Ravin v State of Alaska: An Outdated 'Product of its Time', or an 'Enlightened' Personal Liberties Approach to the Marijuana Debate?

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Table of Contents

I. Introduction

On the evening of 11 December 1972, in Fairbanks, Alaska, Irwin Ravin was pulled over by police for driving with a broken taillight.[1] Ravin, a local attorney, had been on the lookout for a test case through which to

1 *Ravin v State of Alaska*, 537 P.2d 494, 494 (Alaska 1975) ('*Ravin*').

challenge the constitutionality of Alaska's marijuana laws, which he deemed 'unjust'.[2] Just two nights earlier, he and his business partner and fellow attorney Robert Wagstaff had agreed that the 'legal and political climate in Alaska' was right for such a case.[3] Thus, knowing that he had two 'joints' in his coat pocket, when stopped by police Ravin refused to sign the traffic citation given to him, and effectively forced his arrest.[4] After arriving at the police station, the joints were found, and Ravin was charged with their possession.[5] Describing the incident in 1990, Ravin recalled, 'I made them arrest me, and then gave them the pot.'[6]

In the case brought before the Alaska Supreme Court, *Ravin v State of Alaska* ('*Ravin*') in 1975,[7] it was unanimously held that an express right to privacy, enshrined within Alaska's Constitution, protected an adult's ability to possess and use a small amount of marijuana at home for personal use, and thus rendered laws prohibiting such use invalid. In *Ravin*'s immediate aftermath, the decision was heralded as 'a progressive, enlightened and unprecedented ruling',[8] that 'should prove persuasive' in other States.[9] However, in the almost 50 years since *Ravin*, that has not proven to be the case. Despite the close resemblance of Alaska's privacy right with other US state constitutions,[10] *Ravin* remains the only decision of a US state or federal court finding in favour of a constitutionally enshrined privacy right protecting a degree of marijuana use and possession. The refusal of other US state courts to embrace *Ravin* has prompted some more recent commentators to re-consider its contemporary relevance, and

2 Robert Black, 'Cannthropology: Legalizing the Last Frontier – How the second-to-last state to join the Union became the second state to decriminalize marijuana' (Web page, 1 December 2021); 'Use of Marijuana in Horne Legalized by Alaska Court' *New York Times*, (New York, 28 May 1975) 8.

3 Patrick Anderson, *High in America*, (2015) 207.

4 'Test Case on Pot', *Anchorage Daily News* (Anchorage, 21 April 1973) 20.

5 *Ravin* (n 1) 494.

6 Black (n 2).

7 *Ravin* (n 1) 494.

8 Janet Breece, 'Ravin v State: Marijuana Use in the Home Protected by Right of Privacy' *North Carolina Central Law Review* (1975) 7(1) 163, 163.

9 Bruce Brashear, 'Marijuana Prohibition and the Constitutional Right of Privacy: An Examination of Ravin v. State'*Tulsa Law Journal* (1975) 11 563, 565.

10 See e.g., *Arizona Constitution* Article II, § 8; *California Constitution* art I, § 1; *Florida Constitution* Art. I, § 23; *Hawaii Constitution* Art. I, § 5; *Illinois Constitution* Art. I, § 6; *Louisiana Constitution* Art. I, § 5; *Montana Constitution* Art. II, § 10; *South Carolina Constitution* Art. I, § 10.

question whether the decision was 'like so many other artifacts of the 1970's... too much a product of its time'.[11]

Through an examination of the context in which the *Ravin* decision was made—namely, Alaska's socio-cultural 'zeitgeist', the circumstances of Alaska's fledgling judicial system, and legal and scientific attitudes toward marijuana in the 1970's—this chapter partially agrees with the view that *Ravin* was a product of circumstance. In addition, through analysis of criticisms levelled at the Court's decision, this chapter will also explain why *Ravin* has proven unpersuasive in other US states. By illuminating the emerging international trend of national courts finding similarly to the Alaska Supreme Court in *Ravin*, it is argued that, despite being catalyzed by such a unique confluence of factors, that Court's application of an approach to constitutional interpretation which attempts to deny weight to 'notions of morality' and places an emphasis on individual liberty was 'enlightened', and provides valuable lessons that ought to be considered in any evaluation of prohibitory marijuana laws.

This discussion takes on heightened relevance in the current context. Today, there is growing realisation that the so-called 'war on drugs' has failed.[12] Marijuana has been described as 'at a pivotal moment' in the unravelling of the previously almost ubiquitous prohibition internationally.[13] As of 2020, over 50 countries around the world have either decriminalised or legalised marijuana use, and a wave of commercial forces have moved in to capitalise on subsequent business opportunities.[14] In most cases of marijuana legalisation, other policy aims have assumed primacy at the expense of individual liberty-based arguments; such as leveraging the marijuana industry's economic benefits;[15] improving public health,[16] and

11 Eric Johnson, 'Harm to the Fabric of Society as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme from Ravin v. State' *Seattle University Law Review* (2003) 27(1) 41, 41.

12 Global Commission on Drug Policy, *War on Drugs: Report of the Global Commission on Drug Policy* (2011) 17; Glenn Greenwald, 'Do Adults Have a Privacy Right to Use Drugs? Brazil's Supreme Court Decides', *The Intercept* (online), 11 September 2015.

13 Toby Seddon, 'Immoral in Principle, Unworkable in Practice: Cannabis Law Reform, the Beatles and the Wootton Report' *British Journal of Criminology* (2020) 60(6) 1567, 1568.

14 See ibid.

15 Christopher Stiffler, *Amendment 64 would produce $60 million in new revenue and savings for Colorado*, Colorado Centre on Law and Policy (2012) 1.

enhancing public security.[17] A recent example, New Zealand's proposed marijuana legalisation bill, tabled in October 2020, had the stated aim of reducing the harms associated with cannabis and restricting minors' access to it.[18]

Marijuana reform remains a controversial political issue in many places. In the world's first recreational marijuana legalisation referendum held in 2020, 50.7% of New Zealanders voted against implementation of the legalisation bill, leading the New Zealand government to side-line any legislative change to marijuana's legal status for 'the foreseeable future'.[19] Despite numerous US states having legalised recreational marijuana use,[20] it remains a 'Schedule I' narcotic under US Federal drug legislation[21]—a class reserved for drugs with the most 'serious potential for misuse and no medical benefit'.[22] Also classified within Schedule I is heroin, along with other opiates.[23]

It follows from these examples that, while marijuana is having a 'high time' at present, the debate is far from over. Scholars note the similarities between alcohol prohibition in the United States during the early 20th Century and the ongoing illegality of marijuana—in both cases, it is claimed that state regulation was guided largely by 'puritanical moral views' harboured within a societal majority.[24] As such, recognizing judicial approaches that scrutinize the impact of marijuana legislation on individual freedoms, a

16 Task Force for the Legalization and Regulation of Cannabis in Canada, Government of Canada, *The Final Report of the Task Force on Cannabis Legalization and Regulation* (2016) 100.

17 Rosario Queirolo et al, 'Why Uruguay legalized marijuana? The open window of public insecurity' *Addiction* (2018) 114(7) 1313, 1313.

18 Parliamentary Counsel, *Cannabis Legalisation and Control Bill. Exposure Draft for Referendum, Explanatory Note,* (NZ 2020) 1.

19 Marta Rychert and Chris Wilkins, 'Why did New Zealand's referendum to legalise recreational cannabis fail? *Drug and Alcohol Review* (2021) 40 877, 879.

20 Ilaria Di Gioia, 'Intrastate Conflicts and Lessons Learnt from Marijuana Legalization' *Fordham Urban Law Journal* (2022) 4 617, 617.

21 *Comprehensive Drug Abuse Prevention and Control Act of 1970* (United States), Schedule 1, Pub.L, 91–513, 84 Stat. 1236 ('*Drug Act 1970*').

22 Ibid.

23 See ibid.

24 Eric Blumenson and Eva Nilsen, 'Liberty Lost: The Moral Case for Marijuana Law Reform' *Indiana Law Journal* (2010) 85 279, 281 ('*Liberty Lost*'); James Bakalar and Lester Grinspoon, *Drug Control in a Free Society* (1984) 86.

threshold issue in liberal societies,[25] is important in ensuring that historical mistakes made in the regulation of alcohol and tobacco—and indeed with the regulation of marijuana itself both before and since *Ravin*—are avoided, now and in the future.

II. Courts, Culture, and Cannabis in 1970's Alaska

To make sense of the *Ravin* decision, it must be placed in the broader context of Alaskan history and marijuana reformist movements that gathered momentum in the United States and many parts of the world[26] during the mid-20th Century. Three elements are of relevance in outlining this context: the historical identity of Alaskan culture and society, the early development of Alaskan jurisprudence under the Alaska Supreme Court, and the socio-legal status of marijuana in the 1970's, both in Alaska and the US mainland.

1. Historical Identity of Alaskan Culture and Society

Since the sale of Alaska by Russia to the United States in 1867,[27] commentators have described Alaskan society as being marked by a 'longstanding tradition and respect for individuality'.[28] Much of this can be traced back to the State's early settlers, many of whom had travelled north from the mainland either seeking fortune during the Klondike gold rush in the winter of 1897-1898;[29] were 'on the run' from misfortune; or simply sought 'frontier' refuge from the constraints of the mainland's burgeoning cities and communities.[30] Susan Orlansky and Jeffery Feldman note that Alaska's community values have historically been underscored by a 'high level of tolerance for personal idiosyncrasy, unconventional thought and

25 Blumenson and Nilsen, *Liberty Lost* (n 24) 281.
26 See generally Seddon (n 13).
27 Claus Naske and Herman Slotnick, *Alaska: A History of the 49th State* (2nd ed, 1994) 60–61.
28 Susan Orlansky and Jeffery Feldman, 'Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework' *Alaska Law Review* (1998) 15 1, 2.
29 Stephen Haycox, *Battleground Alaska: Fighting Federal Power in America's Last Wilderness* (2016) 17.
30 Mary Mangusso, *Interpreting Alaska's history: an Anthology* (1994) 5.

lifestyle', and a deep respect for personal privacy.[31] Concordantly, Mary Ehrlander, discussing Alaskan culture before and after the state's 1916 alcohol referendum, described the then US-territory as embracing 'masculine frontier norms'—some of which, Ehrlander notes, 'tolerated and even encouraged risky behaviors'[32]—alongside 'anti-authoritarian attitudes and [an] emphasis on individual rights'.[33]

2. The State of Alaska's Legal System

Although several early Alaskan legal decisions underscored this value placed on individual liberty,[34] as Alaska was governed as a federal territory prior to becoming the 49th State of the Union in 1959,[35] these decisions were ultimately subject to legal precedent established on the American mainland, and thus guided by a 'different culture'.[36] Indeed, prior to statehood, appeals from Alaskan territorial courts were heard by the United States Court of Appeals for the Ninth Circuit, located in San Francisco.[37]

Following the achievement of Alaskan statehood in 1959, and subsequent implementation of the Alaska Constitution,[38] the challenge of melding uniquely Alaskan values into a coherent model of constitutional law fell upon the newly-formed State Judiciary, led by the Alaska Supreme Court.[39] Commentators have identified several factors influential in this initial consolidation of Alaskan constitutionalism; including, the pre- and post-statehood influence of the federal government, Alaska's late admission to the Union, Alaska's physical, social and political geography, and a recognition of the Alaskan community's strong commitment to individual

31 Orlansky and Feldman (n 28).

32 Mary Ehrlander, 'The Paradox of Alaska's 1916 Alcohol Referendum: A Dry Vote within a Frontier Alcohol Culture' *The Pacific Northwest Quarterly* (2010) 102(1) 29, 40.

33 Ibid 29.

34 See e.g., *Glover v. Retail Clerk's Union Local* 1392, 10 Alaska 274 (D. Alaska 1942); *Smith v. Suratt*, 7 Alaska 416 (D. Alaska 1926).

35 See Gerald McBeath and Thomas Morehouse, *Alaska Politics and Government* (1994) 7.

36 Orlansky and Feldman (n 28).

37 Ibid.

38 Gerald McBeath, *The Oxford Commentaries on the State Constitutions of the United States: The Alaska Constitution* (2011) 21 ('*The Oxford Commentaries*').

39 Orlansky and Feldman (n 28).

rights.[40] These factors—alongside what has been described as a deliberate move by the Alaska Supreme Court to distance itself from contemporaneous changes to the 'judicial philosophy' of the United States Supreme Court, brought about by the appointment of four additional conservative justices by then-President Richard Nixon[41]—resulted in the former gradually adopting a proactive, Alaskan-focussed interpretation of the state constitution that distinguished it from its federal counterpart.[42]

This distinct Alaskan approach was first explicitly stated in *Roberts v State.*[43] There, the Alaska Supreme Court expressed the view that it was 'not bound' by the United States Supreme Court and carried a 'right and obligation' to conduct independent, and oftentimes distinct, interpretation of the Alaska constitution.[44] Fuller meaning to this notion was given in *Baker v City of Fairbanks*,[45] where the Court specified that it had a duty to 'move forward' and interpret the constitutional provisions more broadly than its federal counterpart.[46]

As the original Declaration of Rights incorporated into the Alaskan Constitution did not contain any express right to privacy,[47] that was not an area wherein the Court initially sought to actively develop Alaskan law.[48] For the first decade of their existence, Alaskan courts had mostly viewed privacy as a matter for federal courts and the federal constitution,[49] and had generally given little consideration to the scope and extent of the right.[50] In *Breese v Smith*,[51] the Alaska Supreme Court delivered its only major opinion relating to privacy rights prior to the

40 Clive Thomas, Kristina Klimovich and Laura Savatgy, *Alaska Politics and Public Policy: The Dynamics of Beliefs, Institutions, Personalities, and Power* (2016) 608.
41 Orlansky and Feldman (n 28) 4.
42 Ibid 2.
43 458 P.2d 340 (Alaska 1969) 342–343.
44 Ibid 342.
45 471 P.2d 386 (Alaska 1970) 401.
46 Ibid.
47 Ronald Nelson, 'Welcome to the Last Frontier, Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation' *Alaska Law Review* (1995) 12(1) 1, 7.
48 John Grossbauer, 'Alaska's Right to Privacy Ten Years After Ravin v. State: Developing a Jurisprudence of Privacy' *Alaska Law Review* (1985) 2(1) 159, 165.
49 Nelson (n 47).
50 Grossbauer (n 48) 161.
51 501 P.2d 159 (Alaska 1972).

Constitutional privacy amendment of 1972.[52] In that case, which involved a challenge made by a student to a school hair length limitation,[53] the Court found that a de-facto right to privacy existed under the Alaska Constitution's right to liberty,[54] which captured the personal right of students to select their own individual hairstyles.[55] Though it was available to them, the Court opted not to determine the case on federal grounds, citing disagreement over the nature of privacy rights between state and federal courts.[56] At the federal level, commentators have noted that the right to privacy was 'not well-defined'.[57] Despite the wide scope of cases having been brought before the US Supreme Court on the matter, it had primarily been construed as capturing 'the right to be left alone,' the right of marital privacy, and the privacy of the home.[58]

Following the decision in *Breese*,[59] and spurred on by concerns about electronic police surveillance and the possible state abuse of computerized information systems,[60] the Alaska Constitution was amended in 1972 to include a specifically enumerated right of privacy.[61] This amendment, included under Section 22, specifically provided: 'the right of the people to privacy is recognized and shall not be infringed.'[62] Thus, with the introduction of this guarantee, and amidst the Supreme Court's embrace of expansive constitutional interpretation, the opportunity for the Court to entrench a unique 'Alaskan' privacy right into judicial precedent was ripe.

3. Marijuana Use, Legality, and Support for Decriminalisation

Echoing statutory proscription at the federal level,[63] possession and use of marijuana in early-1970's Alaska was unlawful pursuant to Alaska Statute

52 Ibid 165.
53 *Breese v Smith* 501 P.2d 159 (Alaska 1972) 159.
54 *Alaska Constitution* Art. I § I; Grossbauer (n 48) 166.
55 *Breese v. Smith* (n 53) 170.
56 Ibid 166.
57 Nelson, (n 47) 17.
58 *Griswold v. Connecticut*, 381 U.S. (1985) 479, 484 ('*Griswold*').
59 David Rohrer, 'Constitutional Law – Right of Privacy – Possession of Marijuana' (1976) (1) *Wisconsin Law Review* 305, 318.
60 McBeath, *The Oxford Commentaries* (n 38) 72.
61 *Alaska Constitution* Art. I § 22 (1972).
62 Ibid.
63 See *Drug Act 1970* (n 21).

('*AS*') 17.12.010. Except for Oregon, which abolished criminal penalties for possession of small quantities of marijuana in 1973,[64] this position was shared by every other US state.[65] At a social level, however, marijuana use in the United States was common. Following a rapid rise in usage during the 1960's, marijuana consumption developed into a widespread social practice in the 1970's.[66] This was also the case in Alaska:[67] research conducted in the early 1970's showed that 36.6% of Anchorage senior school students had used illegal drugs on at least one occasion, the most common of which was marijuana.[68]

Accompanying the wide-spread use of marijuana were calls for its decriminalization, in both Alaska and the mainland, made by a host of scientific, medical, and legal organizations.[69] The most notable of these was the National Commission on Marihuana and Drug Abuse, which had recommended decriminalization of private possession for personal use in 1972.[70] These calls were soon heeded by state legislatures. Roughly a week after the *Ravin* opinion was delivered, Alaska relaxed the application of AS 17.12.010—the statute Irwin Ravin was charged under—and decriminalised possession of up to one ounce of marijuana in public, and any amount in private.[71] By 1978, a total of eleven states had, in some way, enacted similar measures decriminalising small amounts of marijuana possession.[72]

64 *Oregon Revised Statutes*, § 167.207(3) (1973).

65 Eric Single, 'The Impact of Marijuana Decriminalization' in Yedy Israel et al (eds), *Research Advances in Alcohol and Drug Problems* (1981) 405, 410.

66 James Slaughter, 'Marijuana Prohibition in the United States: History and Analysis of a Failed Policy' *Columbia Journal of Law and Social Problems* (1988) 21(4) 417, 417.

67 See Lynda Mae Wong, 'Ravin v. State: A Case for Privacy and Possession of Pot' *UCLA Alaska Law Review* (1975) 5(1) 178, 178.

68 Bernard Segal, *Drug-Taking Behavior Among School-Aged Youth: The Alaska Experience and Comparisons with Lower-48 States* (1990), np.

69 *Ravin* (n 1) 512.

70 Ibid.

71 See Act of 1975 § 1, 1975 Alaska Sess. Law Ch.110, 2; Jason Brandeis, 'The Continuing Vitality of Ravin v. State: Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes' *Alaska Law Review* (2012) 29(2) 175, 181 n 37 ('*The Continuing Vitality*').

72 See Single (n 65).

III. Ravin v State

1. Pretrial & Decision

Following his arrest, Irwin Ravin was brought to the District Court in May 1973.[73] Here, he forwarded a motion to dismiss on the basis that the State, in charging him under AS 17.12.010, had 'violated' his constitutional right of privacy at both state and federal levels, as well as breaching the equal protection provisions under each constitution.[74] Ravin's motion was underpinned by two arguments: first, that there was no 'legitimate state interest' in prohibiting adult possession and use of marijuana, given the existence of both constitutional privacy rights; and second, in view of the legal status of alcohol and tobacco, that the classification of marijuana as a dangerous drug denied him due process and equal protection of law.[75]

Following the denial of his motion in the District Court on the ground that the law was constitutional,[76] and the upholding of that denial by the Superior Court,[77] Ravin successfully petitioned for review to the Alaska Supreme Court.[78] While Ravin's equal protection and due process claim was struck down,[79] his privacy claim succeeded in part, with the Alaska Supreme Court unanimously finding that state's marijuana law was unconstitutional insofar as it prohibited use and consumption within the home. The reasoning explored by the Court in its reasons, authored by Chief Justice Rabinowitz, is noteworthy for three reasons: first, for its broad expounding of the privacy right contained within the Alaska Constitution; second, for its application of legal tests—underpinned by liberal principles—in determining whether the State's law infringed these privacy rights; and third, for its typification of marijuana's harms, both to society and to individuals, in relation to these tests.

73 Black (n 2).
74 *Ravin* (n 1) 494.
75 Ibid.
76 Black (n 2).
77 *Ravin* (n 1) 496.
78 Ibid.
79 Ibid 502.

2. Expounding of Alaska's Constitutional Privacy Right

Following a review of US Supreme Court decisions regarding the federal right to privacy—which the Alaska Supreme Court found 'only arises in connection with other fundamental rights'[80]—a separate inquiry was conducted into the extent to which privacy was protected under the Alaskan Constitution.[81] In doing so, the Court took specific note of the privacy right it had established in *Breese*, as well as the recent amendment to the Alaska Constitution and its terms.[82]

Though it recognised the independent existence of Alaska's privacy guarantee, the Court distinguished Ravin's case from *Breese.* It found that, unlike the right to personal appearance discussed in that case, the guarantee of privacy did not create a fundamental, or general, right to use or possess marijuana.[83] Notwithstanding this, consideration was given to the notion that, despite not being a fundamental right, a right to marijuana possession and use could exist within the privacy of the home.[84] In forming this view, the Court recognised emphasis placed on the home within various Alaskan statutes,[85] the intent of the '[t]he privacy amendment to the Alaska Constitution… to give recognition and protection to the home',[86] and a long line of US Supreme Court decisions affirming its significance vis-à-vis the Federal Bill of Rights.[87] In particular, their honours gave credence to the US Supreme Court's opinion in *Griswold v. Connecticut*,[88] and its subsequent decision in *Stanley v Georgia*,[89] which established that discussions of a constitutional right to privacy take on 'an added dimension' within the home.[90] Acknowledging these decisions, the Alaska Supreme Court found that if there is 'any area of human activity to which a right to privacy pertains more than any

80 Ibid 500.
81 Ibid.
82 Ibid.
83 Ibid 502.
84 Ibid 502–503.
85 *Ravin* (n 1) 503 n 42, citing *Alaska Statute* §§ 09.35.090 (repealed 1982), 11.15.100 (repealed 1978), 11.20.080.100 (repealed 1978).
86 Ibid 501.
87 *Ravin* (n 1) 504.
88 *Griswold* (n 58) 479.
89 *Stanley v Georgia* 394 U.S. 557 (1969) ('*Stanley*').
90 *Ravin* (n 1) 499; Grossbauer (n 48) 164.

other, it is the home.'[91] The Court coupled this federal jurisprudence with the heightened respect for privacy and autonomy that shaped the 'character of life in Alaska', noting that Alaska 'has traditionally been home of people who have chosen to settle or to continue living here in order to achieve a level of control over their lifestyles which is now virtually unattainable in many of our sister states.'[92]

While *Ravin* was the Alaska Supreme Court's first opportunity to meaningfully define the scope of the Alaska Constitution's right to privacy,[93] it had held a year earlier, in *Gray v State*,[94] that the privacy amendment protected 'the ingestion of food, beverages, and other substances'.[95] In light of this decision and the aforementioned emphasis on the home, the Court's finding that the 'citizens of Alaska have a basic right to privacy in their homes under Alaska's constitution', which potentially protected 'the possession and ingestion of substances such as marijuana in a purely, personal, non-commercial context,'[96] was, as Andrew Winters describes it, 'a fairly modest step'.[97]

3. Application of Legal Tests Embodying Liberalist Principles

In determining whether the privacy right did, in fact, capture personal marijuana use within the home, the Alaska Supreme Court applied the 'rational basis' test.[98] Under this test, the State was required to 'meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.'[99] The central question, the Court said, was whether there existed a 'close and substantial nexus' between laws proscribing marijuana use within the home and the 'achievement of a legitimate state interest', an example of

91 *Ravin* (n 1) 503.
92 *Ravin* (n 1) 504.
93 Brandeis, *The Continuing Vitality* (n 71) 181.
94 *Gray v State* 525 P.2d 524 (Alaska 1974).
95 Ibid 528.
96 Ibid 504.
97 Andrew Winters, 'Ravin Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of their Homes?' *Alaska Law Review* (1998) 15 315, 318.
98 *Ravin* (n 1) 497–498.
99 Ibid 504.

which included harm to the 'public health or welfare'.[100] In applying this test, the Court was guided by what it stated was a 'basic' principle: namely, that the 'authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large'.[101] Inherent in this view—closely resemblant of John Stuart Mill's 'harm principle'[102]—is the notion that the State could be justified in imposing upon individuals 'its own notions of morality, propriety, or fashion' only in circumstances where individual conduct begins to substantively infringe on the rights and welfare of others.[103] In its effort to locate the threshold between an individual's private activity and cognisable harm to the public welfare, the Court reasoned that drug use, despite only directly harming the user, can have an indirect effect on society. Explaining this idea, the Court's opinion gives the example of a drug with effects so potent that it would result in 'numbers of people becoming public charges or otherwise burdening the public welfare'. In such a case, his Honour wrote, the resultant damage to the 'fabric of society' could justify complete state prohibition of the drug, and thus the extension of state control into the home.[104]

4. Progressive Typification of Marijuana's Harms

The application of this reasoning by the Alaska Supreme Court led to its second finding: that marijuana did not qualify as the kind of harmful substance, either to individuals or broader society, that displaced the burden of justifying government intervention within the home. This finding followed consultation of scientific evidence tabled by both Ravin and the State—the latter of whom sought to show that marijuana caused violent criminal behaviour and long-term psychological problems, among other complications[105]—and recognition of the weight of scientific and

100 Ibid 511.

101 Ibid 509.

102 The 'harm principle' provides that individuals may act as they wish insofar as they do not cause harm to others (John Stuart Mill, *On Liberty* (1859); see also Michael Perry, 'Substantive Due Process Revisited: Reflections on (and beyond) Recent Cases' *Northwestern University Law Review* (1976) 71(4) 417, 431.

103 Ibid 509.

104 Ibid 507.

105 Ibid 504.

legal support calling for marijuana's decriminalisation.[106] Despite determining that the scientific position on marijuana's harm was 'inconclusive',[107] the Court nonetheless reasoned that its effects on the individual, in concert with the patterns of societal use, were 'not serious enough to justify widespread concern'.[108] In the Court's view, this was particularly so when compared to the 'far more dangerous' effects of other substances, including alcohol, barbiturates, and amphetamines.[109]

The Court was cautious in determining the extent to which personal marijuana use remained an individual activity capable of being protected under the privacy right. Evidence relating to marijuana's effects on time perception, attentiveness, and motor functions, as well as the 'maturity' one requires to 'handle the experience [of marijuana use] prudently',[110] grounded their Honours' finding that AS 17.12.010 remained constitutional as it pertained to drivers and minors.[111] Similarly, it was found that the privacy protection did not invalidate the State's prohibition on public marijuana possession and use, distribution, as well as possession of quantities indicative of an intent to distribute.[112]

The Court also emphasised that it did not condone the use of marijuana or other drugs.[113] This view was based in the belief that individuals could best achieve their duty to 'live responsibly, for our own sakes and society's… without the use of psychoactive substances'.[114] In so doing, however, the Court also recognised that this opinion was underpinned by personal 'notions of morality, propriety or fashion',[115] and not any 'tangible adverse affects' shown, on the evidence, to be posed by the personal use of marijuana within the home.[116]

106 *Ravin* (n 1) 512.
107 Ibid 510.
108 Ibid 509.
109 Ibid.
110 Ibid 511.
111 Ibid 510–511.
112 Ibid 511.
113 Ibid.
114 Ibid 512.
115 Ibid 509.
116 Johnson (n 11) 42.

IV. Ravin's Application on other US State Courts, and Criticisms

Reactions to the *Ravin* decision, and to the legislative decriminalization of marijuana use that occurred simultaneously, were mixed. While supporters of marijuana reform celebrated the decision—which made Alaska (except for Nepal) the only jurisdiction in the world to legalize some degree of marijuana use and possession,[117] the polarized public response it received thrust Alaska into 'unwanted national controversy'.[118] The Alaska Supreme Court, for its distinctive interpretation of its State Constitution and guidance by liberal ideals, also attracted criticism from a variety of legal commentators. These criticisms, in conjunction with the refusal of other state courts to emulate the decision, serve to underscore the uniqueness of, and arguably illuminate the shortcomings within, *Ravin*.

1. Broad Constitutional Interpretation

Following *Ravin*, a multitude of 'copy-cat' applicants in other states sought to rely on privacy rights embodied within their own state constitutions to protect marijuana use and possession in the home. However, no other state Supreme Court reached the same conclusion as the Alaska Supreme Court.[119] While, in many of these cases, claimants failed on account of their state constitutions lacking an express privacy provision,[120] Supreme Courts in states with such privacy provisions have nonetheless refrained from applying the broad interpretation elucidated in *Ravin* on account of differences in their constitutional traditions.[121] A notable example of this emerged two years after *Ravin*, where, in finding that Arizona's textually-similar privacy provision did not protect personal marijuana use within

117 New York Times (n 2).

118 Winters (n 97) 343.

119 See e.g., *State v Murphy,* 570 P.2d 1103 (Alaska 1975), 1073; *Laird v State*, 342 So. 2d 962 (Florida 1977), 965 ('*Laird*'); *Renfro*, 542 P.2d 366 (Hawaii 1975), 368–69; *State v Baker*, 535 P.2d 1394 (Hawaii 1975), 1399–1400 ('*Baker*'); *State v Kincaid*, 566 P.2d 763 (Idaho 1977), 765 ('*Kincaid*'); *State v Anderson*, 558 P.2d 307 (Washington 1976), 309–10 ('*Anderson*').

120 See e.g., *Kincaid* (n 119) 765; *Laird* (n 119) 965; *Anderson* (n 119) 309.

121 *Baker* (n 119) 1400.

the home, the Arizona Supreme Court noted that Alaska's method of constitutional interpretation 'stands alone'.[122]

One aspect of this isolation derives from the Alaska Supreme Court's use of *Stanley* to found a privacy right centring on the home.[123] Predicting in 1977 that the possibility of other states following *Ravin* was 'remote', Thomas Hindes contends that, while general mention to a right to privacy was made by the US Supreme Court in *Stanley*, the opinion was 'unmistakeably directed' at promoting free speech values under the federal constitution's First Amendment.[124] Indeed, while referencing *Stanley's* holding that the state has 'no business telling a man, sitting alone in his own house, what books he may read or what films he may watch',[125] the Alaska Supreme Court did not meaningfully address the caveat the US Supreme Court placed on its application: namely, that it did not diminish the state's power to 'make possession of other items... such as narcotics... a crime'.[126]

The most compelling criticisms of the Alaska Supreme Court's approach arise from its interpretation of the Alaskan constitution through the lens of Alaskan 'values, ideals and beliefs', and intent to distinguish itself from interpretations of the right to privacy made by the United States Supreme Court.[127] For this, James Gardener has criticised the Alaska Supreme Court for falling into a broader theme of state courts interpreting their constitutions through the lens of 'romantic sub-nationalism',[128] whereby the 'character and fundamental values of the state polity'[129] is relied upon to determine 'difficult cases' involving state constitutional interpretation.[130] The primary shortcoming of this state-centric approach to interpretation,

122 *State of Arizona v Murphy*, 570 P.2d 11 1070 (Arizona 1977), 1072.

123 See *Illinois NORML Inc v. Scott* 66 Ill. App. 3d 633 (Illinois 1978), 636 ('*Illinois NORML Inc*'); Thomas Hindes, 'Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process' *University of Pennsylvania Law Review* (1977) 126 344, 351.

124 Hindes (n 123) 352.

125 Stanley (n 89) 565.

126 Ibid 568 n.11; See *Illinois NORML Inc* (n 123) 636.

127 Nelson (n 47) 1.

128 James Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (2005) 180–275 ('*Interpreting State Constitutions*').

129 Ibid 56.

130 James Gardner, 'The Failed Discourse of State Constitutionalism' *Michigan Law Review* (1992) 90(4) 761, 816.

Gardner contends, is that its underlying premise—that states can be understood as a 'single, unified community'—amounts to a 'gross over-simplification'[131] which fails to recognise the more substantive bond of national identity, and thus sense of morality, shared between Americans. Developments in the legislative status of marijuana in Alaska post-*Ravin* lent credence to Gardner's view. Following a state-wide ballot initiative, Alaskans voted to recriminalize marijuana possession and use in 1990.[132] Commenting on the vote, which prompted debate about *Ravin*'s standing,[133] Gardner suggests that the Alaskan character of 'rugged individualism did not hold out for long against the nationwide hardening in attitudes against drug use.'[134]

While potentially valid in the context of mainland state constitutions, Gardner's criticism fails to adequately capture Alaska's constitutional discourse, and the objectives of the Alaska Supreme Court in the early years of statehood. Having the benefit, as the last original statehood constitution, of witnessing the shortcomings of redundant, or overly precise, constitutional drafting in other states,[135] commentators have noted Alaska's constitution was created to 'set broad goals for the new state of Alaska',[136] while being orientated firmly 'toward the future'.[137] Indeed, as Ronald Nelson notes, 'the Alaskan Constitution is not merely a weak copy of the United States Constitution,' but rather, was 'purposefully customised for the Alaskan experience'.[138] It stands, therefore, to reason that the Alaska Supreme Court, in its interpretation of the Alaska constitution in the early days of statehood, would do so with the expansive intent first revealed in *Roberts*, and subsequently applied in *Ravin.*

131 Gardner, *Interpreting State Constitutions* (n 128) 56.

132 *Alaska 1990 Initiative Proposal No. 2*, §§ 1–2 (codified at *Alaska Statute* 11.71.060(a)(1)).

133 Brandeis, *The Continuing Vitality* (n 71) 181.

134 Gardner, *The Failed Discourse* (n 130) 816 n 283.

135 Erwin Chemerinsky, 'Keynote Address: The Alaska Constitution and The Future of Individual Rights' *Alaska Law Review* (2018) 35 117, 122–123.

136 Robert Williams, 'Alaska, the Last Statehood Constitution, and Subnational Rights and Governance' *Alaska Law Review* (2018) 35(2) 139, 139.

137 Nelson (n 47) 7.

138 Nelson (n 47) 7.

2. Real-World Tensions

The Alaska Supreme Court has received further criticism for the practical difficulties flowing from its finding that marijuana's harms bore relevance only insofar as prosecution involved consumption within the 'privacy of one's home'.[139] Such a finding necessarily questions the justification of imposing punishment upon those selling to the 'home-smokers', particularly in the absence of a state scheme providing for orderly distribution.[140] Describing this tension, Hindes claims that 'it is absurd to talk about a right to use a product when it remains illegal to purchase… and… transport it to the place where it may rightfully be consumed.'[141]

Later in 1975, the Court had the opportunity to remedy this issue in *Belgarde v State*,[142] which involved a '*Ravin*-esque' constitutional challenge to laws prohibiting the sale of marijuana.[143] There, however, the Court expressly rejected the possibility of extending the *Ravin* principle beyond home use and possession, finding that the public sale of marijuana was not protected under the constitutional right to privacy.[144] While the 'sanctity of the home' is a central concept of the *Ravin* decision, the paradox created by *Belgarde* calls into question the Court's assessment of where personal marijuana use begins to constitute a 'societal harm' justifying state intervention. Specifically, it is difficult to reconcile the view that a marijuana user, acting in a private location outside of their home, would constitute a greater 'harm to others' than they would within it.

3. Over-Emphasis on Liberal Ideals

Finally, the *Ravin* decision has been criticised for the Alaska Supreme Court's apparent endorsement, and 'elevation to constitutional status', of John Stuart Mill's libertarian political worldview.[145] That critique, provided by Michael Perry, posits that the test applied by the court, in determining the constitutionality of Alaska's law prohibiting marijuana use and possession,

139 Hindes (n 123) 383.
140 Ibid.
141 Ibid.
142 *Belgarde v. State*, 543 P.2d 206, 207–08 (Alaska 1975).
143 Ibid.
144 Ibid.
145 Perry (n 102) 431.

should have been whether its objective was legitimate relative to 'conventional standards of morality'—not whether it offended the 'harm principle', which Perry, writing in 1976, claimed was 'beside the point'.[146] While there are, as mentioned, challenges associated with the Court's attempt to determine the point at which marijuana use poses a cognisable 'harm' to others, use of this framework nonetheless avoids the problematic task of ascertaining what 'conventional morality' actually is.[147] Moreover, the *Ravin* approach also provides for 'neutral' determinations about the constitutionality of state interventions into the private lives of their citizens—which may not be possible if courts were to adhere solely to the direction of 'conventional morality'

V. Praise and Echoes

Despite its esoteric nature, and the cogency of criticisms levelled against it, the Alaska Supreme Court's decision in *Ravin* has received praise for its commitment to the denial of independent weight to 'notions of morality' when determining the extent to which laws interfering with an individual's personal autonomy can be justified as achieving a legitimate state objective.[148] For this general principle, it has been held out as an example of judiciary refocussing on its role in protecting the 'ideals of individuality and pluralism' in the face of the 'seemingly inherent tendency of the state to impose cultural conformity'.[149] The legitimacy of this principle is evident in the growing body of international constitutional law, developed by non-US courts, that has sought to balance constitutional personal autonomy rights and state objectives in proscribing marijuana through a similar framework to that applied by the Court in *Ravin*.[150] In

146 Ibid 433.

147 Hindes (n 123) 377–378 n 143.

148 Johnson (n 11) 41.

149 Perry (n 102), 431; see e.g., *Wisconsift v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

150 *Amparo en revision* 237/2014 (Mexico 2015); *Amparo en revision* 1115/2017 (Mexico 2018); *Amparo en revision* 623/ 2017 (Mexico 2018); *Decision No. C-221/94* (Colombia 1994); *'Fallo Arriola'* A.891 XLIV (Argentina 2009); *Minister of Justice and Constitutional Development v Prince* 1 SACR 14 (South Africa 2019); Constitutional *Complaint N 1282* (Georgia 2018); *Citizen of Georgia Beka Tsikarishvii v the Parliament of Georgia N/5/592* (Georgia 2015).

aligning these approaches, it is necessary to note that while some courts have found prohibition of personal use unconstitutional on the basis that impugned laws lack a 'legitimate aim', or are disproportionate to the achievement of that aim,[151] these considerations were incorporated into the Alaska Supreme Court's interpretation of the concept of privacy itself.[152]

1. South America in the Late 20th Century

The earliest examples of courts applying the *Ravin* framework to constitutional claims against laws prohibiting personal marijuana use can be seen in decisions made by South American courts in the late 20th century. The first of these is the Argentinian Supreme Court's 1986 decision in *Fallo Bazterrica.*[153] Against a backdrop of national enthusiasm for individual freedom and privacy following the collapse of military rule,[154] in this case the Court found that laws prohibiting marijuana use were in contravention of the right to privacy and personal autonomy enshrined within the Argentinian Constitution.[155] In its analysis, the Court recognised the existence of a private sphere, and emphasised the need to balance protection of it against the state's role in regulating potential dangers to the public health.[156] This private sphere, the Court found, was grounded within Article 19 of the Argentine Constitution, which provides that 'the private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and exempted from the authority of judges.'[157] Subsequently, for the legislature to criminalise marijuana use and possession within the private sphere, it bore the onus of demonstrating that such conduct would affect the

151 Release Legal Emergency & Drugs Service, 'Release in the matter of amparo appeal no 237/2014 of Sociedad Mexicana de Autconsumo Responsable y Tolerante, A.C. y Otros' (Media Release, February 2015).

152 *Ravin* (n 1) 537; R. T. Paschke, 'Personal Use and Possession of Dagga: A Matter of Privacy or Prohibition' *South African Journal of Criminal Justice* (1995) 8(2) 109, 118.

153 *Bazterrica*, CSJN 306 Fallos 1392, 1416 (Argentina 1986) ('*Bazterrica*')

154 Kevin Szmuc, 'A Constitutional Hope: an Alternative Approach to the Right Privacy and Marijuana Laws Using Argentina as an Example' *University of Miami International and Comparative Law Review* (2018) 26(1) 166, 179.

155 *Constitución de la Nación Argentina*, s 19 (Argentina).

156 *Bazterrica* (n 153) 1416.

157 *Constitución de la Nación Argentina* (n 155).

public—examples of which included 'use in private places that could harm third parties' or encourage widespread public use.[158] Finding that it could only demonstrate these harms 'through inference',[159] the Court determined that the State could not satisfactorily displace this onus, and thus that the law was unconstitutional.

Following the increase in the number of justices on the Argentine Supreme Court from five to nine—and the filling of the additional four positions with—according to some commentators[160]—judges aligning with Argentina's governing neo-liberal government, the Court, in *Fallo Montalvo*,[161] reversed the position it had expounded just three years earlier in *Bazterrica*, finding that the law criminalising personal marijuana consumption was constitutional.[162] In reaching this decision, the Court constrained the expansive privacy right it had found previously within Argentina's Constitution, and stated that questions of marijuana's harms were, being partly an issue of morality, for the exclusive determination of legislators and beyond the Court's ambit.[163] Remarkably, in 2009, this position was again overturned by the Argentine Supreme Court in *Fallo Arriola.*[164] There, in addition to re-applying the *Bazterrica* interpretation of a constitutional privacy right, the Court took the view that the state's legitimate purpose of protecting public health had, since the decision in *Montalvo*, not been achieved through the re-introduction of prohibitory laws.[165]

The other early instance of a South American court applying the broader principles embodied by *Ravin* was in 1994, where the Colombian Constitutional Court found laws criminalising the domestic possession of small quantities of drugs[166] unconstitutional on the basis that they interfered with the constitutional right to personal autonomy.[167] In that case, the Court specified that the laws, in regulating individual conduct

158 *Bazterrica* (n 153) 1416.
159 Szmuc (n 154) 197.
160 Szmuc (n 154) 179.
161 *Montalvo*, CSJN 313 Fallos 1333 (Argentina 1990).
162 Ibid.
163 Ibid.
164 *Arriola Fallos* (A. 891. XLIV) (Argentina 2009).
165 Ibid.
166 Ley 30 de 1986, art. 2, sec. 5, art. 51 (Colombia).
167 *Constitución Política de Colombia*, art. 16 (Colombia).

which did not harm others, applied unilateral conceptions of morality which ought to be determined solely by individuals.[168]

2. 21st Century: Spread to Other Jurisdictions

Despite the Canadian Supreme Court overturning a lower court decision approving a constitutional challenge to legislation prohibiting marijuana use in 2003,[169] the 21st Century has seen *Ravin*-esque challenges spread to jurisdictions across the world. During the late 2010's, the highest courts in Georgia, South Africa, and Mexico, applying similar reasoning, reached the same conclusion as the Alaska Supreme Court; finding that laws prohibiting marijuana use, despite advancing legitimate state interests, were not always justified when held against constitutional autonomy protections.

In *Amparo en Revision 237/2014*, the Supreme Court of Mexico, having established that laws prohibiting marijuana use infringed a constitutionally 'protected interest' in privacy under provisions protecting the 'free development of personality', found that there was 'no rational connection' between the legitimate purpose of promoting public health and the prohibition of marijuana use.[170] On that basis, the Court ruled that the laws, as they pertained to personal marijuana use, were disproportionate and unconstitutional.[171]

The 2018 decision of the South African Constitutional Court in *Minister of Justice and Constitutional Development v Prince*,[172] is particularly noteworthy for its extensive reference to *Ravin*'s broader principles. Agreeing with the High Court of South Africa's finding that a right to privacy was enshrined within Section 14 of the *South Africa Constitution*,[173] which provides that

168 Michael Pahl, 'Judicial One Hit? The Decriminalization of Personal Drug Use by Colombia's Constitutional Court' *Indiana International & Comparative Law Review* (1995) 6(1) 1, 19.

169 *R. v. Malmo-Levine; R. v. Caine* [2003] 3 S.C.R. 571.

170 *Amparo en Revision 237/2014* (2015) xii-xv (Mexico).

171 Ibid xii-xv.xxii.

172 *Minister of Justice and Constitutional Development v Prince* (*Clarke & Others Intervening*); *National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* (2019) 1 SACR 14 (CC) ('*Prince*').

173 Ibid 27 [43].

individuals have the right to make intimate decisions and freely exercise their own will, the Constitutional Court found that limitations on that right imposed by laws prohibiting marijuana consumption could not be justified on public health grounds. In its consideration of marijuana's public health impacts, the Court referred extensively to the Alaska Supreme Court's findings in *Ravin* vis-à-vis the inaccuracy of the belief that marijuana causes criminal or violent conduct, and that use leads to the consumption of more potent drugs.[174] In addition to this, the Constitutional Court dealt, in part, with the practical problem inherent in the *Ravin* doctrine of protecting use only within the home. Despite the High Court finding that 'use, cultivation and possession' of marijuana protected only in a 'private dwelling',[175] the Constitutional Court ruled that, in light of other constitutional rights to human dignity and freedom of movement,[176] there was 'no persuasive reason' for that limitation, and instead determined that marijuana use need only be carried out 'in private' to receive constitutional protection.[177] Despite this, the Constitutional Court also reversed the High Court's invalidation of provisions prohibiting the sale of cannabis, finding, like the Alaska Supreme Court in *Ravin* and *Belgarde*, that such measures were 'a justifiable limitation on the right to privacy'.[178]

Observing this broader trend of some national courts adopting a *Ravin*-esque approach, it is notable that each instance has involved the application of a constitutional 'bill of rights' securing some degree of personal autonomy, or privacy specifically. That challenges brought in countries without these enumerated rights have either failed, such as in the United Kingdom,[179] or have simply not been brought at all, lends support for arguments which emphasise the importance of guaranteed constitutional freedoms.

174 Adriaan Anderson, 'Criminal Law' *South African Journal of Criminal Justice* (2019) 32(1) 86, 101.
175 *Prince* (n 172) 55 [100].
176 Ibid 54 [99].
177 Ibid [101].
178 Ibid.
179 See *R v Morgan* [2002] EWCA Crim 721 (United Kingdom).

VI. Lessons from Ravin and its Relatives: Application of the new Human Rights Approach

It is clear from the increasing adoption of *Ravin*-esque approaches in other jurisdictions—all of which have vastly different cultural and political worldviews to Alaska—that the Alaska Supreme Court did not do anything particularly 'novel' in *Ravin.* Rather, the Court, guided by the culture and history of Alaska's Constitution, merely illuminated the compelling human rights argument for private marijuana use that exists among all countries that prize personal autonomy, or privacy, to the extent that they have enshrined these principles within constitutional guarantees. As such, *Ravin*, alongside the decisions highlighted in Part V of this chapter, highlights two primary benefits that can be derived from the judiciary applying a harm-based framework in determining the constitutionality of laws prohibiting personal marijuana use.

1. A Better Approach to the Drug Legalisation Debate

First, by approaching the issue of marijuana legalisation or decriminalisation through the threshold issue of constitutionally protected personal rights—and specifically, the extent to which the State's interference with these rights is justified—analysis conducted by Courts enables a more 'nuanced and structured' evaluation of the danger posed by marijuana to public health.[180] Specifically, this nuance is achieved through the simultaneous consideration of public health impacts of use and the extent to which laws seeking to achieve a legitimate state aim infringe on individual privacy rights. Application of this approach—despite the outcomes of the cases discussed in this paper—is not overtly weighted toward the expansion of individual rights. As the *Ravin* decision makes clear, the approach also recognises that 'harm' sufficient to justify state intervention can be indirect in nature; the outcome of it is the approach's application in other jurisdictions demonstrates only that personal marijuana use does not constitute such harm.

180 Amber Marks, 'Defining Personal Consumption in Drug Legislation and Spanish Cannabis Clubs' *International and Comparative Law Quarterly* (2019) 68(1) 191, 221.

This is compared to the approaches more commonly taken by legislatures in recent years, which frequently offer either a utilitarian rationale for laws decriminalising drug use—specifically, that the prosecution and imprisonment of drug users produces more social 'harm' than 'good'[181]—or invoke moral questions regarding the prosecution of individuals for what could be considered, in the case of seriously addicted individuals, a health problem.[182] While these rationales have merit, their reliance on legislative enactment necessarily involves an alignment with prevailing majority public morality; the very same morality which, guided by community instincts for paternalism and a preference for cultural homogeny, saw international marijuana laws enacted in the first place.[183] Moreover, within most national legislatures, determinations of marijuana's harms have inevitably commenced from a position of criminalisation.[184] Under the United Nations Single Convention on Narcotic Drugs of 1961,[185] marijuana was classified within Schedule IV, reserved for drugs with 'particularly dangerous properties', until December 2020.[186] As regards the Single Convention, however, an ancillary benefit to judicial determinations on the constitutionality of personal marijuana lies in the existence of article 36(1), which establishes that criminalisation is subject to the 'constitutional limitations' of each State Party.[187] As such, the Convention excepts instances where a Party's constitution prevents the possibility of criminalising a particular form, or type, of drug use.[188]

By providing a clear framework through which to draw the boundaries of permissible personal consumption, judicial application of *Ravin*-esque tests to determine the constitutionality of laws prohibiting marijuana use also abate the 'slippery slope' argument often raised by courts and legislatures

181 Greenwald (n 12).

182 Ibid.

183 Wong (n 67) 186.

184 Seddon (n 13) 1581.

185 *Single Convention on Narcotic Drugs 1961* (as amended by the 1972 Protocol), signed 30 March 1961, 520 UNTS 7515 ('*Single Convention*').

186 United Nations, 'UN Commission reclassifies cannabis, yet still considered harmful' (Webpage, 2 December 2020).

187 *Single Convention* (n 185), art 36(1).

188 Neil Boister, 'Decriminalizing Personal Use of Cannabis in New Zealand: The Problems and Possibilities of International Law' *Yearbook of New Zealand Jurisprudence* (1999) 3 55, 67.

alike.[189] Following its decision in *Ravin*, the Alaska Supreme Court expressly rejected a constitutional privacy challenge to laws prohibiting cocaine in *State v Erickson*,[190] having been satisfied that 'scientific evidence of harm or potential harm' resulting from cocaine use justified, among other things, the proscription of its use in the home.[191] While no case has yet been brought to the Alaska Supreme Court seeking the expansion of the *Ravin* protection to 'harder', more harmful, substances, such as methamphetamine, it is clear that these would fall outside of the scope of the protection.[192]

2. Robustness of Judicial Decision-Making

On the basis that courts are effective in the implementation of this framework, the second benefit lies in the robustness of their decisions. While the changing interpretation of Argentina's constitution, and thus its protection of marijuana use, between *Bazterrica* and *Montalvo* demonstrates that judicial decision making can be limited by subsequent changes in a court's ideology,[193] no other court finding a degree of constitutionally protected marijuana use has yet reversed their findings. Given the controversy that many of these decisions sparked, it is clear that judicial determinations, underpinned in common law jurisdictions by the doctrine of *stare decisis*, are not easily subject to external political pressures,[194] and mostly resistant to the inevitable changes in morality a body politic experiences over time.[195]

In the Alaskan context, this robustness was evinced first by the Alaska Supreme Court's decision in the *Noy v State,*[196] where the Court struck

189 Amber Marks, 'Treating the 'Personal' as Private: Contextualising the Normative Framework of Cannabis Clubs in Spain within a 'Global Model of Constitutional Rights' (*Forthcoming*) *International and Comparative Law Quarterly* (2017) 68(1) 191, 33.

190 22 Cr. L. Rep. 2385 (Alaska 1978).

191 Ibid.

192 See e.g. *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986) ('*Bowers*'); Victoria Sheets, 'Breaking Bad Law: Meth Lab Investigations Highlight Alaska's Current Approach to Privacy' *Alaska Law Review* (2015) 32(2) 373, 382.

193 Szmuc (n 154) 179.

194 Boister (n 188) 69.

195 Gardner, *Interpreting State Constitutions* (n 128) 271.

196 *Noy v State of Alaska* 83 P.3d 538 (Alaska 2003).

down, on the basis of unconstitutionality, the State's implementation of a 1990 voter initiative to recriminalize marijuana to the extent that it contravened the right to personal use established under *Ravin.*[197] While it may be contended that this decision evinces a disconnect between the judiciary and the democratic will of citizens, the success of modern Alaskan marijuana legalisation efforts, achieved through the same democratic method in 2014,[198] support the claim that, amidst these frequent shifts in popular appeal, courts are better placed to decide on the limit of state interference into personal autonomy, as it pertains to constitutionally protected personal rights, than legislatures. Indeed, that is why, in part, judicial review exists: to 'ensure the rights of the unpopular minority' where they are threatened by the 'strict will of the majority'.[199]

3. The Importance of Not Closing the Door

Amid this robustness, it is important that courts remain open to revising prior decisions. Comments made at the Superior Court in Alaska suggest that *Ravin* could be overturned if the State can present scientific evidence persuasive enough to invalidate that accepted by the Alaska Supreme Court in *Ravin.*[200] So long as the harm caused by marijuana remains a disputed scientific issue,[201] it does not appear that *Ravin* will be overturned.

VII. Conclusion

Reflecting on the unique periodical context that influenced it, and subsequent criticisms of the Alaska Supreme Court's expansive approach, this chapter posits that the *Ravin* decision was a 'product of its time', with flaws that remain outstanding today. By directing attention toward the

197 Ibid.

198 State of Alaska, 'General Election: November 4, 2014 Official Results' (Web Page, 25 November 2014).

199 Jason Brandeis, 'Ravin Revisited: Alaska's Historic Common Law Marijuana Rule at the Dawn of Legalization' *Alaska Law Review* (2015) 32(2) 309, 344.

200 *State v. McNeil*, No. 1KE-93–947 CR (Alaska 1993) 6.

201 Wayne Hall, 'The Costs and Benefits of Cannabis Control Policies' *Dialogues in Clinical Neuroscience* (2020) 22(3) 281, 281.

threshold issue of whether marijuana laws abridge individual rights, and attempting to discount the impact of 'notions of morality' in determinations about the constitutionality of these laws through application of the harm principle, the Alaska Supreme Court developed a reasoned model through which courts could determine where the state has 'overstepped' in its attempt to regulate personal marijuana use. For this, the decision can be regarded as 'enlightened'. And, as support for this approach has grown across jurisdictions with vastly different constitutional histories, culture, and systems of law to that of Alaska, the legitimacy of the *Ravin* model, and its relevance to societies with constitutionally protected individual freedoms, has become increasingly more apparent.

With this modern context in mind, it is not difficult to view the principle that *Ravin* champions as obvious, or even banal. However, it is important to note that the exclusion of public morality from judicial reasoning was not the prevailing view—at least in the United States—when the *Ravin* opinion was delivered.[202] As an example from another debate concerning this concept of morality, in 1986 eleven years after *Ravin* the United States Supreme Court found, in *Bowers v Hardwick*, that laws in the US State of Georgia prohibiting homosexual sodomy were constitutional on the basis that 'the presumed belief of a majority of the electorate in Georgia' that such activity was 'immoral and unacceptable'.[203] This decision, which was only overturned in 2003,[204] highlights the murky boundary between private conduct and public welfare that the drug legalisation debate—and indeed every debate regarding issues that offend current conceptions of morality—exposes. It follows that, in their attempts to navigate this boundary, courts would be well served to remember *Ravin* and the principle that it yields.

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