe, "The Failed War on Drugs," *The New York Times*, 31 December 2017, accessed 28 May 2018, https://www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-re; Fernanda Mena and Dick Hobbs, "Narcophobia: drugs prohibition and the generation of human rights abuses," *Trends Organ Crim* 13 (2010), 60; Arthur Benavie, *Drugs: America's Holy War* (New York: Routledge, 2009).
[545] For example, "Marijuana-related traffic deaths…more than doubled" between 2013 and 2016. This and other issues are discussed in Rocky Mountain HIDTA, Strategic Intelligence Unit, "The Legalization of Marijuana in Colorado: The Impact," vol. 5 (October 2017), available at http://www.rmhidta.org/html/FINAL%202017%20Legalization%20of%20Marijuana%20in%20Colorado%20The%20Impact.pdf, 1.
[546] Ethan Nadelmann, "The End of the Epoch of Prohibition," in Bölinger (ed), *Cannabis Science*, http://www.bisdro.uni-bremen.de/boellinger/cannabis/05-nadel.pdf.
[547] Pryce, *Fixing Drugs*, 151.
[548] Jonathan P. Caulkins, "After the Grand Fracture: Scenarios for the Collapse of the International Drug Regime," *Journal of Drug Policy Analysis* 2 (2015), 9. See too Laura Graham, "Legalizing Marijuana in the Shadows of International Law: The Uruguay, Colorado, and Washington Models," 33 *Wis Int'l LJ* 140 (2015).

done to address interactions between prohibitionists and legalizers.[549] The trajectory of cannabis law and policy will have implications not only for that substance, but the future of prohibitionist regulatory framework as a whole.

Rapid changes in the US and Canada came about, to a significant extent, as a result of cannabis users articulating their legal cases in the language of human rights and fundamental freedoms. Efforts of this sort were rebuffed in the UK, but there is no denying that the tide of public opinion is turning against prohibitionists. Drug law and policy is just as much a matter of human rights as other, more traditional, issues. The history of cannabis in the courtroom makes this clear.

[549] Caulkins, "After the Grand Fracture," 19.

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