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The Legalization of Cannabis and the Question of Reparations

Kojo Koram*

ABSTRACT

This article surveys the dramatic sea change in the legal status of both the domestic and international cannabis trade over the past decade and asks whether legalization challenges or complements racial capitalism. As the changing status of prohibited drugs not only seeks to correct a historical wrong but also gives rise to a new, highly profitable cross-border commodities market, I analyse whether the variety of policies that are currently being implemented alongside cannabis legalization—from import restrictions to social equity licences—is sufficient to appease the demand for reparations by the communities who suffered the most through the past century of the ‘War on Drugs’. This ‘War on Drugs’ was both historically and structurally weighted towards the reinforcement of racial hierarchies. As it enters into its twilight, I find that an overview of both the international and domestic laws that are being passed in order to introduce a new age of legal, commercial cannabis threatens to lock in the racial inequalities of our global economy, rather than serve as a tool for the advancement of reparative racial justice.

Recently, there has been a growth of interest in ideas of racial capitalism both inside and outside the academy, as political events have reanimated the myriad of ways in which capitalism is inextricably linked with histories of racist expropriation.¹ A litany of compounding global crises—comprising the 2008 financial crises, the global Black Lives Matter protests, and the Covid-19 pandemic, amongst others—have breathed new life into Robinson’s conception of the ways through which the concept of ‘racial capitalism’ captured how ‘the development, organization, and expansion of capitalist society pursued essentially racial directions.’² In this political moment, common understandings of racism have begun to move increasingly beyond interpersonal articulations of prejudice towards showing greater consideration of how systems of wealth accumulation that derive from the European colonization of the planet continue to inform the distribution of resources and subsequent life opportunities across the world today. The recognition of capitalism’s and racism’s interdependence on each other is becoming more apparent.

The corollary to this insight is an understanding that any notion of ‘racial justice’ should be committed not only to inspiring widespread changes in latent ideas about racial hierarchies but also to pushing for changes in our planetary systems of production and distribution.

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¹ Gargi Bhattacharyya, *Rethinking Racial Capitalism: Questions of Reproduction and Survival* (London: Rowman and Littlefield, 2018) 1–88.

² Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Chapel Hill: The University of North Carolina Press, 2005) 2.

Effective anti-racism requires a confrontation with the presiding trends of capitalism. As a result, shadowing the increase of scholars analysing the dynamics of racial capitalism has been the growing re-emergence of the idea of reparations. For years dismissed as a political impossibility, reparations have suddenly returned to the public discourse as a potential tool for correcting the material legacy of historical wrongs emerging from the racialization of global populations. Reparations have been posited as a legal mechanism not just for addressing the racially inequitable impact of historical wrongs like slavery or genocide but also for coming epochal cataclysms such as climate change and the global migration crisis.³ Furthermore, as an idea, reparations have moved beyond a simple estimation of the money required to compensate for harm. Reparations can contain a broad range of policies aimed to restructure the world, as, in the words of Táíwò and Cibralic:

The term reparations refers to making amends and often connotes one-off cash transfers or apologies... [but] ... are better understood as a systemic approach to redistributing resources and changing policies and institutions that have perpetuated harm—rather than a discrete exchange of money or of apologies for past wrongdoing.⁴

The promise of reparations lies beyond any potential to affect a hasty financial rebalancing act. Reparations carry an immense symbolic as well as material potency, as Waldron illustrated when arguing that '[q]uite apart from any attempt genuinely to compensate victims or offset their losses, reparations may symbolize a society's undertaking not to forget or deny that a particular injustice took place, and to respect and help sustain a dignified sense of identity-in-memory for the people affected.'⁵ Yet, despite the recent resurgence of the idea, the Sisyphean impossibility of trying to accurately quantify the financial impact of centuries of racial capitalism still leads critics to ultimately disqualify the realistic potential of undertaking any effort at facilitating racial reparative justice. As Coates explained in his essay 'The Case for Reparations', which ignited the issue just as the first iteration of the Black Lives Matter movement was erupting, 'broach the topic of reparations today and a barrage of questions inevitably follows: Who will be paid? How much will they be paid? Who will pay?'⁶ With historical claims for reparations, the question of temporal distance as often invoked as an obstacle to practical implementation. Arguments for restitution can be made based on 'entitlement that fade with time, counterfactuals that are impossible to verify, injustices that are overtaken by circumstances.'⁷ The historical time frame of harm is too broad, the original imposition of the multi-headed hydra from which racial capitalism grew being simply too distant for accurately identifying contemporary victims.

However, a narrowing of the historical frame to specific events can be effective for identifying how incidents of violence can be addressed by reparations. In Chile, the end of Augusto Pinochet's military dictatorship led to the creation of the National Truth and Reconciliation Commission, which committed to an investment of around US\$3.2 billion as part of a reparation programme for victims such as the families of those executed by the dictatorship.⁸ The programme has included everything from educational benefits for the victims to public memorials

³ See Olúfẹ́mi O. Táíwò, Beba Cibralic, 'The Case for Climate Reparations', in *Foreign Policy*, 10 October 2020, <https://foreign-policy.com/2020/10/10/case-for-climate-reparations-crisis-migration-refugees-inequality/> (visited 25 July 2022); E. Tendayi Achiume, 'Migration as Decolonization', 71 (1) *Stanford Law Review* 1509–73 (2022).

⁴ See Táíwò and Cibralic, above n 3.

⁵ Jeremy Waldron, 'Superseding Historic Injustice', 103 (1) *Ethics* 4–28 (1992), at 13, University of Chicago Press.

⁶ Ta-Nehisi Coates, 'The Case for Reparations', *The Atlantic*, June 2014, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (visited 18 December 2021).

⁷ See Waldron, above n 5, 27.

⁸ The International Center for Transitional Justice, 'ICTJ Program Report: Reparative Justice', 13 May 2013, <https://www.ictj.org/news/ictj-program-report-reparative-justice#:~:text=Chile%20has%20invested%20around%20US,civil%20services%20or%20public%20companies> (visited 4 April 2022).

being erected in honour of those harmed.⁹ The colonial genocide committed against the Herero and Nama ethnic groups by the German empire was recently recognized by the contemporary German government, along with a commitment to pay the descendants of the Herero and Nama \$1.3 billion worth of reparations, although Germany has publicly insisted that the payment was not reparations but merely a ‘gesture to recognize the immense suffering inflicted.’¹⁰ In 2006, the Canadian federal government agreed to provide \$2 billion of reparations to the survivors of the Indian Residential Schools programme to compensate the children who had been physically and sexually abused in these institutions.¹¹ In all of these examples, such actions have been just the first step in an ongoing process of addressing historical wrongs and in some contexts have even been used to direct attention away from wider reparative justice reforms, as with the Canadian reparations payments and claims for land reappropriation for example. Still, the successful recognition of reparation payments in relation to these distinct but different historical issues opens up the potential of arguing for reparations as a political reality. The concept of reparations has been well established as a principle of international law since the early 20th century, with the 1927 Chorzów Factory case providing the authority for the general principle of the need for restitution or compensation following an internationally wrongful act. There is now a substantial body of case law and treaty obligations establishing that a breach of an international obligation should raise the question of ‘adequate, effective, and prompt reparation for harm suffered’ by the victims.¹² Therefore, it is now legitimate to explore the relevance of reparations with regard to one of the most dramatic global shifts currently occurring across the world.

During the 20th century, few industries have brought together the dynamics of racial violence and capital accumulation better than the global drugs industry, and this industry is currently going through a seismic change, particularly in relation to the legal and cultural status of cannabis. Cannabis was one of the primary targets of the 20th century ‘War on Drugs’, legally prohibited, culturally demonized, and relegated to the global black market; recent domestic and international legislative changes are turning the drug into a lucrative, licit commodity.

Reparations serve as the material conclusion of a far broader transitional justice process that often reflects a holistic shift in societal attitudes about a specific action, including revised cultural and behavioural norms as well as legal changes. What was acceptable in the previous generation, the transitional justice process renders not only illegitimate in the present day but also, in some circumstances, invoking the need for corrective compensation to victims. Currently, in North America and Europe, this broad social process is now well underway in relation to attitudes towards prohibited drugs, most notably with cannabis. Since medicinal cannabis was legalized in California, USA, in 1996, a wave of legal reform has transformed the legal status of both the medicinal and recreational use of cannabis across several jurisdictions across the world. States as disparate as Alaska, New York, Colorado, and Massachusetts have all legalized recreational cannabis over the past decade. At the nation state level, Canada, Thailand, and Uruguay have passed cannabis legalization laws, with governments in Germany, Malta, and Switzerland announcing their commitment to follow suit. With several jurisdictions having implemented either the decriminalization or outright legalization of a commercial, recreational cannabis market over the past few years, international law has also shifted in position on the control of the drug. The ‘United Nations (UN) Single Convention on Narcotic Drugs, 1961’ (hereby referred

⁹ Elizabeth Lira, ‘The Reparations Policy for Human Rights Violations in Chile’, in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford: Oxford University Press, 2006) 55–102.

¹⁰ Samantha Granville, ‘We want trillions to heal our wounds’, in BBC News 7 August 2021, <https://www.bbc.co.uk/news/world-africa-57961151> (visited 21 December 2021).

¹¹ Mayo Moran, ‘The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools’, 64 (4) *The University of Toronto Law Journal* 529–65 (2014), University of Toronto Press.

¹² Article VII, 11(B), ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation> (visited 3 April 2022).

to as the Single Convention) is the foundation of the current international framework for drug prohibition. In December 2020, the UN Commission for Narcotic Drugs voted to remove cannabis from Schedule IV of the Single Convention, the strictest level of control within the treaty reserved for drugs with high risk of use and providing little to no medicinal value. Following a 2019 recommendation from the World Health Organization for cannabis to be reclassified within the international drug control treaties, the Commission for Narcotic Drugs decided to follow this recommendation although cannabis remains under the control of the much less strenuous Schedule I of the Single Convention.

These shifts in the legal status of a once demonized drug have opened the door for a cross-border, profit-generating commodities market that invites questions over its potential to either reinforce or repair the given dynamics of racial capitalism. Such a dramatic sea change in the law governing the domestic and transnational cannabis trade provokes the question of what accompanying vision of transitional justice might underpin this shift? Does the changing status of prohibited drugs mark the recognition of a historical wrong in the previous era of arresting and incarcerating cannabis traders? What are the policies that are currently being implemented alongside cannabis legalization to repair the material harm endured by individuals and communities through the past century of a futile ‘War on Drugs’? Do these policies equate to a demand for reparations? Proceeding from a brief review of the ways in which the ‘War on Drugs’ was both historically and structurally weighted towards the reinforcement of racial hierarchies, I will look at how international and domestic legal initiatives may serve as a tool of either facilitation or obstruction to the advancement of reparative racial justice alongside the legalization of cannabis. However, I will also look at how the creation of a new lucrative commodities trade in legal recreational cannabis opens new questions about how racial capitalism through the drugs trade might gain new life through property rights, licencing laws, and national monopolies rather than the old era of policing and imprisonment. The legalization of cannabis across multiple jurisdictions brings this new commodities market into the purview of international economic law. Producers in different jurisdictions look to contract with distributors across borders; investors will look to fund experimental cultivation practices based on countries that might be subject to vastly divergent regulatory frameworks. If the international trade laws that will emerge to provide oversight of this industry centre the interests of the small-scale producers and suppliers of cannabis who were subject to violent criminalization during the drug war, then they carry the potential to help rebalance a world disorientated by the history of racial capitalism. However, should the practices and rules that govern the legal cross-border trade in cannabis tie themselves to the interests of the European and North American pharmaceutical companies, tech companies, and food companies who are currently positioned to dominate this industry, then it carries the potential of using the legalization of drugs to accelerate the inequalities inherent to racial capitalism.

I. THE WAR ON DRUGS AND RACIAL CAPITALISM

In aid of narrowing the historical frame through which any claim for reparative justice for drug prohibition policies could be made, it is important to denaturalize prohibition and restate just how much of a historical anomaly the 20th-century global ‘War on Drugs’ was. The use of psychoactive substances for medicinal, social, religious, or nutritional purposes has been common throughout the world for centuries prior to the ‘War on Drugs.’¹³ Different cultures had long indulged in ritualistic, religious, medicinal, and hedonistic practices of intoxication, and with European colonialism giving rise to a new interconnected world market, a wider assortment

¹³ William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge, 2000) 9.

of psychoactive substances became more accessible to a greater array of the world's people than they had been before.¹⁴ Much of the wealth accumulated by European empires was derived from the trade of various psychoactive substances, which included substances that have been wholly absorbed into the Western diet like coffee, sugar, and tobacco alongside substances that would later become codified as 'drugs'—opium, coca, and cannabis.¹⁵

However, the early 20th century gave rise to a moral panic over the consumption of certain psychoactive commodities in Europe and particularly in the USA, a movement that over the course of the next hundred years crystalized into concrete legalization and political project to eradicate the global market in the recreational use of drugs. Only during the past decade has there been growing recognition of the failure of the previous century's experiment in global drug prohibition within the governments of Europe and North America. The criminalization of drugs has failed to bring about the 'drug-free world' that its advocates had promised.¹⁶ Instead, despite billions of dollars being spent per annum on trying to enforce the laws prohibiting drugs, by the UN's own estimation, around 275 million people continue to recreationally use prohibited drugs each year.¹⁷ Rather than eliminating drug use and associated harms, the main effect of prohibition was the transformation of a set of psychoactive substances into one of the most profitable of all global criminal industries, with drugs now accounting for one-fifth of global criminal proceeds by the UN's own admission (rising to half if tax evasion is discounted).¹⁸

Furthermore, futile attempts to impose laws of prohibition had devastating humanitarian consequences across the world. As has been illustrated by scholars like Alexander and Gilmore, drug prohibition was the propellant behind the emergence of mass incarceration in Western countries over the past 50 years.¹⁹ As recently as 2019, it was recorded that nearly half of all federal prisoners in the USA (46%) had been incarcerated because they had been convicted of a drug offence.²⁰ This trend continues beyond the oft-reported USA. In the UK, Black people are recorded as comprising up to a quarter of all people who are convicted of cannabis possession, even though they account for less than 4% of the UK's total population.²¹ Beyond over-policing and mass incarceration, the racial legacy of drug prohibition also bares its mark upon the lived environment of communities. In countries like Colombia and Mexico, the internationally mandated crop eradication and aerial fumigation policies devastated arable rural land, particularly affecting afro-descendant and indigenous communities.²² In the traditional drug-producing regions of Latin America and Southeast Asia, prohibition has led to an eruption of violence as drug trafficking cartels and state anti-narcotic paramilitary groups escalate the conflict. Increased violence constituted only one element of the social disruption hastened by the drug war; prohibition also contributed to huge increases of environmental damage, human displacement, and agricultural

¹⁴ For further reading on how European imperialism produced a market in drugs, see David T. Courtwright, *Forces of Habit: Drugs and the Making of the Modern World* (Cambridge: Harvard University Press, 2001) 9–53.

¹⁵ Sidney Wilfred Mintz, *Sweetness and Power: The Place of Sugar in Modern History*, Revised ed. (London: Penguin Books Ltd, 1986); or Carl A. Trocki, *Opium, Empire and the Global Political Economy: A Study of the Asian Opium Trade, 1750–1950* (London: Routledge, 1999).

¹⁶ See the 1998 United Nations General Assembly: Special Session on the World Drug Problem, 8–10 June 1998, <http://www.un.org/ga/20special/> (visited 8 October 2021).

¹⁷ United Nations Office of Drugs and Crime, *World Drug Report 2018*.

¹⁸ 'Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes: Research Report', UNODC (October 2011), 20 https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf (visited 3 August 2021).

¹⁹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Reprint ed. (New York: The New Press, 2012); Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007).

²⁰ E. Ann Carson, 'Prisoners in 2019', Bureau of Justice Statistics, October 2020, NCJ 255,115, <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> (visited 9 October 2021) 1.

²¹ Niamh Eastwood, Michael Shiner, and Daniel Bear, 'The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales', *Release*, 2013.

²² See Washington Office on Latin America, *Peace, Drug Policy, and an Inclusive Society Eleven Ways Colombian and FARC Negotiators can Reform Drug Policy and Build a Lasting Peace* (2013) 4, <https://www.wola.org/sites/default/files/Colombia/2014/WOLA Drug Policy PrinciplesFINAL.pdf> (visited 14 October 2021).

disruption.²³ And most significantly for the topic of reparations, it is now widely established that across a variety of different jurisdictions, the demographics of those who have borne the heaviest burden of the social disruption caused by the War on Drugs reflect the racial asymmetries of the world that have marked the world since colonialism.

The emergence of international drug prohibition in the first half of the 20th century was tied to explicitly racist propaganda that sought to associate psychoactive substances with the defective characteristics of groups still defined in that era as inferior within the pervading norms of scientific racism. The earliest laws prohibiting opium in the USA came in the wake of newspaper stories that portrayed opium as an insidious threat to all Americans, causing even those with ‘respectable parentage’ to be lured into deviancy through the ‘unmitigated evil’ of the Chinese opium dens.²⁴ Historian Musto has emphasized how the preponderance of racialized drug stories at that time, such as the *New York Times*’ now infamous report entitled ‘Negro Cocaine “Fiends” Are a New Southern Menace’, illustrates the ‘white fear’ behind the shift away from the laissez-faire approach to drugs that enriched the French and British imperial opium trade.²⁵

On the international level as well, the emergence of the first international laws on drugs is wholly interwoven within the growing hegemony of American liberalism over the 20th century. Under the mask of a moral humanitarianism, the racial and imperial anxieties of Christian missionaries and development reformers working in America’s growing sphere of global influence played a major role in driving prohibition into law. At the same time as USA sought to drive the world away from the protectionism of European inter-imperial competition, it insisted on greater restrictions to the trade in narcotics. In seeking to reform the vice that they saw as infecting the lost souls of the otherwise promise land of global free trade, institutions such as the World’s Woman’s Christian Temperance Union, the Young Men’s Christian Association, and the Young Women’s Christian Association would lead the campaign against narcotics to clear the ground for the coming American economic and moral empire.²⁶ Missionaries such as William Dix, Wilbur Crafts and perhaps most famously Charles Henry Brent, who saw opium use in the Philippines as an impediment to ‘the natives’ conversion to Christianity.²⁷ The religious and racial paranoid that informed this temperance movement were able to influence the strictness of international drug policy as they worked in conjunction with the wider foreign policy aims of the USA as it is sought to supersede the European imperial powers on the international stage.

II. DRUG POLICY REFORM AND THE WINDS OF CHANGE

When we consider the ways in which the drug war has been historically and structurally interwoven with histories of racial capitalism, it is unsurprising that the opposition against drug prohibition has become a new frontier in the anti-racist fight for racial justice and/or a geographic reordering of global power. The initial call for reform of the global drug laws came from the ‘pink tide’ in Latin America, where an end to the devastation that the War on Drugs had wrought over the region was seen as key towards loosening the neo-colonial grip that the USA enjoyed over Latin American politics and economics. A key symbolic moment in the shift away from the drug war came in March 2009, at the 52nd session of the UN Commission on Narcotic Drugs (CND). Bolivian President Evo Morales travelled to Vienna to petition for the removal of the raw coca leaf from schedule 1 of the drugs that are prohibited by the ‘Single Convention’.

²³ Noam Chomsky, *Rogue States: The Rule of Force in World Events* (London: Pluto Press, 2000) 64.

²⁴ ‘The Opium Dens’; San Francisco Chronicle; 16 November 1875, <https://earlydruglaw.files.wordpress.com/2011/02/ordinance-passes.pdf> (visited 8 April 2021).

²⁵ David Musto, *The American Disease* (Oxford: Oxford University Press, 1999) 8.

²⁶ For further on the role of Christian missionary groups in emerging American hegemony see Ian Tyrrell, *Reforming the World: The Creation of America’s Moral Empire*, Reprint ed. (Princeton: Princeton University Press, 2013).

²⁷ Tyrrell, *Reforming the World*, 152.

During his speech calling for support for Bolivia's initiative, Morales pulled out a coca leaf. Holding it up for the audience to verify, he then placed the prohibited substance into his mouth. Morales then condemned the 'Single Convention' as 'an attack on the rights of indigenous peoples.' He also decried the drug treaty for contradicting the new Bolivian constitution, which enshrined that 'the State protects the native and ancestral coca as cultural patrimony, as a renewable natural resource of the biodiversity of Bolivia, and as a factor of social unity'.²⁸ Furthermore, Morales declared that UN Office of Drugs and Crime Executive Director Antonio Maria Costa, seated in the audience, should, by law, take him to jail for what he is doing in an attempt to render visible the violent absurdity of the drug laws. 'I am a producer of the coca leaf', he cried out 'I am a consumer of the coca leaf. The coca leaf represents the culture of the people of the Andean region.'²⁹

As the first indigenous Amerindian President of his country, Evo Morales actions at the CND cannot be comprehended outside of a consideration of 'raciality and indigeneity', and the significance of his appearance upon the world stage as a challenge to the persistent coloniality of world ordering.³⁰ For Denise Ferreira de Silva, Morales functions as 'an indigenous, racial, peasant... [who]... refigures past and present deployments of physical and symbolic violence that now configure the globe as a political space'.³¹ The Latin American Commission on Drugs and Democracy report that arrived the same year as Morales' performance at the CND broke new ground in international diplomatic circles by openly declaring the War on Drugs a failure. Subsequently, in 2012, the presidents of Colombia, Guatemala, and Mexico issued a formal statement calling for a review of all global drug policies, and in 2013, the Organization of American States published the first ever intergovernmental report entertaining the possibility of future legal regulation of drugs. This shift in rhetoric reached its climax in December 2013 when Uruguay, led by the former communist guerrilla José Mujica, turned talk into action and became the first nation state since the implementation of the 'UN Single Convention on Narcotic Drugs 1961' to legislate for the legal production, distribution, and possession of one of the prohibited drugs—cannabis.

The brazen action undertaken by Uruguay in 2013 proved to be just the first domino to fall in a wave of cannabis legalization that has swept across the world in subsequent years. At the level of the nation state, Canada, South Africa, Germany, and Luxemburg have all followed Uruguay's lead and announced a legal recreational market in cannabis. Perhaps most dramatically, within the USA, the nation that drove and rigorously policed the international War on Drugs as a key element of its foreign policy platform for decades, 18 of the 50 states have legalized the recreational production, sale, and use of cannabis since Colorado and Washington states began the trend in 2012. The spread of cannabis legalization represents a new epoch in the normative conception of the drug trade. As the legal, recreational cannabis industry becomes increasingly familiar across some of the world's largest economies, legalization is likely to rise at an ever-quicker rate. The USA is nearing the tipping point for nationwide legalization already, with 2021 seeing federal legal cannabis being proposed by bills from both Republican and Democratic congressmen.³² However, the topic of reparations looms over the question of drug policy reform at both a national and international level.

²⁸ Article 384, Constitution of Bolivia, https://www.constituteproject.org/constitution/Bolivia_2009.pdf (visited 9 March 2020).

²⁹ See Evo Morales (2009), Speech at the CND, <https://www.youtube.com/watch?v=FzuL5vHLMPA> and <https://www.youtube.com/watch?v=llz6WzdaP14> (visited 9 March 2020).

³⁰ See Denise Ferreira da Silva, 'An Outline of a Global Political Subject: Reading Evo Morales's Election as a (Post-) Colonial Event', 8 (1) *Seattle Journal for Social Justice* 25–49 (2009).

³¹ *Ibid.*, 38.

³² Will Yakowicz, 'Republican Congresswoman Nancy Mace Is On A Mission To Legalize Cannabis—And Amazon Just Got Behind Her', in *Forbes* 25 January 2022, <https://www.forbes.com/sites/willyakowicz/2022/01/25/republican-congresswoman-nancy-mace-is-on-a-mission-to-legalize-cannabis-and-amazon-just-got-behindher/?sh=5069af845450> (visited 25 January 2022).

A. Cannabis legalization and international trade

Whilst drug policy reform in the USA has begun to take tentative steps towards reparative justice on a domestic level, a still underdeveloped area of policy reform is the value of reparations to the international aspect of what is invariably a global commodity in cannabis. The harm of the drug war has not only impacted different social groups within countries differently but advanced an asymmetry in the relations between whole countries and continents. The legalization of cannabis opens questions regarding international trade laws, and the extent towards any actions of reparation could accompany global cannabis legislative reform. Does drug policy reform consist of merely transferring the governance of the trade of the drug from the UN's drug control treaties to the World Trade Organization (WTO) legal framework and related bilateral and regional free-trade agreements, which provided the legislative framework for the economic model known as neoliberalism? How does international law adjust to a world where it no longer insists on criminal prohibition on the trade of cannabis and therefore invites a whole range of questions about regulatory control and consumer standards? How will international financial laws balance the money flows of the burgeoning cannabis market and the anti-money laundering initiatives that control cannabis trade in aid of prohibition? Who are the special interest groups who stand to benefit from the new era—the pharmaceutical companies and the large agricultural companies—and how might they frame the regulatory environment in their own interests? Can international commodity agreements work instead to empower the small-scale cannabis cultivators and traffickers who were often criminalized by both national and international laws during the era of the War on Drugs but without who the cross-border trade in cannabis wouldn't exist?

One of the great curiosities of the War on Drugs was always how it intensified to its most feverish state from the 1970s to the early 2000s, through the imposition of draconian policing and restriction of cross-border trade just as many of the same institutions and actors that were pushing the prohibitionist gospel were also eulogizing the benefits of deregulated international trade, reflected in the crystallization of a reenergized international economic legal framework that sought to encase rules to allow the easy movement of global commodities. This is a heightened example of a contradiction that can be seen through various elements of international economic law during this era, the narrowing of flexibilities in international intellectual property regimes for example along with increased policing for any breaches of IP rights.³³ Of course, there was always a symbiotic relationship between these two ostensibly contrasting legal regimes, as the economic liberalization favoured by vocal drug warriors like Reagan, Thatcher, Bush snr, or Clinton encouraged narcotic trafficking by reducing barriers of entry between producer countries and consumers. A pertinent example is how The North Atlantic Free Trade Agreement (NAFTA) was interwoven with the escalation of the drug war in Mexico. By facilitating the erasure of the economic border between the USA and Mexico for the service of free trade, the drug war was not an unfortunate by-product of NAFTA but an essential underside to the 'legitimate' trade that was being encouraged. Narcotics traffic feeds not only on the increased ease of transportation to the USA but also on the way in which agricultural reforms were demanded of Mexico. Under the mantle of dismantling protectionism, communal lands were divided up leading to falling incomes and rising unemployment, with farmers turning to narcotics production to sustain an income and benefiting from a surplus population looking to become a *narco-trafficante*.³⁴

³³ See Debora J. Halbert, 'The Curious Case of Monopoly Rights as Free Trade: The TPP and Intellectual Property and Why It Still Matters', 7 *Journal of Information Policy* (2017) 204–27.

³⁴ Peter Andreas, 'When Policies Collide: Market Reform, Market Prohibition and the Narcotization of the Mexican Economy', in Richard H. Friman and Peter Andreas (eds), *The Illicit Global Economy and State Power* (Lanham: Rowman and Littlefield, 1999) 125–27.

Far from being an absent bystander to the War on Drugs, international economic law accelerated the global flow of commodities, which includes illicit commodities like drugs. In addition to lubricating the wheels of the supply of drugs across borders, international economic law has also played a key role in globalizing a form of Western consumer capitalism, which includes a particularly hedonistic culture of self-gratification.³⁵ All of the transnational regulatory design issues that are recognized as shaping in global market in other agriculturally produced psychoactive substances like coffee or sugar have had an impact on the drug markets, from the inability of rural producers from the global south to compete with large conglomerates without protection to the failure of consumer standards leading increases in problematic use. Drugs, in both their legal and illegal forms, give rise to all the questions of how we facilitate the governance of global commodity supply chains that have sat at the heart of the discipline of international economic law.

Therefore, simply folding the regulation of transnational cannabis trade into existing international economic law does not eradicate the structures of exploitation and violence that were enacted through the drug war, especially as prohibition always operated in a co-dependent relationship with neoliberalism. Any transition of cannabis into a standard commodity to be traded within the transnational marketplace would invite it into the web of international economic regulation that emerged alongside drug prohibition in the late 20th century to encase global capitalist trade from the pressure of egalitarian democracy. The final treaty of the UN's tripartite drug prohibition legislative system, the 'UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988', was signed in the middle of the 1986–94 Uruguay Round negotiations that gave rise WTO, which sought to solidify ease of trade across borders and minimize policies of protectionism. A telling instance of conflict between the undercurrent ideologies of the liberalization of trade law and barriers to drug prohibition is provided by the 2005 *EC-Tariff Preferences* case, where the WTO panel had to decide on a case that was brought by India arguing that the European Union (EU) was engaging in discriminatory trading practices by placing drug enforcement conditions onto developing countries that wanted to improve trading access into the European market.³⁶ India's case rested upon the free-trade impulse that has underwritten the WTO and international economic law more widely, highlighting that there is a requirement of non-discrimination that should restrict the ability of the EU to grant preferential access to some countries over others, depending on how well they comply with the EU's demands regarding drug enforcement control. The EU countered that an exception to the usual non-discriminatory practices of open markets could be made on the issue of different countries' compliance with drug control as the issue was significant for the protection of public health.³⁷ The WTO disagreed on finding that the EU practices of providing differential access to developing countries based upon their drug enforcement records were a violation of the EU's free-trade obligations.³⁸ This case provided a rare example of the diverging legal regimes of drug law and trade law colliding with each other, illustrating the conflict between WTO obligations and transnational drug control objectives. As the legal status of drugs, particularly cannabis begins to shift, new points of rupture with international economic law will open, especially as the idiosyncratic stigma left on cannabis through a century of prohibition encourages states to adopt unusual trading provisions alongside legal reform.

³⁵ Toby Seddon, 'Markets, regulation and drug law reform: Towards a constitutive approach', 29 (3) *Social & Legal Studies* 313–33 (2020), at 319.

³⁶ *EC—Tariff Preferences* (2005), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm (visited 18 January 2022).

³⁷ Robert Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preference: A Little Known Case with Major Repercussions for 'Political' Conditionality in US Trade Policy', 4 *Chicago Journal of International Law* 2, Article 10, 385–405, <https://chicagounbound.uchicago.edu/cjil/vol4/iss2/10> (visited 25 July 2022).

³⁸ Ravindra Pratap, 'WTO and Tariff Preferences: India Wins Case, EC the Law', 39 (18) *Economic and Political Weekly* 1788–90 (2004).

The changing status of drugs, particularly cannabis, has been accompanied by some caveats in a bid to assuage moral concerns about the legalization of this long-demonized trade. The clearest example of this comes with Canada's legalization of a domestic recreational cannabis market being accompanied with a commitment to cultivating all the plants for sale within its own borders. With the Canadian Cannabis Act 2018 containing an absolute ban on all imports of recreational cannabis, growers from traditional producer countries like Mexico, Jamaica, or Morocco are shut out of this profitable regional sector in a manner seemingly at odds with WTO rules on protectionism. As a plant, cannabis benefits from an ability to be grown in an easily manufactured environment which means although it may be typically connected with being produced in warmer climates, in practice it can be cultivated almost anywhere. The turn to legalization of cannabis in Canada in its current form could contribute to the immiseration of cannabis producers and transporters from the global south who, despite the dangers of prohibition, did have a pathway towards accessing the illicit consumer market in high-income countries in a way that they would be barred from due to the protectionist conditions of legalization. The differential treatment of cannabis sourced internationally as opposed to domestically in Canadian law is not founded on any public safety or licencing standards that producers from other countries could hope to meet, it is simply an explicit import ban propelled by an unarticulated assumption of drugs from the 'developing' world as being inherently dangerous. The Cannabis Act 2018 allows Canada's Ministry of Justice to refuse to grant an applicant a permit or licence just on the grounds that 'an organization that was incorporated, formed or otherwise organized outside of Canada.'³⁹ The normalization of this structure carries the risk of cannabis legalization accelerating the asymmetry in the global economy, with northern countries now warehousing the production, trade, and subsequent profits of this in-demand drug.

In terms of the relationship between drug policy reform and racial capitalism, there is a danger that the capture of the wealth derived from cannabis consumption by the Global North extends beyond simply the profits of the finished product but stretches up the entire supply chain into the areas of research, testing, and experimentation on the plants.⁴⁰ Much of the value of new cannabis strains being developed for the exploding medicinal and recreational markets across the world will be captured in the medical patents, trademarks, and plant variety rights that can be obtained in this field.⁴¹ Particular technologies for cultivating, testing, storing, and transporting cannabis will also be owned by companies looking to corner the market in production and supply of this newly legal commodity. Each section carries the danger of corporate capture, freezing out smaller producers, especially those already penalized during the decades of the War on Drugs. As Eliason and Howse have argued, 'A significant part of the "value" of cannabis as a product may be traded without the drug itself crossing international borders through services that transmit know-how... Typically, such know-how is proprietary and is traded through licences and contracts that require protection of trade secrets and give limited rights to use the intellectual property, for example, patents, of the provider.'⁴² Without provisions looking to facilitate reparations, cannabis legalization could result in the further calcification of racial and geographic inequalities, especially when cannabis is plugged into the current legal architecture governing trade. Systems to protect against biopiracy could give rise to a new era of cross-border, geographic, and racially discriminatory policing.⁴³ By entrenching control of the intellectual

³⁹ The Cannabis Act 2018, 62 (7) (e) (iii), <https://laws-lois.justice.gc.ca/eng/acts/C-24.5/page-5.html#h-77411> (visited 18 January 2022).

⁴⁰ Antonia Eliason and Robert Howse, 'A Higher Authority: Canada's Cannabis Legalization in the Context of International Law', 40 (2) *Michigan Journal of International Law* 327–83 (2019), at 379.

⁴¹ See Michael Blakeney, 'Patenting of plant varieties and plant breeding methods', 63 (3) *Journal of Experimental Botany* 1069–74 (2012).

⁴² See Eliason and Howse, above n 40, 379.

⁴³ See Vandana Shiva, *Protect or Plunder: Understanding Intellectual Property Rights* (London: Zed Books, 2001).

property that will underwrite the production of cannabis for the most lucrative consumer markets in this new legal industry in the hands of national companies, the Canadian government's approach to legalization may offer a better legal order through which capitalist wealth can be entrenched and protected to the advantage of 'Western' nations over the global south than the expensive chaos of prohibition.

III. CANNABIS LEGALIZATION AND REPARATIVE JUSTICE

With the potential for cannabis legalization to entrench current trends of economic inequality and asymmetry in the governance structures of global commodity markets in favour of Western, capitalist multinational corporations, we can understand better why drug reform has emerged as a policy that carries appeal to people across the traditional left-right political/economic axis. For those ideologically wedded to the sanctity of the free market, the removal of historically anomalous moralistic restrictions on a popular, tradable commodity provides a rare opportunity for personal enrichment. As compounding fiscal crises—from an escalating climate crisis to the spectre of further infectious disease pandemics—threaten the stability of the global economy and the capitalist world looks towards a future where the profits being offered in industries like oil, food supplies, and luxury goods are stagnating, prohibited psychoactive substances are starting to look like one of the few growth industries still offering exponential profit gain. Offering wealth accumulating opportunities across the entire supply chain of cannabis production, entrepreneurs have been rushing to invest in the cultivation, distribution, consumption, and advertising of cannabis products. These endeavours include developing new edible goods, vape pens, medicinal cannabis pills, and CBD oils, spanning across lifestyle cultures that stretch from the hedonistic nightlife market to the flourishing wellness industry.

In the USA, Silicon Valley tech companies, Hollywood celebrities, and even former politicians who were once passionate advocates of the War on Drugs are now investing in the new cannabis industry.⁴⁴ The sector has become particularly attractive to tobacco companies looking to rebrand themselves following the growing public concern over the health impact of smoking. In 2016, one of the traditional titans of the tobacco industry, Philip Morris International, invested \$20 million in a new cannabis company in the second largest cannabis investment of the year.⁴⁵ In a similar move, British American Tobacco purchased a 20% stake in a cannabis producer in early 2021.⁴⁶ The material wealth now on offer in the cannabis trade is driving legalization across the world, as market incentives continue to outpace political moralism. According to Bloomberg, the global legal cannabis market is estimated to be worth around \$91.5 billion by 2028.⁴⁷ The questions of reparations regarding the drug war take place against this background of wealth explosion.

In terms of international law, claims to reparations are often assessed and administrated through international or regional forums, tribunals where victims of world-historic crimes can seek compensation. An array of international treaties contain provisions that might empower a transnational tribunal that was established to review the harms of the War on Drugs, from article 2(3) of the International Covenant on Civil and Political Rights, which ensures that 'any person

⁴⁴ Chanan Tigay, 'A Silicon Valley Pot Deal', in *The Atlantic* 20 April 2018, <https://www.theatlantic.com/business/archive/2018/04/a-silicon-valley-pot-deal/558281/> (visited 21 January 2022); Matt Laslo, 'Marijuana-loving former politicians are lining up to profit off the end of their war on drugs', in *NBC news* 12 June 2019, <https://www.nbcnews.com/think/opinion/marijuana-loving-former-politicians-are-lining-profit-end-their-war-ncna1016746> (visited 21 January 2022).

⁴⁵ Shoshanna Solomon, 'Philip Morris investment in Syqe was 2nd-largest 2016 cannabis deal – report', *The Times of Israel*, 9 January 2017, <https://www.timesofisrael.com/philip-morris-investment-in-syqe-was-2nd-largest-2016-cannabis-deal-report/> (visited 21 December 2021).

⁴⁶ Patricia Nilsson, 'British American Tobacco takes stake in Canadian cannabis producer', *The Financial Times* 11 March 2021, <https://www.ft.com/content/4690ba7b-d8a8-4e0e-84f6-cf600f52fb6c> (visited 21 December 2021).

⁴⁷ PR Newswire, 'Legal Cannabis Market Size Worth \$91.5 Billion By 2028', in *Bloomberg* 27 July 2021, <https://www.bloomberg.com/press-releases/2021-07-27/legal-cannabis-market-size-worth-91-5-billion-by-2028-cagr-26-3-grand-view-research-inc> (visited 21 December 2021).

whose rights or freedoms as herein recognized are violated shall have an effective remedy' to article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, which includes a 'the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.'⁴⁸ However, with the international treaties on drugs embracing change at a far slower pace than domestic legislation across North America and Europe, international law currently does not present itself as a viable arena for those committed to drug policy reform through a lens of reparative justice. Despite the changing scheduling of cannabis with the Single Convention pointing to the first cracks in UN's drug control system, widespread acceptance of the failure of the War on Drugs and the harms that it has visited upon scores of the world's most vulnerable populations remains absent from international law. History has not yet arrived at the point at which transitional justice forums are being established to review the harms caused by the drug war, although the Comprehensive System for Truth, Justice, Reparations, and Non-Repetition that was created through the 2016 agreement to end the armed conflict in Colombia might serve as a prototype for such endeavours, as one of its aims will be to analyse the interconnection of human rights violations drug, paramilitary violence, land dispossession, and counter-narcotics policy in the context of the Colombian conflict.⁴⁹

A. The social equity model

Critics of the traditional model of reparations often point to the futility of distributing compensation payments to victims in the context of trying to advance systemic change.⁵⁰ Reparations payments can often be categorized as an element of the politics of symbolism, rather than facilitating a substantial restructuring of the material basis of a society. In fact, financial payments may in time act as a block on systemic change, as payments come to stand as the easy retort to anyone still complaining of structural inequalities after the money has been handed out; the reparations payment here serves as the conclusion to an issue of injustice that is, in practice, ongoing, rather than the opening of a new era of attention on the problem. Therefore, it is understandable why the tort law system of compensation payments to victims has not been the most prominent method employed to include reparative justice within drug policy reform.

Instead, the profits being generated through the legal cannabis market have reignited questions about how wealth redistribution can constitute reparative justice. This can compose a broad tapestry of policies aimed at facilitating both a sustained transfer of wealth to disadvantaged communities and a wholesale restructuring of the economic order of society. Currently, the most common legislative mechanism for trying to guarantee some compensation to the victims of the drug war is the implementation of what is called social equity programmes, alongside the creation of the new commercial cannabis industry. At least in the USA, 'social equity programmes' are the general terms used to describe a myriad of provisions that can be included within cannabis reform legalization in order to try and transfer wealth and opportunities to traditionally disenfranchised, disadvantaged, and over-policed communities. Provisions include initiatives like the cancellation and erasure of criminal sentences for cannabis possession and supply, the allocating of tax revenue to disadvantaged communities, and the delineation of a specific portion of the new licences to be distributed only to minority applicants. Whilst these

⁴⁸ Article 2(3) of the *International Covenant on Civil and Political Rights* (1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (visited 25 July 2022); Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial> (visited 5 March 2022).

⁴⁹ Onur Baniker, 'The Comprehensive System for Truth, Justice, Reparations and Non-Repetition', in James Meernik, Jacqueline H.R. DeMeritt, Mauricio Uribe-Lopez (eds), *As War Ends* (Cambridge: Cambridge University Press, 2019).

⁵⁰ Glenn C. Loury, 'It's Futile to Put a Price on Slavery', in *New York Times* 29 May 2000, <https://www.nytimes.com/2000/05/29/opinion/it-s-futile-to-put-a-price-on-slavery.html> (visited 3 April 2022).

programmes are often careful to avoid any explicit reference to the idea of reparations, analysts do consider that ‘the objectives advanced by social equity programming—expungement initiatives, licencing preferences, and community reinvestment—should be embraced as a unique form of reparations.’⁵¹

The commuting of prison sentences appears to be the most immediate reparative demand that advocates for legalization can successfully advocate for. It is hard to envision reformers being able to lay claim to an ending of the War on Drugs, if drug convictions continue to impact the lives of former convicts, sometimes decades after the crime they were sentenced for has been rendered legal. Expunging cannabis convictions does not only facilitate early release for prisoners currently incarcerated for related crimes, but it can also elide a comprehensive transformation in life chances even for people who may have long completed their sentence. With the punitive architecture of criminal record inspection and mandatory probationer and employee drug testing, those who have served time for drug-related offences can often find that even historically distant convictions can impact everything from their ability to travel abroad, to apply for jobs, to gain access forms of public housing, and to recover the custody of their own children. Despite the positive aims of such expungement provisions, an initial issue that emerged was that often these provisions placed the responsibility of applying for expungement on the individuals who were affected, making the ability to navigate complex paperwork and having the financial means to pay for the application a requirement of anyone’s ability to obtain such relief.⁵² However, some of the states that have legalized cannabis more recently, such as California and New York, have included a mechanism of automatic expungement as part of the new law, a system that sees the state automatically erase criminal records without impacted individuals having to physically lodge an application.⁵³ As a result of states adopting a system of auto-expungement, vulnerable people are no longer required to navigate a complicated or expensive bureaucratic system in order to have their lives no longer impeded by crimes that their society no longer recognizes. Auto-expungement should be an entry-level provision included in any drug policy reform programme that intends towards any gesture of reparative justice.

Another common element of social equity provisions can be some form of commitment to ensuring that a large proportion of the accumulated tax revenue that will be gained by states from the new legal vendors of cannabis will be reallocated for investment in low-income and racial minority neighbourhoods.⁵⁴ Perhaps the most ambitious tax redistribution scheme within cannabis legalization attempted so far is the scheme in New York state, where, within the bill that enacted cannabis reform, the state committed to bracketing 40% of tax revenue it will gain from the new legal industry for targeted economic and social support for historically disadvantaged communities.⁵⁵ The employment of tax-based methods of redistributive reparative justice places the cannabis social equity provisions within a particular tradition of racial reparations that has, at times, been proffered as a less confrontational pathway towards facilitating the type of wealth transfer than would be necessary to offset the results of racial capitalism that the more common idea of reparations as direct cash payments.⁵⁶

⁵¹ Jasmin Mize, ‘Reefer Reparations’, 3 (2) *Social Justice and Equity Law Journal* (2020) 1–35, at 4–5.

⁵² Kari Lydersen, ‘For many, even “automatic” clearing of marijuana records could be complicated’, in *Chicago Business*, 25 November 2019 <https://www.chicagobusiness.com/crains-forum-cannabis/many-even-automatic-clearing-marijuana-records-could-be-complicated> (visited 21 January 2022).

⁵³ Assembly Bill No. 1076-Chapter 578, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1076 (visited 22 January 2022).

⁵⁴ American Civil Liberties Union, *Bullies In Blue: The Origins And Consequences Of School Policing* (New York: ACLU Foundation, 2017).

⁵⁵ The Marihuana Regulation & Taxation Act, <https://cannabis.ny.gov/marihuana-regulation-and-taxation-act-mrta> (visited 25 January 2022).

⁵⁶ Kyle Logue, ‘Reparations as Redistribution’, Available at SSRN: <https://ssrn.com/abstract=586987> (visited 22 December 2021).

On the other hand, the element of social equity cannabis programmes that most clearly sharpen the tensions over ownership and competition that underlie any system of capitalism is the various steps that states have taken in some US states to try and guarantee a significant proportion of Black and racial minority ownership in the new legal cannabis dispensaries in compensation for the decades of impoverishment through the drug war. In states like California, Massachusetts, and Illinois amongst others, minority participation in the recreational cannabis industry has been encouraged through affirmative action application policies that prioritize candidates from racial minority backgrounds, mentorship schemes for those applicants, funded cultivation training programmes, and start-up business grants or interest-free loans. Often, these licencing provisions have been drafted to be made available not only to formerly incarcerated individuals who have previously been convicted of a cannabis-related offence and, as a result, face multiple barriers of exclusion in the mainstream economy, but also to the immediate family members of these individuals.⁵⁷ The familial element of these provisions functions as a gesture of recognition of the way any attempt to address the harms of prohibition must confront the intergenerational aspect of the harm caused by the enforcement of the drug war. Reparations almost by definition invoke the challenge of quantifying harm across generations as so often the victims of the original harm do not survive long enough to be the beneficiaries of the changing cultural or political standards that give rise to the potential of compensation.⁵⁸

Of the social equity laws currently on the books, New York state probably provides the most ambitious model of provisions so far. It also indicates the importance of on-the-ground organized activist pressure in order to extract maximum benefits at the key moment of the transition in the legal status of cannabis. In 2019, the proposals to legalize recreational cannabis at the state level in New York were frustrated, not by the expected religious or conservative opposition but by racial justice activists and minority politicians who recognized that the incoming law contained insufficient provisions for the communities who had been devastated by the departing system of prohibition. A further 2 years of negotiations were required as advocates extracted greater concessions from the state. In March 2021, the Marijuana Regulation & Taxation Act was eventually passed in New York state once it was adjudged to contain sufficient provisions for the minority communities.⁵⁹ At the heart of the Act was the establishment of a goal to award 50% of licences that the state would issue to applicants from disadvantaged communities. This category includes ‘individuals from communities disproportionately impacted by the enforcement of cannabis prohibition’, ‘minority-owned businesses’ and people who were ‘convicted of a cannabis-related offense...or had a parent, guardian, child, spouse, or dependent, or was a dependent of an individual who, prior to the effective date of this chapter, was convicted of a cannabis-related offense.’⁶⁰ The New York Marijuana Regulation & Taxation Act also includes automatic expungement for former prisoners; legal protections for cannabis users against the discrimination they may face from housing, education, or parental custody authorities for their drug use; avenues for people with past convictions from illegal drug activities to become involved in the new legal trade; and the right for adults to be free to cultivate up to six plants for themselves for their own personal use in their own place of residence. To encourage greater engagement in the legal cannabis industry from communities traditionally excluded

⁵⁷ City of Sacramento, Cannabis Opportunity Reinvestment and Equity (CORE) Program, <https://www.cityofsacramento.org/Finance/Revenue/Sacramento-Marijuana-Information/Core-Program> (visited 20 January 2022).

⁵⁸ For more on reparations and intergenerational trauma see, Alfred L. Brophy, ‘What Should Inheritance Law Be? Reparations and Intergenerational Wealth’, 20 (2) *Transfers, Law & Literature* (2008) 197–211.

⁵⁹ Tiffany Kary, ‘All Eyes on New York as Legalization Looms: Cannabis Weekly’, in *Bloomberg* 4 October 2021, <https://www.bloomberg.com/news/articles/2021-10-04/all-eyes-on-new-york-as-legalization-looms-cannabis-weekly> (visited 25 January 2022).

⁶⁰ Marijuana Regulation & Taxation Act, Office of Cannabis Management, https://cannabis.ny.gov/system/files/documents/2021/09/cannabis-management-fact-sheet-9-21-social-equity-04_0.pdf (visited 28 January 2022).

from the legitimate economy, New York's Cannabis Control Board is funding an incubator programme to provide direct support to minority applicants as well counselling services, education, small business coaching, financial planning, and compliance assistance.

An unintended consequence of the state-by-state process through which cannabis legalization has been adopted in the USA is that it facilitates an ease of comparison between states regarding the role that reparative justice can play in drug reform. The approach to cannabis reform undertaken in the states that have placed social equity at the heart of the new industry sits at odds with the more commercial outlook that has been prioritized in states where the lawmakers have not had to draft their laws under the same kind of pressure to include reparations alongside reform. States that are home to a more libertarian political tradition have sought to arrange a cannabis industry in a fashion that best serves the interests of the market, eschewing any gestures towards reparative justice. In the state of Alaska, for instance, not only was there no social equity programme included in the original reform initiative, but cannabis legalization worked to amplify the demonization faced by people caught up in the drugs trade when it was prohibited. Legalization precipitated a new era of exclusion for the formerly incarcerated as it doesn't allow anyone who has had a felony conviction in the last 5 years—a category that includes most drug offences—to apply to hold licence to trade cannabis in the new legal market.⁶¹ A similar model can be perceived in Nevada—a state with an embedded history of pro-business and anti-labour politics—where individuals formerly incarcerated for drug offences through the drug war are not only barred from gaining a distribution licence in the new, post-prohibition legal market, they are also proscribed from working as an employee or even as a volunteer in any of the legal cannabis dispensaries.⁶² By erecting such high barriers to entry, reinforced by the high cost of licence application and operating costs in a highly competitive marketplace, in these states cannabis legalization promises to actually exacerbate the inequality between racial groups.

B. Cannabis reparations and Indigenous peoples

Whilst the experimentation with including programmes of reparative justice with cannabis reforms has been most advanced in the USA, cannabis legalization and wider drug policy reform are far from exclusively American phenomena, as illustrated by the chronology of legalization outlined earlier. Therefore, as Mize suggests, 'there is value in taking a global perspective on "reefer reparations," and how it can be a building block towards international decriminalization and regulation.'⁶³ The very structure of the drug war encouraged much of the violence necessary to try and ensure compliance with prohibition to fall heaviest on the countries of the global south, where organic, plant-based drugs like cannabis, coca, or opium were easiest to produce. The laws on prohibition primarily targeted the production and supply of drugs over the consumption of them, believing that if the cultivation of substances was strangled at the source, then the demand that they inspired, particularly in the 'civilized' Western world, would subsequently collapse. The emphasis that international law placed on controlling the production and supply of drugs meant that the problem of drugs continued to be associated primarily with the areas and peoples understood to produce the substances—afro-Colombian farmers, Afghan poppy growers, Nigerian contraband smugglers—not with the reasons for their growing desirability amongst Western society.⁶⁴ Therefore, racially subaltern and indigenous subjectivities came to be understood in the West as discursively intertwined with the danger of these prohibited psychoactive substances, an assumption that was reinforced by these communities being

⁶¹ Allie Howell, 'Criminal Convictions Restrictions in Marijuana Licensing', in *Reason* Foundation September 2018, <https://reason.org/wp-content/uploads/criminal-conviction-restrictions-for-marijuana-licensing.pdf> (visited 23 December 2021) 8.

⁶² *Ibid.*, 10.

⁶³ Jasmin Mize, 'Reefer Reparations', 3 (2) *Social Justice and Equity Law Journal* (2020) 1–35, at 34.

⁶⁴ William McAllister, *Drug Diplomacy in the Twentieth Century* (London: Routledge, 2000) 133.

traditionally excluded from the 'legitimate' economic sphere and thereby, in many instances, finding refuge within this illegitimate counter-side of global trade. The campaign to destroy raw drug plant materials at their source, endangering indiscriminate aerial fumigation, crop eradication, and agrarian reform programmes led by paramilitary enforcement agencies, accelerated the economic devastation as well as experience of violence endured by indigenous communities in Latin America, North Africa, and Southeast Asia amongst others in the 20th century.

Following the passing of the UN Declaration on the Rights of Indigenous Peoples in 2007, there has been an increasing awareness of the need to consider reparative justice for the way modern social and economic mechanisms were built upon the breaches of the individual and collective rights of indigenous communities, particularly in the USA.⁶⁵ Reframing historical ills as human rights violations has opened the door to give rise to the legal basis of reparations for indigenous communities, and this conversation can encapsulate not only the land seizures and dispossessions of the centuries gone by but also compensation for the impact of the 20th-century drug war. In its approach to reckoning with the legacy of colonial harm upon indigenous people, Canada has been forced to compensate not only for the violence of the aforementioned schools programme but also for having deprived First Nation communities of their wealth through unconscionable land treaties. Since at least the *Delgamuukw v British Columbia* in 1997, recognition of the economic component of indigenous claims to land and resource ownership have been an increasingly legitimate element of the Canadian legal system.⁶⁶ Yet following Canada's decision to legalize recreational cannabis in 2018, there have been insufficient connections made between the drug policy reform movement and the movement for reconciliation with Indigenous communities. The Canadian government has provoked the ire of the Assembly of First Nations by erecting alongside the new laws that licence the trade and use of a cannabis a set of regulatory barriers excluding Indigenous peoples from participating in the new commercial market. Bill C-45, otherwise known as 'The Cannabis Act 2018', the legislative bill that changed the legal status of cannabis in Canada did not contain a provision that would allow First Nation territories to the control cannabis cultivation and retail within their reservations.⁶⁷ As Valleriani et al. have proposed cannabis legalization should prioritize 'protecting Indigenous sovereignty and Inherent rights to the cannabis plant and our right to cultivate, process, dispense and transport cannabis and hemp... as a primary objective. These rights are not clearly defined in Bill C-45'.⁶⁸ Furthermore, with Indigenous communities existing within a territorial network that cannot be merely translated into the standard map of sovereign nation states, the transnational import and export restrictions of Bill C-45 discussed earlier also raise the question of whether the extent to which they were developed with the consent of Indigenous people or recognized their general rights of exception.

Canada's legalization bill also overlooked the inclusion of any explicit social equity provisions such as the kind that are now being implemented across American states, failing to set aside a specific proportion of licences for indigenous applicants or mark out the percentage of the profits generated through the new industry that would be investment into indigenous communities. Furthermore, there are also the added issues of indigenous sovereignty with respect to how the Canadian government can regulate and enforce the trade of this newly legalized commodity across First Nation territories. Rather than to consider and address these questions, Canada's Cannabis Act 2018 largely ignored them, making just one reference to Indigenous

⁶⁵ Federico Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008) 12–65.

⁶⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do> (visited 12 January 2022).

⁶⁷ The Cannabis Act 2018, <https://laws-lois.justice.gc.ca/eng/acts/C-24.5/page-5.html#h-77411> (visited 18 January 2022).

⁶⁸ Jenna Valleriani, Jennifer Lavalley, Ryan McNeil, 'A missed opportunity? Cannabis legalization and reparations in Canada', 109 (5–6) *Canadian Journal of Public Health* 745–47, at 746.

people and communities within the law when detailing a future commitment to consider Indigenous interests when a mandated 3-year review of the law is undertaken.⁶⁹ Unsurprisingly, as a result, indigenous people have been locked out of the wealth generated by cannabis legalization in Canada. Owusu-Bempah has shown that despite the fact that ‘Black Canadians and Indigenous people were generally more likely to be arrested for cannabis possession than white people... Black people comprised just 1% and Indigenous people 3% of the leaders of licenced cannabis producers in Canada.’⁷⁰ This means rather than repairing the harms that prohibition and its policing visited upon indigenous communities, cannabis legalization in Canada is only adding to the long history of colonial violence within the country and many of the same racial and economic disparities in a new historical context.⁷¹

IV. CONCLUSION

The insights derived from the tradition of racial capitalism have reinforced understandings of how changes in law can facilitate a significant shift in material conditions, which can, in turn, impact the racial structure of the world. This article has sought to illustrate how, in addition to the standard arenas of international economic legal analysis such as trade and food standards or international intellectual property rights, the seismic change currently underway in national and international drug laws are turning cannabis into a new terrain of struggle in the ongoing quest of challenging racial capitalism. The self-regulating market is a myth. The racial disparities that have marked the global economy since colonization are not the natural outgrowth of a deregulated market but require laws and state craft to be produced and reproduced.

Drug prohibition and the resulting War on Drugs provided a potent apparatus of violence, dispossession, and detention laid over the globe in a manner that for a century disproportionately impacted racial minority communities in the West and poorer countries of the South on a global scale. Within the decline of empire and explicit scientific racism, new legal regimes like the War on Drugs provided avenues through which the inequalities of racial capitalism could persevere into a new epoch. Now, with the era of the War on Drugs approaching its twilight, I argue that unless reparative justice sits at the heart of drug policy reform, then the legalization of drugs like cannabis runs the risk of advancing existing dynamics of racial capitalism, rather than counteracting them. Unless balanced against laws committed to reparative racial justice, cannabis legalization may merely facilitate the transfer of a high in-demanded commodity, normally cultivated in the global south, into the ownership of an almost entirely white, North Atlantic investor class. A whole range of licit commodities has played a similar role in accelerating the disparities of global racial capitalism over the same lifespan as the War on Drugs, including gold, oil, and even water.⁷² Just like these other commodities, tracing the movement of cannabis at this crucial historical juncture offers another perspective through which we can explore the default structures of the laws, customs, and institutions that govern the global economy. Legalization of cannabis must learn from the struggles that have surrounded the trade of other resources and include groups impacted by the War on Drugs such as cannabis cultivators from places like Jamaica, Mexico, or Morocco in both the national and international forums where the norms that will govern the new cross-border trade in cannabis will be developed. Unless the interests of formerly criminalized producers and traffickers from the global south and racial minority communities of the

⁶⁹ The Cannabis Act 2018, 151.1 (1), <https://laws-lois.justice.gc.ca/eng/acts/C-24.5/page-11.html#docCont> (visited 18 January 2022).

⁷⁰ Akwasi Owusu-Bempah, ‘Where Is the Fairness in Canadian Cannabis Legalization? Lessons to be Learned from the American Experience’, 55 (2) *Journal of Canadian Studies/Revue d’études canadiennes* 395–418 (2021), at 396, 408.

⁷¹ See Valleriani, Lavalley, and McNeil, above n 68, 746.

⁷² See Hannah Appel, *The Licit Life of Capitalism: US Oil in Equatorial Guinea* (Durham: Duke University Press, 2019) or Laura Pulido, ‘Flint, Environmental Racism, and Racial Capitalism’, 27 (3) *Capitalism Nature Socialism* 1–16.

West are represented at the table, cannabis reform could, in practice, herald the start of a new, more insidious epoch of racial capitalism through the trade rather than prohibition of drugs.

Alternatively, as some activists and politicians in the USA are already articulating, reparations—and they use this word explicitly—could provide an opportunity for people from communities that have been devastated over generations by cannabis prohibition and policing to receive a substantial wealth transfer from the multi-billion industry now blooming.⁷³ Victims of failed militarized state projects have found themselves qualifying as recipients of reparation payments once the era of panic and paranoia that drove their harm had finally dissipated. Are the victims of the drug war and their families of an order removed from the Japanese Americans who were interned in camps during the Second World War or descendants of those who disappeared by Augusto Pinochet's regime in Chile? In line with the broader discussions within the literature on reparations, there is still an ongoing contestation about the preferred frameworks that could be implemented for evaluating reparations policies in terms of drug policy reform. Claims for direct financial compensation do not appear to be a suitable mechanism for addressing the long-term, racially disproportionate impacts of drug policing in the way they might have worked for other reparations claimants. However, there are various models of racial, social, and economic justice initiatives currently being trialled across the world, which have been covered over the course of this article. Yet despite the considerable boldness of certain social equity provisions in the bid to ensure reparative justice, the full responsibility for the structural injustice of the century-long War on Drugs visited upon racialized communities has yet to be borne by international law.⁷⁴ What would 'social equity provisions' look like on a global level? How could international trade law be weaponized to ensure global equity within the new cannabis market? Would extending the inclusion of indigenous people in the legal cannabis industry encourage the furthering of the domestication of indigenous people?⁷⁵ Would turning drug war victims into cannabis distributors be enough to overturn the world-making process initiated by 1492?⁷⁶ Reparations will need to construct a new world, not just repair the damage wrought by the current one. When it comes to human's relationships with psychoactive substances and to our understandings of our own consciousness, this will require a greater transformation than the aim of merely trying to turn substances that were originally banned because of fear regarding their compatibility with Western modernity into standard commodities for capitalist profiteering. Reparation justice through drug policy reform will require a reimagining of the human relationship with the environment, recognizing the slippage between waging war against plant life with the wars that have been waged against the bodies of racially subaltern subjects.⁷⁷ It would require a turn away from the excessive logic and rationality of a capitalist accumulation that has driven the industrialization of the planet. This logic has stood in as a representative of civilization, with the condemnation of drugs functioning as the metaphor for all other categories fixed in exclusion from this category. To repair the damage that this ideology has visited will require the construction of a new dynamic between humanity and the planet.

⁷³ Jenni Avins, 'In the age of luxury cannabis, it's time to talk about Drug War reparations', *Los Angeles: Quartz*, 25 January 2019, <https://qz.com/1482349/weed-and-reparations/> (visited 15 January 2021).

⁷⁴ Catherine Lu, 'Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress', 19 (3) *The Journal of Political Philosophy* 261–81 (2011), at 269.

⁷⁵ See Amar Bhatia, 'Statehood, Canadian sovereignty, and the attempted domestication of Indigenous legal relations', in Sujith Xavier, Beverley Jacobs, Valarie Waboose, Jeffery G. Hewitt, Amar Bhatia (eds), *Decolonising Law: Indigenous, Third World and Settler Perspectives* (London: Routledge 2021) 99–125.

⁷⁶ See Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press).

⁷⁷ See Shela Sheikh, 'Translating Geontologies', 21 *The Avery Review* (2017) 165–84.