Some Hope in Harm: A Normative Evaluation of the UK Government's Proposals to Bifurcate Drug Users, Dependent on Their Drug Use Status

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Abstract

The developed world has been moving away from treating drug use as a matter for the criminal justice system and toward treating it as a public health concern or a matter for regulation. However, the United Kingdom has proposed a novel approach to drug use splitting drug users into two subgroups, recreational users and drug-dependent users, proposing two separate legal regimes for the different subgroups. This article is interested in the moral justification for treating different groups of users differently under the law for ostensibly the same act. This article commits to a thick conception of the rule of law, (civic-equality-plus), arguing that the UK Government, and governments more generally, are justified in treating drug users differently based on their drug-use status subject to the streamlining of other areas of legislation, offering hope for jurisdictions where there may be staunch opposition to more progressive approaches to drug policy.

1 Introduction

On the 17 June 2021 the Lord Advocate of Scotland released a statement to the Scottish Parliament advising that anyone found in simple possession of any class of drug could be dealt with by way of a warning or through diversion to an appropriate public health body.[1] This direction pre-empted the release of statistics, showing that Scottish drug deaths had risen to a record high of 1,339 people, the highest per capita rate in Europe.[2] While explicitly not representing de facto decriminalisation of drug use, the direction, and subsequent White Paper,[3] expressed a generational shift in treating drug use not as a criminal justice matter but as a 'public health emergency'.[4] Around the same time the UK Government released their 10-year drugs plan, 'From Harm to Hope', which appeared to follow suit.[5]

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[1] Lord Advocate Bain QC, 'Lord Advocate Statement on Diversion from Prosecution' (22 September 2021) <https://www.copfs.gov.uk/about-copfs/news/lord-advocate-statement-on-diversion-from-prosecution/> accessed 3 June 2023.

[2] National Records of Scotland, 'Drug-related deaths in Scotland in 2020' (2021) 4 <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/deaths/drug-related-deaths-in-scotland/2020> accessed 3 June 2023.

[3] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (2022) <https://drugstaskforce.knowthescore.info/wp-content/uploads/sites/2/2022/08/Changing-Lives-updated-1.pdf> accessed 14 June 2023.

[4] Lord Advocate Bain QC, 'Lord Advocate Statement on Diversion from Prosecution' (n 1) para 3.

[5] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (*GOV.UK*, 2021) <https://www.gov.uk/government/publications/from-harm-to-hope-a-10-year-drugs-plan-to-cut-crime-and-save-lives/from-harm-to-hope-a-10-year-drugs-plan-to-cut-crime-and-save-lives> accessed 3 June 2023.

Scotland's approach tracks global trends where there has been increasing de facto decriminalisation,[6] state level legalisation,[7] de jure trial decriminalisation,[8] and in some cases complex mixed systems of decriminalisation and legalisation.[9] While the array of different regimes may be confusing, and this article wishes to go some way toward clearing them up, the underlying trend is not. Globally, the consensus, backed up by legislation, has been moving from treating drug use as a criminal justice matter alone. The modern debate in academia has never really had convincing advocates for the criminalisation of drug use and has tended to focus on the when, what, how, and how far of decriminalisation.[10] Therefore, on first reading the claim in the Government's 10-years drugs plan to shift the focus of drug policy in the UK from 'not just a law enforcement issue but as a problem for all of society that all of government must deal with'[11] seems to be moving with this trend towards ending the decades long 'war on drugs' led by the US and the UK.[12]

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[6] For example Portugal, see Hannah Laqueur, 'Uses and Abuses of Drug Decriminalization in Portugal' (2015) 40(3) LSI 746.

[7] For example California, see official website of the State of California, 'What's Legal' <https://cannabis.ca.gov/consumers/whats-legal/> accessed 3 June 2023.

[8] For example Canada, see BBC, 'Canada trials decriminalising cocaine, MDMA and other drugs' (1 June 2022) <https://www.bbc.co.uk/news/world-us-canada-61657095> accessed 3 June 2023.

[9] For example Thailand, see Chad De Guzman 'What Thailand's Legalization of Marijuana Means for Southeast Asia's War on Drugs' (*Time,* 14 June 2022) <https://time.com/6187449/southeast-asia-drugs-thailand/> accessed 3 June 2023.

[10] For an attempt to construct an argument for criminalisation see, Douglas Husak 'Drug Proscriptions as Proxy Crimes' (2017) 36(4) Law Philos 345.

[11] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 3.

[12] See Christopher Coyne and Abigail Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs* (Cato Institute 2017).

The UK Government's plan is in part a response to the two staged drugs review undertaken by Dame Carol Black in 2019 and 2021 respectively.[13,14] While adopting most of the recommendations of the review the Government's response commits to 'going further', insisting that changes to drug user classification be backed up with 'tough enforcement action',[15] committing to a White Paper that will be 'bolder in achieving tougher and more meaningful consequences for illegal drug use.'[16] This is despite the Dame Carol Black report explicitly stating that enforcement can have 'unintended consequences, such as increasing levels of drug-related violence' and that the 'evidence suggests that efforts to restrict the supply of drugs rarely have lasting impacts'.[17] Thus, while seeming to offer real hope for drug reform, the proposal looks more like a piece of populist propaganda aimed at escalating the 'war on drugs'.

However, Chapter 3, of the 'From Harm to Hope' plan, makes a relatively novel commitment, to make a distinction between 'recreational' drug use and 'drug dependency', with significant commitments to divert and fund the treatment and recovery of those suffering from drug dependency,[18] while imposing tougher criminal sanctions on 'recreational' users.[19] The primary concern is whether the

[13] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 1 ' (2019) <https://www.gov.uk/government/publications/review-of-drugs-phase-one-report> accessed 3 June 2023.
[14] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 2' (2021) <https://www.gov.uk/government/publications/review-of-drugs-phase-one-report> accessed 3 June 2023.
[15] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 31.
[16] ibid 47.
[17] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 1' (n 13) (Summary) 13–14.
[18] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) ch 3.
[19] ibid 49–53.

state is morally justified in having two different legal regimes for drug users contingent on their 'drug use status'. Specifically, what demands the rule of law and a version of civic-equality place upon a policy that proposes to treat citizens differently for committing ostensibly the same act.

Having set out the factual terms of the debate, and the Government's proposed response, this article will examine the demands a society governed by the rule of law places upon any proposed policy. Whilst it is accepted that there is no single account of the rule of law, I wish to commit to a working model. As such this article will take Green and Hendry's lead, arguing that any policy proposal cannot be assessed without first committing to at least a limited political legal philosophy.[20] The account does not intend to be comprehensive; proposing three minimum conditions a policy must pass to be 'rule of law compliant', namely: non-arbitrariness, full fidelity and capacity. This does not imply that any policy that passes these conditions *ought* to be implemented, as further demands may be layered on top, it only indicates that if it falls foul of these conditions it is not a suitable 'rule of law compliant' candidate for legislation.

Therefore, this article's focus will be on defining and defending a variation of 'civic-equality', ie civic-equality-plus, which is taken from Green and Hendry[21] and expands upon Gerald Postema's notion of 'fidelity', 'horizontal-social', and 'vertical-political mutuality'.[22] To fully justify the three conditions, particularly horizontal fidelity, will require a deep exploration of 'basic moral equality'. The case for a 'basic *human* moral equality' will be argued, which necessarily leads to conditions that place significant constraints on how and when we are

[20] Alex Green and Jennifer Hendry, '*Ad Hominem* Criminalisation and the Rule of Law: The Egalitarian Case against Knife Crime Prevention Orders' (2021) 42(2) OJLS 635-636.
[21] ibid 638-640.
[22] Gerald J Postema, 'Fidelity in Law's Commonwealth' in Lisa M Austin and Dennis Klimchuck (eds), *Private Law and the Rule of Law* (OUP 2014) 17, 39.

morally justified in treating one another differently. The article argues that these constraints exist prior to any considerations around the philosophy of criminalisation, acting as a starting gate through which policy candidates must pass.

2 The Proposal and The Problem

This article does not focus on the justification for criminalisation, nor on a theory of criminalisation. Rather, it is a normative examination of whether the state is justified in bifurcating the population based on their drug use and having two separate legal regimes dependent on use status. As such, the definition of criminalisation and decriminalisation is useful only insofar as it sets the context within which certain citizens will be treated differently under the law.

2.1 What are Drugs?

A look at the UK's Psychoactive Substances Act 2016[23] gives perhaps the clearest insight into what legislators are trying to get at when they use the word drug. The Act is a piece of legislation designed to be as un-circumvent*able* as possible in reaction to public hysteria around 'legal highs'.[24] The Act describes a 'psychoactive substance' as a substance 'capable of producing a psychoactive effect in a person who consumes it'.[25] A 'psychoactive effect' is one that stimulates a person's central nervous system, which in turn affects the person's mental functioning or emotional state. There is a list of 'exempted substances' in sch 1 of the Act, which includes: controlled drugs, medicinal drugs, alcohol, nicotine and tobacco products, caffeine, and food.[26] For the

[23] Psychoactive Substances Act 2016.
[24] Clare Wilson, 'You're Not Hallucinating, MP's Really Did Pass Crazy Bad Drug Law' (*New Scientist*, 21 January 2016) <https://www.newscientist.com/article/2074813-youre-not-hallucinating-mps-really-did-pass-crazy-bad-drug-law/> accessed 3 June 2023.
[25] Psychoactive Substances Act 2016, 2(1)(a).
[26] ibid sch1.

purposes of this article a drug will be defined as any substance capable of producing a psychoactive effect including all those substances on the exempted list *excluding* food.

This definition deviates from the strict classification of substances adopted under the Misuse of Drugs Act 1971 by the Advisory Council on the Misuse of Drugs.[27] Crucially, the definition adopted here treats alcohol or tobacco as a drug in the same way it treats heroin or cannabis for example. This is intentional; there is no discernible normative reason why we should, a priori, treat psychoactive substances differently simply because their consumption has been normalised over generations. In fact, doing so may be extremely unhelpful, especially when one considers things like the co-morbidity of alcohol and heroin dependency,[28] or the specific challenges of changing consumption habits of cannabis users who regularly consume it in conjunction with tobacco.[29]

2.2 Criminalisation and Punishment

At the centre of the three criminalisation definitions is punishment. The definition of punishment itself is problematic, given 'the range of possible sanctions and the difficulty of comparing' them.[30] Much of the punishment literature is focused on 'hard treatment'.[31] However, for the

[27] Misuse of Drugs Act 1971, s 1.

[28] See for example Aldo Polletini, Angelo Groppi and Maria Montagna, 'The Role of Alcohol Abuse in the Etiology of Heroin-Related Death: Evidence for Pharmacokinetic Interaction Between Heroin and Alcohol' (1999) 23(7) JAT 570.

[29] Hindocha and others, 'No Smoke without Tobacco: A Global Overview of Cannabis and Tobacco Routes of Administration and Their Association with Intention to Quit' (2016) 7 Front Psychiatry 104.

[30] Matt Matravers, 'The Place of Proportionality in Penal Theory: Or Rethinking Thinking about Punishment' in Michael Tonry (ed), *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime* (OUP 2019) 78.

[31] Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49(3)

purposes of this article a broader definition of punishment will be adopted. Put simply, punishment can be understood as any unwanted burden imposed upon an individual by the state for something for which they are deemed to be blameworthy. The reasons for adopting this definition are set out below.

Punishment is, in many cases, obvious, taking the form of penal sentences handed out for an act for which someone is blameworthy. Whilst this definition clearly precludes burdens for which we are not blameworthy, for example taxation, Douglas Husak, amongst others, seems to be unsure as to whether things like fines or non-voluntary substance abuse programmes are punishment.[32] It is hard to understand why Husak finds these cases difficult, in their non-voluntariness they are unwanted burdens, and assuming they have been imposed once blameworthiness is established, they are quite obviously punishment, not least because they are 'backed-up' by 'hard treatment' if not complied with. These deterrents are particularly stark in the case of drug offences. For many drug users, particularly for those with the severest dependencies, the ability to pay a fine is often reliant on them supplying drugs to other users or committing acquisitive crimes.[33] The same applies to the use of coercion in non-voluntary substance abuse programmes; the drug user is almost always faced with either engaging in the programme or suffering hard treatment. Thus, fines and non-voluntary programmes have almost practical equivalence with 'hard treatment' and as such ought to be treated as punishment.

The second part of the formulation focuses on blame. Nicola Lacey and Hanna Pickard argue that a 'consensus prevails' that only those that are responsible and therefore blameworthy 'deserve' punishment[34] as

Monist 397–398.

[32] Douglas Husak and Peter de Marneffe, *The Legalization of Drugs* (CUP 2005) 5–7.

[33] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 1' (n 13) (Evidence Pack) 91.

[34] Nicola Lacey and Hanna Pickard, 'From the Consulting Room to the Court

Husak states, 'refusing to punish in the absence of desert'.[35] This article adopts Lacey and Pickard's lighter definition of blameworthiness, or desert, avoiding affective blame, that is to say where blame itself *is* punishment, thus for the purposes of this article punishment is an unwanted burden imposed after blame or responsibility is established but not through blameworthiness in the first instance.[36]

Having adopted a definition of punishment, criminalisation and its analogues can be dealt with relatively easily. In this article, criminalisation will be understood to be where the *use* of drugs is explicitly prohibited and that prohibition is sustained through punishment. Decriminalisation is where, whether de facto or de jure, the use of drugs is not punished. Finally, legalisation is when the use, supply, and manufacture of a drug is not punished, still allowing for non-criminal regulation, much like the alcohol industry in the UK today. These definitions roughly map the landscape of different legal regimes across the globe and therefore have practical and meaningful significance when used.[37]

2.3 From Harm to Hope—The Proposal

The Government's paper, 'From Harm to Hope', proposes a mixture of de facto decriminalisation, and continued criminalisation. Legalisation is not discussed nor contemplated. The most significant change proposed is in the re-classification of 'drug dependency', the Government proposes to treat drug dependency as a 'chronic health condition' that requires 'long-term support'.[38] In line with Dame Carol

Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2013) 33(1) OJLS 1, 2.

[35] Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (OUP 2010) 9.

[36] Lacey and Pickard (n 34) 3.

[37] See (n 6–9).

[38] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 31.

Black's advice, this would put drug dependency on a par with conditions 'like diabetes, hypertension or rheumatoid arthritis'.[39] One could, of course, be dependent to varying degrees, but there is a very important distinction made between 'recreational users' and 'drug-dependent users'.[40] Notably, this change in classification is a major deviation from other areas of law, particularly the Mental Health Act 1983 where drug dependency is specifically excluded as a mental disorder,[41] and the Equality Act 2010, which denies drug dependency as a legitimate 'impairment'.[42]

Before exploring how the subgroups will be treated, it is worth looking at how they are to be identified as this may have some bearing on the legitimacy of the overall proposal. The proposal suggests the possibility of establishing problem-solving 'substance misuse courts' to oversee 'treatment and other interventions tailored to their [drug-dependent users] needs'.[43] This approach bears some resemblance to the system in Portugal, where specialist drug courts deal with cases of drug use, conducted by a Ministry of Health and Ministry of Justice appointment alongside an addiction specialist.[44] The Government's proposals are at such an early stage that they do not set out concrete details as to how this would work in practice in the UK, but it can be expected that their proposal is similar. As such, it is assumed that where an individual is apprehended for drug use they are seen by a specialist 'drug court' who determine whether the individual before them is 'legally' drug-

[39] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 2' (n 14) 2.
[40] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 47–49.
[41] Mental Health Act 1983, s 1(3).
[42] Equality Act 2010 (Disability) Regulations 2010, s 3(1).
[43] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 41.
[44] Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies* (Cato Institute 2009) 3–4.

dependent and therefore suffering from a 'chronic health condition'.[45] In such cases it will be assumed that the individual, if at this point having committed no other crime than drug use, will be immediately diverted into treatment.

The report is unequivocal on the requirement that 'offenders fully engage with recovery-focused treatment services',[46] a sentiment reinforced by the recent Ministry of Justice's White Paper on sentencing that commits to utilising compulsory community treatment.[47] In essence, such non-voluntary substance abuse programme's would be considered 'diversion' and thus 'treatment' by the Government, whereas for the purposes of this article, dependent on the consequences of non-compliance, they would be considered punishment.

It is worth roughly sketching out what is meant, or at least implied by diversion into treatment and recovery. By examining the Dame Carol Black report, the recent Scottish 'Changing Lives'White Paper,[48] and systems in other jurisdictions it is possible to piece together what diversion might look like. First, there are the physical, funded and delivered treatments, which look far more like a public health offering than anything associated with criminal justice. This should include crucial things such as inpatient detoxification centres,[49] access to

[45] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 31.
[46] ibid 40.
[47] Ministry of Justice, 'A Smarter Approach to Sentencing' (*GOV.UK*, 2021) 53 <https://www.gov.uk/government/publications/a-smarter-approach-to-sentencing> accessed 3 June 2023.
[48] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3).
[49] ibid (n 3) 61–62.

buprenorphine treatment,[50] needle exchanges,[51] safe injection facilities,[52] naloxone provision,[53] early intervention initiatives for young people,[54] imbedded 'brief alcohol' interventions in primary care settings[55] and probably most controversially learning from the Swiss model and accepting Heroin Assisted Treatment as the most effective treatment for the most entrenched drug users.[56] Finally sustained investment needs to be made into the workforce, to make working in drug treatment, whether as a psychiatrist, nurse or support worker, a stable and attractive career.[57]

The second prong of treatment and recovery relates to society as a whole and the law more generally. It is important that not only is drug dependency recognised as a health condition as per the Dame Carol Black report but that it is recognised as a *treatable* health condition.[58]

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[50] Matisyahu Shulman, Jonathan Wai and Edward Nunes, 'Buprenorphine Treatment for Opioid Use Disorder: An Overview' (2019) 33(6) CNS Drugs 367.
[51] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3) 23.
[52] ibid.
[53] ibid 47–48.
[54] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 40.
[55] Robin Room, Thomas Babor and Jurgen Rehm, 'Alcohol and Public Health' (2005) 365 Lancet 519, 523–524.
[56] See either Jurgen Rehm and others, 'Feasibility, Safety and Efficacy of Injectable Heroin Prescription for Refractory Opioid Addicts: A Follow-Up' (2001) 358 Lancet 1417 or John Strang and others, 'Heroin on Trial: Systematic Review and Meta-Analysis of Randomised Trials of Diamorphine-Prescribing as Treatment for Refractory Heroin Addiction' (2015) 207(1) BJ Psych 5.
[57] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 2' (n 14) 13–14.
[58] Emma McGinty and others, 'Portraying Mental Illness and Drug Addiction as Treatable Health Conditions: Effects of a Randomized Experiment on Stigma and Discrimination' (2015) 126 Soc Sci Med 73.

Drug-dependent users must be treated in the same way as anybody else suffering from a chronic health condition is now treated, with just as valuable life choices and expectations, approached with an attitude of compassion.[59] For the differentiation of users under the law to be defensible it will be essential that the law avoids any stigmatisation once a person is diagnosed as drug-dependent. Legal classification must in fact be the first step in a positive journey of understanding.

One thing is clear; those deemed non-dependent under the proposals would continue to be dealt with solely through the criminal justice system with 'no implicit tolerance of so-called recreational drug users' and 'new penalties' for such use.[60] These penalties are to include escalating sanctions such as 'curfews or the temporary removal of a passport or driving license'.[61] Thus drug users, committing the same offence, would be bifurcated and treated differently under the law.

2.4 Why We Should Care

To deal with why drug reform is something we should care about, approximately 3.2 million people used an illegal drug in the UK in 2020. Of those, roughly 715,000 were using illegal drugs regularly.[62] In addition, when surveyed, roughly 25 million adults had consumed alcohol in the week prior to questioning.[63] These statistics tell us two things: drug use is widespread; and a drug's legal status doesn't deter vast numbers of people from using it. Given over half the adult UK population engages in regular drug use, at the very least we should be

[59] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3) 14.
[60] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 4.
[61] ibid 6.
[62] Office for National Statistics, 'Drug Misuse in England and Wales: year ending March 2020' (2020).
[63] Office for National Statistic, 'Adult Drinking Habits in Great Britain: 2017' (2018).

asking why we have such diverse legal regimes dependent on the drug of choice.

Moreover, the data implies that people want to, or at least are in some way compelled to, take drugs, regardless of their legal status. 60% of British adults believe that a drug's legal status is ineffective in preventing usage.[64] Indeed, people appear to have equally little regard for the implied 'risk' to their health, 84% of British adults think regular drinking is either 'very harmful' or 'fairly harmful',[65] yet clearly many of those same people continue to engage in it. Putting these two points together we have the first reason to care: we use a lot of drugs, and the legal landscape for specific drugs is different.

However, there is a far more significant reason to care, the UK has seen an 80% increase in deaths from illegal drugs since 2012,[66] with 3,284 deaths reported in 2018, the highest level in Europe.[67] In addition, there are an estimated 300,000 people dependent on crack-cocaine and heroin in England, this group tend to spend their lives cycling in and out of prison, and are responsible for roughly half of all acquisitive crimes.[68] Acquisitive crimes from this cohort are caused by the need to fund addiction; this is clearly having a damaging effect on all of society. Furthermore, when those suffering from drug dependency enter prison, they are faced with a prison system in crisis and 'plagued by drugs'.[69]

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[64] 'YouGov—Drugs Results' (*YouGov*, 2021) Question 1 <https://docs.cdn.yougov.com/dst8x5o1s4/YouGov%20-%20Drugs%20Results.pdf> accessed 3 June 2023.

[65] ibid Question 3.

[66] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 12.

[67] European Monitoring Centre for Drugs and Drug Addiction, 'Drug-related deaths and mortality in Europe' (2021) 7.

[68] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 3.

[69] HM Inspector of Prisons, 'HM Chief Inspector of Prisons for England and Wales: Annual Report 2018–2019' (2019) 7.

Given roughly one third of offenders are in prison on drug related offences, drug users undoubtedly account for some of the 83 suicides and 45,310 incidents of self-harm across all prisons in 2018–2019, up 25% year on year.[70] The help upon leaving prison is no better. Thus, the Government is right to want 'a generational shift in the country's relationship with drugs'.[71].However, the question remains whether this shift can be achieved while discriminating against individuals based on their 'drug-use status'.

3 Three Fair Conditions

This section will set out 'three fair conditions' that as a minimum a policy must pass to be 'rule of law compliant' and therefore an acceptable candidate for legislation. These conditions can be summarised as non-arbitrariness, full fidelity, and capacity, collectively, to distinguish them from Green and Hendry[72] they are better termed "civic-equality-plus". it will ultimately be shown that the Government's proposal, to have two separate legal regimes based on drug use status can be compatible with civic-equality-plus.

3.1 Thin Rule of Law and Non-Arbitrariness

The initial question that teases out the conditions coalesces around what the rule of law means and why we should care about it. As Nicola Lacey points out, there is a 'vast literature' on the subject and no clear consensus on what the rule of law demands.[73] While Lacey in her article exploring populism and its relation to the rule of law delineates four 'broad approaches',[74] this article is not particularly interested in the

[70] ibid 25.
[71] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 12.
[72] Green and Hendry (n 20) 3–9.
[73] Nicola Lacey, 'Populism and the Rule of Law' (2019) 15(1) Ann Rev Law & Soc Sci 79.
[74] ibid 85.

categorisation of approaches, agreeing with Joseph Raz that 'most classifications do no greater harm than being boring'.[75] As such in what follows, a singular rather thick concept of the rule of law will emerge that evolves out of different approaches and will be defended against possible critiques from across the spectrum.

The first thing to note is that across the gamut of rule of law theories there is consensus that 'legality' is important to any conception of the rule of law. Legality can roughly be understood as an agreement to be 'governed by rules' to 'provide real protection against arbitrary power'.[76] As Green and Hendry point out, this feature appears in all mainstream accounts of the rule of law.[77] Simply put we should care about the rule of law because it protects us from the arbitrary use of power.

For many it may simply take on a Hobbesian form and be limited to a commitment to subject oneself to a set of rules regardless of the rule's content.[78] For example, as Raz states, the law *can* be morally valuable and 'a worthy object of identification and respect' but it *need not* 'enjoy legitimate authority' to meet it's 'inherent claim to authority'.[79] In other words the law could and indeed should aspire to be in some way morally valuable, but that is not a precursor to a polity or policy being compliant with the rule of law. There can be plenty of 'bad' legitimate rules.

This concept of legality is just as important to much 'thicker' accounts of the rule of law, for example Susanne Baer who sees an 'inextricable connection' between a set of defined 'fundamental rights' and the rule

[75] Joseph Raz, 'About Morality and the Nature of Law' (2003) 48(1) Am J Juris 1, 2.
[76] Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2004) 2.
[77] Green and Hendry (n 20) 4.
[78] Thomas Hobbes, *Leviathan: with selected variants from the Latin edition of 1668* (Edwin Curley ed, Hackett Publishing 1994) 219–220.
[79] Raz (n 75) 15.

of law.[80] Baer, in defending a rights-based version of constitutionalism, concerned with the 'growing intensity and popular success' of attacks on the rule of law,[81] turns the standard account on it's head echoing the Platonic fears of democracy and its vulnerability to tyrants.[82] She nonetheless still conceptualises 'legality' as an agreement to be governed by a set of rules and to be protected from the arbitrary use of power, even if that is the arbitrariness of 'the mob' or nationalist elite.

This generates the first and most fundamental characteristic of the rule of law, and the first condition of this article: non-arbitrariness. Colloquially 'arbitrary' has a very different meaning to the one adopted here, often meaning something that is done randomly, without reason or without good reason.[83] This article is interested in the far more specific concept of arbitrariness which flows from *libero arbitrium,* where an act may 'be reasonable, reasoned or otherwise justified but it is still arbitrary if it is taken entirely at the will or pleasure of the agent'.[84] That is to say, it takes consideration of nothing other than the interests of the agent. Non-arbitrariness merely demands that due and careful consideration be given to the interests of others, that is, in the case of legality, the interests of those who are governed. As such it is best conceptualised as a deliberative condition, which demands that the 'deliberative perspective'[85] of the entirety of *the governed* to be taken into account when a decision is being made.

This may at first appear a very weak condition. However, an exploration of what the condition demands shows it to be quite constraining. Take the 2019 controversy over then British Prime Minister Boris Johnson's

[80] Susanne Baer, 'The Rule of—and not by any—Law. On Constitutionalism' (2019) 71(1) CLP 335, 362.
[81] ibid 338.
[82] Plato, *The Republic* (Desmond Lee (tr), 2nd edn, Penguin 2007) 290–308.
[83] Merriam-Webster, <https://www.merriam-webster.com/dictionary/arbitrary> accessed 3 June 2023.
[84] Postema (n 22).
[85] ibid.

attempt to prorogue Parliament and avoid scrutiny and debate over the Government's 'Brexit Bill'.[86] The Government's case for prorogation ultimately went to the Supreme Court and lost.[87] This is a clear instance of a government violating the condition of non-arbitrariness, as the policy, in this case the Brexit Bill, had been drafted from the 'deliberative perspective' of the Government *alone* and had not, indeed, had purposefully attempted to avoid, the deliberative perspective of those it purported to govern. Looked at in this way the condition demands that any policy must be scrutinised from the perspective of those to whom it is going to apply. A reasonable reading of this condition is that it demands that for a policy to be compliant it is given due consideration by a body of representatives of the governed, even if the executive ultimately overrules them.

Deliberation alone has merit as a condition for the rule of law, as at a minimum it places hurdles in the way of tyrants and bullies looking to bypass established social deliberative norms. Deliberation is also clearly a rule of law asset as it generates and solidifies the norms amongst the ruling classes (whether they be executives, officials, judges, or legislatures) who then reach a shared consensus as to what the law is. This is essential for example, to any rule of recognition in a modern legal system, which is dependent on a legislature for validity.[88] Absent deliberation, consensus would be almost impossible to locate. The requirement for a deliberative condition is exemplified across the world in the current era of 'strongman' politics, where even in seemingly developed democracies, individuals, acting as executives, have tried to avoid or override deliberative scrutiny.[89]

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[86] European Union (Withdrawal) Act 2018.

[87] *R (On the Application of Miller) v The Prime Minister* [2019] UKSC 41.

[88] Hart (n 24) 100–106.

[89] For an overview see, Seraphine Maerz and others, 'State of the World 2019: Autocratization Surges—Resistance Grows' (2020) 27(6) Democratization 909, 910–914 or, for a specific case study of arbitrary rule in Hungary see, Péter Krekó and Zsolt Enyedi, 'Explaining Eastern Europe: Orban's Laboratory of Illiberalism' (2018) 29(3) J Democr 39, 43–50 or, Flora

However, an anecdotal example illustrates the shortcomings of this stand-alone condition. Emperor Nero's decree of AD64, following the great fire in Rome of that century, would most probably have passed the non-arbitrariness condition.[90] If the consensus is to be believed he did call a council of advisors as per Roman law of the time, and considered multiple other 'culprits', or one could argue perspectives, notably the Jews, before issuing his decree against Christianity.[91] While executively choosing to legislate against the interests of those he governed he at least nominally considered their deliberative perspective and as such his decision was 'non-arbitrary'.

Postema, quoting Pettit, quite rightly sees non-arbitrariness alone being insufficient to determine the rule of law.[92] Postema argues that truly what is required for the protection from arbitrary rule is *answerability*, or more specifically 'mutual accountability', which he sees as sitting independently of arbitrariness.[93] In answer Postema advances a 'fidelity thesis', which has two dimensions, one vertical and the other horizontal.

3.2 Full Fidelity

Fidelity is to be read as a binding commitment. Specifically, Postema sees fidelity as a three-way street, a tripartite marriage of equals. First, mutual commitment and accountability between subjects and the state for the rules they institute, second between citizens and the rules, and finally amongst citizens themselves, generating a compact amongst the

Garamvolgyi and Jennifer Rankin, 'Viktor Orban's Grip on Hungary's Courts Threatens Rule of Law' *The Guardian* (London, 14 August 2022) <https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge> accessed 3 June 2023.

[90] Francis Bacchus, 'The Neronian Persecution' (1908) 143 Dub Rev 346, 347.

[91] Michael Gray-Frow, 'Why the Christians? Nero and the Great Fire' (1998) 57 Latomus 595, 615.

[92] Postema (n 22) 19.

[93] ibid.

governed and the governors as we 'the people', to our law.[94] The vertical element relates to the mutual commitment owed between the state and its citizens and the horizontal is that which is owed between citizens bound together in a commonwealth.[95] This idea of vertical and horizontal commitments is not unique, for example Jeremy Waldron talks of terms like 'equal concern' and 'human dignity', 'clustering together to form a powerful body of principle' which do two jobs 'one vertical and one horizontal'.[96]

3.2.1 Vertical Fidelity

The vertical element of the fidelity thesis is expressed under many different guises and can be seen as the natural answer to Hobbes' unchecked Leviathan. Stated simply, the lawmakers and powerholders may construe laws however they please, provided that they themselves are beholden to them and cannot 'opt out'. For example Martin Krygier, rejecting a purely technical account of the rule of law, argues for 'at least a reliable constraint on the exercise of power' by those in positions of authority.[97] Krygier quotes Frank Upham's frustration that 'the training of Chinese judges by American law professors does not prevent the detention of political dissidents',[98] this is a handy example of where the 'means' of the rule of law are not met by the 'ends' of the rule of law. Vertical fidelity demands that our hypothetical Chinese judge cannot detain or decree against an individual simply because they dislike them or their views.

It could be argued, that had the hypothetical judge, expressed dissident views, and broken some codified law, they may well be subject to

[94] Green and Hendry (n 20) 25.
[95] Postema (n 22) 39–40.
[96] Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Harvard University Press 2017) 3.
[97] Martin Krygier, 'The Rule of Law and "The Three Integrations"' (2009) 1 HJRL 21, 26.
[98] ibid 23.

sanction. But Upham's frustration is of the type where the judge uses their discretion too freely, correlating the law with their own morality rather than seeing it as an independent instrument. All judges, and therefore office holders, must be held to the same standard as the accused.

Vertical fidelity at its most basic prevents *the governed* from being treated differently from the *governors*, that is all. However, this alone does not satisfy the sort of 'moral equality' or equal standing someone like Waldron has in mind when he expresses that 'human life has a high worth that is important and equal in the case of each person'.[99] For a more thorough determination of 'basic moral equality' and therefore full fidelity, we need to look to the horizontal element of the formulation.

3.2.2 Horizontal Fidelity

The following element of civic-equality-plus will be fundamental in determining the defensibility of the Government's proposals. Via means of a justification of a 'basic human moral equality', that doesn't rely on human uniqueness or the possession of a range of human characteristics, it will be shown that, so long as we meet a standard of treating drug-dependent users with a sufficient level of esteem, the law is justified in having different legal regimes for different types of drug users.

The horizontal element to the rule of law can be understood as involving three dimensions: 1) a commitment to treat each other as moral equals, 2) a commitment to one another to be ruled by '*one* set of governing standards', 3) a commitment to hold one another to account for those rules.[100] It is from the first dimension that the other following two dimensions stem. In this way the rule of law can be conceptualised as a social communal phenomenon where humans, as agents in a social

[99] Waldron (n 96) 2.
[100] Green and Hendry (n 20) 5.

enterprise, commit to being ruled with some minimal guarantees of fairness and dignity. This is admittedly not a particularly novel idea, as Postema acknowledges, Kant and Rousseau commit to a form of horizontal fidelity, but despite the criticisms levelled against them it is an idea worth defending.[101]

3.2.3 Horizontal Fidelity as Basic Moral Equality

The crux of the horizontal commitment implicitly relies on the theory that 'all persons have equal moral standing', something George Sher notes as 'a rare point of agreement' amongst moral and political philosophers.[102] This article relies heavily on this consensus and as such perhaps the most pressing demand, and one that Waldron notes Ronald Dworkin apparently takes for granted,[103] is a justification as to why we should assume ourselves 'moral equals'. If we can establish good reasons for this, then we are in a strong position to accept the 'horizontal duties' expected of us without further concern as to how they are formulated.

Waldron provides a starting point, proposing two reasons as to why we might consider ourselves moral equals. The first argument, he terms 'continuous equality', in which he argues that 'the principle of basic equality is opposed to any claim that there are moral distinctions and differentiations to be made *among humans* like unto or analogous in scale and content to the moral distinctions commonly made between humans and other animals'.[104] Stated simply there are no 'moral distinctions' that we can make amongst humans akin to those we can make between humans and 'other animals', or rather, all humans are more human than any other animal is human.

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[101] Postema (n 22) 36.
[102] George Sher, 'Why We Are Moral Equals' in Uwe Steinhoff (ed), *Do All Persons Have Equal Moral Worth? On 'Basic Equality' and Equal Respect and Concern* (OUP 2015) 17.
[103] Waldron (n 96) 15.
[104] ibid 30.

Waldron's second principle, termed 'distinctive equality' takes the first principle further and argues for human exceptionalism. Waldron commits himself to this second stronger principle of moral equality.[105] This is not a necessity; a modified version of his first principle alone is sufficient as a basis for moral equality.

In dealing with Waldron's second principle, his first is undermined but easily revisable. What Waldron calls 'distinctive equality' should be better termed 'anthropocentric equality'. Waldron sets out that humans are in some way special. He allows that this may be a religious claim,[106] or it may be a more 'modern' claim that our 'moral standing depends on some variable property or capacity',[107] most often this capacity is consciousness or intelligence. Whatever the root cause the argument is that we are 'special', not just different, but different *and* better.

Human exceptionalism tends to fall into two groups. This article will not deal with the more eccentric ideas around what Anil Seth calls "'spooky" free will', that is the type of humanness that invokes some sort of 'spirit force' or soul,[108] but rather with the more plausible suggestion that we are special because we are especially conscious or intelligent.

Consciousness and intelligence turn out to be very poor traits to base human uniqueness on, largely because of what Sher terms the 'scalar problem',[109] something that Waldron, by way of Rawls, is alert to.[110] This posits that if we are to determine our uniqueness, and therefore our moral equality, on a certain property, say our intelligence or our

[105] ibid 31.
[106] ibid ch 5.
[107] Sher (n 102) 18.
[108] Anil Seth, *Being You: A New Science of Consciousness* (Faber & Faber 2021) 211.
[109] Sher (n 102) 18.
[110] Waldron (n 96) 113–141.

consciousness, how conscious or intelligent do we need to be to be moral equals. If we set some, arbitrary level, inevitably we will end up with scenarios where for example the severely learning disabled or children may fall out with the required level of intelligence or consciousness. Indeed, we are becoming acutely aware that many mammals and birds outperform quite advanced children at different intelligence tests, and machines are certainly outperforming adult humans.[111] This is problematic, not because if, by 'lowering the bar', we award moral equality to non-human beings, rather that in setting the bar at any level we will almost always exclude humans we would wish to include. This is clearly not a firm basis on which to base basic moral equality.

So, to turn to Waldron's 'continuous equality', the idea that denies the 'existence of major discontinuities in the human realm',[112] the starting premise needs clearer elucidation. What is unsaid is that we are concerned with humanity, and how we organise ourselves. We need not resort to other animal comparisons; the argument here is one of sufficiency, homogeneity and potential. First of all, all humans are sufficiently homogeneous, that is to say sufficiently human, for us not to discriminate against one another, something Waldron agrees with.[113] Is this really true? After all there are 'innumerable physical and mental differences that separate people'.[114] These differences, however, are not enough to ever stop someone being human. There is yet to be a human born with a granite rock for a head, or a sun for a nose, or who is able to navigate the world through magnetoreception.[115] Yes, within the bounds of what a human is like, there are differences, but on the physical scale of the universe these are minute. We really are just too

[111] Seth (n 108) 251.
[112] Waldron (n 96) 30.
[113] Waldron (n 96) 134.
[114] Sher (n 102) 17.
[115] Jason Daley 'Can Humans Detect Magnetic Fields' (*Smithsonian Magazine*, 20 March 2019) <https://www.smithsonianmag.com/smart-news/can-humans-detect-magnetic-fields-180971760/> accessed 3 June 2023.

similar, 'we inhabit a tiny region in a vast space of possible conscious minds, and the scientific investigation of this space so far amounts to little more than casting a few flares out into the darkness'.[116]

Second, this article posits a stronger theory, that all humans while having the potential, however small, to make up the gaps in some of what we might have previously seen as the characterising features of being specifically human, are still always human. This is distinct from Waldron's 'telos', which states that any person could have been, or at any point might fail to be within the *range* of humanness,[117] but is rather grounded in the reality of our changing circumstances. Children grow up, those suffering from mental illness have new treatments that in some cases alleviate all their symptoms,[118] the visually impaired can increasingly see,[119] and the drug-dependent recover.[120] That matters to the individuals but what matters most is the simple fact that we are born humans and it is humans, and the way in which we organise ourselves that we are concerned with. Our equality stems from the simple fact of our birth into the set we call human animals.

Basic moral equality and therefore status equivalence is based on an acceptance of *sufficient* human homogeneity, which proscribes citizens, or those that govern, from discriminating against one another based upon a *sufficient* set of standardised 'human' characteristics. As such differences in skin colour, gender, height or intelligence are *insufficiently* heterogeneous amongst humans. If we were to insist upon

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[116] Seth (n 108) 245.

[117] Waldron (n 96) 250.

[118] Hannah Devlin, 'Woman Successfully Treated for Depression with Electrical Brain Implant' *The Guardian* (London, 4 Oct 2021) <https://www.theguardian.com/society/2021/oct/04/woman-successfully-treated-for-depression-with-electrical-brain-implant> accessed 3 June 2023.

[119] Reza Dana, 'A New Frontier in Curing Corneal Blindness' (2018) 378 N Engl J Med 1057.

[120] See for example Patrick Flynn and others, 'Looking Back on Cocaine Dependence: Reasons for Recovery' (2003) 12(5) Am J Addict 398.

going outside the human sphere for cardinal differences a better gauge might be that we are *certainly* distinctive from rocks or stars, maybe single-cell amoeba, but not from one another. This is enough to establish 'basic human moral equality'.

3.2.4 Esteem and Horizontal Fidelities Duties

Having established basic moral equality amongst humans, we can then deal with the other two dimensions of the horizontal element of the rule of law, namely a commitment to be ruled by a set of rules and a commitment to hold one another to account for those rules. These flow quite neatly from basic human moral equality, the first condition insists that if we accept each other as moral equals, that is to accept oneself as an equal, no better, no worse, and as such having no *good* reason for excusing oneself from the set of rules we have, albeit perhaps tacitly, agreed to be governed by. [121]

The second condition is more nuanced; if we believe ourselves moral equals then it is incumbent on us to hold each other in equal esteem. However esteem ought to be understood through two paradigms. The first type, for the purposes of this article is 'strong esteem', the second, 'sufficient esteem', it is this second variety that basic human moral equality demands.

Strong esteem can be thought of as a sort of attitude, regard and perhaps even reverence with which we might treat people who we see as being of good standing or moral excellence, the opposite being where an individual falls short of what we might expect of them.[122] Basic moral equality doesn't require us to go around revering all people at all times, and we can often have very good reasons not to. However, 'sufficient esteem' is implied by basic moral equality, and it requires that no matter

[121] For a comprehensive discussion on the possibility of tacit consent to be governed see, Hanna Pitkin, 'Obligation and Consent I' (1965) 59 APSR 990 and Hanna Pitkin, 'Obligation and Consent II' (1966) 60 APSR 39.
[122] For example, see 'affective blame' in Lacey and Pickard (n 34) 18–20.

the conduct of 'others' they remain human and therefore we owe them the duties of human dignity and respect, regardless of their acts. That extends to respect for their mental welfare as much as to their bodily integrity, for as basic moral equals we can't possibly have any good reasons not to.

An extension of 'sufficient esteem' is the requirement to hold one another accountable to the rules to which we have prescribed. This should not be thought of as a sort of Foucauldian social policing[123] but rather a positive commitment to hold each other to account to our rules, to which we have, perhaps only putatively, agreed in common. This is better understood as for example calling out racism or misogyny when we see it, whether that is amongst citizens or within laws, rather than calling the local council when our neighbour has parked on a double yellow line. A commitment to basic moral equality is a positive commitment that demands non-passivity and therefore the defence of our shared rules.

Together these three dimensions generate horizontal fidelity, and along with vertical fidelity create full fidelity, a commitment to the equal subjection to the rules by the ruled and the ruler, and a stronger commitment between all, to both treat each other as moral equals under those rules and hold each other to account for them. Any policy to be rule of law compliant must be capable of passing this condition.

3.3 Capacity

The type of capacity relevant to this article is the individual's capacity to give, to commit, even if only in a hypothetical sense, to the full fidelity required of them as outlined above. The obvious case is, of course, minors, from whom we cannot expect full fidelity. Thus while a newborn baby is a moral equal, we are justified in temporarily suspending and making rules that intervene on the duties owed to, and

[123] Michel Foucault, *Discipline and Punish: The Birth of The Prison* (1st edn, Penguin Classics 2020).

by, them but only if we are working toward a point that they can fully participate in the commonwealth. This applies not only to minors but also acutely, to the insane[124] and the severely mentally disordered,[125] and requires stringent checks and balances, that emphasise some scheme in which there is a 'way back' to full fidelity and the maintenance of sufficient esteem.

These three conditions can collectively be conceived of as a version of civic equality. It is this account, civic-equality-plus, which extends the rule of law beyond its more familiar and limited contours, into a socio-phenomenological one, which can then be used to determine whether any given policy is rule of law compliant. It helps to see what policies this account of civic equality permits, to see if it is doing any real-world work, before moving on to test the Government's drugs policy proposal against it.

3.4 Testing Civic-Equality-Plus

The paradigm of three potential 'marriage laws' is useful for testing this version of civic equality, namely: interracial marriage, marriage to a minor and 'no marriage'.

To start with interracial marriage, could a fair society institute a policy, which allowed those of the same ethnicity to enter into marriage but ban marriage between those of different ethnicities?[126] Such a policy would pass the first condition, non-arbitrariness, provided it was debated in a legislature before being passed, and the views of those who wished to

[124] See for example, Matt Matravers, 'Holding Psychopaths Responsible' (2007) 14(2) PPP 139 or, Michael Moore, 'The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik' (2015) 9(4) Crim Law and Philos 645.

[125] See for example, Ailbhe O'Loughlin, 'Sentencing Mentally Disordered Patients: Towards a Rights-Based Approach' (2021) 2 Crim LR 98.

[126] For example in Apartheid South Africa see, Prohibition of Mixed Marriages Act, Act No 55 1949.

engage in interracial marriage were represented in that debate. The demands of vertical fidelity would permit it, provided those governing also abstained from interracial marriage, however it would clearly fail on the grounds of horizontal fidelity. The key to its failure is not in the banning of interracial marriage; it is in the instituting of any marriage. If marriage is to be permissible, then as moral equals, we must apply the institution evenly across us 'the people' for it to be our law, ethnicity would not be a sufficient ground for discrimination. A law against interracial marriage would not be a permissible candidate for legislation.

What of the unpleasant question of marriage to a minor, to make it easy what of a proposed law that permitted marriage between anyone over the age of six.[127] Non-arbitrariness would be satisfied, as would vertical and horizontal fidelity, however it would clearly stumble on capacity, as no serious person would deem a six-year-old sufficiently capacious to enter into something as solemn and consequential as marriage. So no, civic-equality-plus would not permit a marriage policy that allowed marriage to or amongst minors.

Finally, there is the somewhat unusual outcome of a rule banning all marriage, something civic-equality-plus would permit. However this is where the important point of civic-equality-plus comes in, it is merely a starting gate through which policies pass to be rule of law compliant. If after that point thicker political philosophies wish to be applied then civic-equality-plus remains silent. There may be rights or harm-based grounds, paternalistic or even perhaps some moralistic reasons why a law, policy or regime may or may not be instituted. Civic-equality-plus simply sets a benchmark, a benchmark designed to protect polities from

[127] I have intentionally used a dramatically low age, as the focus of this paper is not on adolescents and their capaciousness, for a comprehensive discussion see, Mathew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave MacMillan 2005).

the 'arbitrary use of power' and offer a minimum level of protection for human dignity amongst moral equals.[128]

4 Is There Any Hope?

Having established and defended an account of civic-equality-plus one can now assess the Government's proposal and decide whether the policy is rule of law compliant and thus a suitable candidate for legislation.

4.1 Is Bifurcation Defensible?

4.1.1 Is it Non-Arbitrary?

This article defends a strong interpretation of non-arbitrariness, namely that the proposal needs to go through sufficient 'normal' stages of deliberation, to include scrutiny by Parliament, taking into account the perspective of all those who would be affected by the proposal, before any changes to law are implemented. Crucially this ought to include the 'deliberative perspective' of the 'recreational user' as well as that of the 'drug-dependent'.

There are two critical things that give hope that this condition will be met, first the way in which the proposal has gotten to where it is today. The Dame Carol Black report was commissioned, and the work in that report was rigorous, consulting with most of the key stakeholders.[129] For example, User Voice was consulted, a charity run by those who 'have been in prison and on probation', representing the views of those with experience of the criminal justice system, many of whom will have lived experience of drug dependency,[130] as well as more institutional consultee's like police forces and academics specialising in addiction

[128] See Allan (n 76).
[129] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 1' (n 13) (Summary) Annex A and B.
[130] User Voice (2014) <https://www.uservoice.org/ > accessed 3 June 2023.

and criminology.[131] Not only was the report commissioned, it has undoubtedly been considered, indeed there is a commitment to implement the 'key recommendations, this is more than satisfactory'[132] for non-arbitrariness. In fact, provided they were given sufficient consideration, the Government could have chosen not to implement any of the recommendations and non-arbitrariness would still be satisfied.

Second, the Government committed to a 'White Paper next year'[133] to bring the matter forward. Again, this seems to be a commitment to follow the deliberative norms of the UK, and, if followed up would lead to a hearing in Parliament. This would satisfy non-arbitrariness.

However, there are two notes of caution to be struck which can nevertheless be easily resolved. The first relates to the 'deliberative perspective' of the 'recreational user'. This point is difficult, as the Government challenges the 'notion of recreational use',[134] despite repeatedly referring to it, admittedly often with the antecedent 'so-called'. Dame Carol Black certainly did not consult with recreational users, and the Government while semi-acknowledging the possibility, denies their validity. However, if the proposal were to get to Parliament and be deliberated there, given the 'principle-agent model' of the House of Commons, it would be adequate to say that all the peoples of the UK's perspective are s*ufficiently* considered when something is deliberated in the Commons. [135] That is to say sufficient to satisfy non-

[131] For example an interview with Cressida Dick the then Commissioner of the Metropolitan Police Service or the Neuroscience of Substance Misuse Roundtable held at Cambridge University both in, Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 2' (n 14) Annex B.
[132] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 8.
[133] ibid 6.
[134] ibid 5.
[135] For a good comparator showing strong links between constituencies and MP's see, Katrin Auel and Resul Umit, 'Who's the Boss? An analysis of the vote on the "The European Union (Withdrawal) Bill" in the House of

arbitrariness. However, this leads to the second concern, namely the scope of the proposed White Paper.

Currently, the Government only proposes that the White Paper explores 'new measures to reduce demand and deter people from illegal drug use through a set of tougher sanctions'.[136] This is insufficient, particularly with regard to the crucial element of treating addiction as a 'chronic health condition'. As will be shown below, an awful lot of work is being done by this change in classification, as such the White Paper ought to include this, and any proposals around the means by which drug dependency is ascertained. Given there is a simple fix, ie broadening the scope, this is not an impediment to the potential defensibility of the Government's proposals. So if the scope of the White Paper is broadened and it is brought before Parliament, non-arbitrariness is satisfied.

4.1.2 Does It Meet the Demands of Full Fidelity and Capacity?

There is nothing to suggest vertical fidelity is under threat; for example, there is no suggestion of special privileges for the governing classes, or an uneven application of the policy. This is obviously dependent on the policy being enforced uniformly, something that may be of concern in light of recent and historic revelations around institutional racism and misogyny in many police forces.[137] However, as a basic normative

Commons' (2021) 29 JCES 468.

[136] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 49.

[137] For example, for instances of institutional racism and misogyny in the Metropolitan Police Force, see, Independent Office for Police Conduct, 'Operation Hotton: Learning Report' (2022) <https://www.policeconduct.gov.uk/sites/default/files/Operation%20Hotton%20Learning%20report%20-%20January%202022.pdf> accessed 3 June 2023.

premise, the proposal does not recommend exclusions for the rulers or powerful.

Horizontal fidelity requires more careful consideration. Treating the drug-dependent differently under the law can be justified due to a lack of capacity, coupled with the ability to return to capacity, whilst holding drug-dependent individuals in 'sufficient esteem' for the period in which they may need to receive treatment. This is where a comparison with mental health law is useful and can provide a template for thinking about drug dependency.

It is already accepted under the Mental Health Act 1983 that individuals suffering from a mental disorder, who have committed a crime, may be dealt with by way of a hospital order, known as s 37 orders.[138] Such orders can only be used when the court is satisfied that the offender is suffering from a mental disorder and that appropriate treatment is available and that this is the best way of disposing of the case.[139]

While current mental health legislation, contrary to the DSM-V,[140] doesn't treat drug dependency as a valid mental health disorder a specialist drug court could. Indeed, the Government's proposal to treat drug dependency as a chronic health issue is doing just that. The diagnosis and classification of the individual as suffering from a condition which prevents them from being able to offer fidelity is one of the key concepts that keeps horizontal fidelity intact. Thus, the separation of the drug-dependent user is justified simply by the acknowledgment of it as a chronic health condition, one of the symptoms of which is the compulsive consumption of a drug or drugs. This speaks to a complete, but temporary, lack of capacity when it comes to the individual's ability to control their drug use.

[138] Mental Health Act 1983, s 37.
[139] ibid s 37(2).
[140] James Morrison, *DSM-V Made Easy: The Clinicians Guide to Diagnosis* (The Guilford Press 2014).

Of course if other crimes were committed concurrently this does not mean drug-dependent offenders would be diverted for *all* crimes. Just as in mental health law the degree to which the individual's mental disorder contributed to the commission of the crime is a matter of the degree of culpability, which can be greater and lesser.[141] This article is only concerned with the act of drug *use* and as such, the individual's commission of other crimes may be related to their dependency to varying degrees or indeed not at all.

The stipulation that treatment is available is also essential, as it speaks to the individual's ability to return to capacity and therefore fidelity, and thus the commitment to basic moral equality. Given the commitment to divert drug-dependent users into a treatment and recovery system, we have to assume, with the help of empirical data showing the possibility of recovery for even the most entrenched drug users,[142] that some form of treatment will always be hypothetically available even if it is not practically available in this jurisdiction now. There are no lost causes.

These two considerations alone, are not enough to fully satisfy horizontal fidelity, as there are two further considerations, that of 'sufficient esteem' and punishment. Dealing with the latter leads to a satisfactory answer to the former.

As discussed previously, this article considers non-voluntary substance abuse programmes as having practical equivalence with punishment, as they are backed up with hard treatment. Therefore this article argues that all 'diversion' would have to be voluntary. There are good practical reasons for this, as intervention usually requires the compliance and acceptance of responsibility by the individual to achieve successful

[141] Nicholas Hallett, 'To What Extent Should Expert Psychiatric Witnesses Comment on Criminal Culpability?' (2020) 60(1) Med Sci Law 67, 69—71.
[142] See Office for National Statistics, 'Drug Misuse in England and Wales: year ending March 2020' (n 62).

outcomes.[143] However, normatively, if the individual is forced into a non-voluntary programme, it is a failure to treat that person with 'sufficient esteem' as demanded by basic moral equality. An example helps to illustrate this; no one would accept that a diabetic ought to be forced to take insulin, even if it were a very foolish thing to refuse to do. We might be justified in not holding them in 'strong esteem' but we ought to have respect for their bodily integrity. To respect their decision to handle their health condition as they see fit is to show them sufficient esteem and as such acknowledge our basic moral equality. The same must be applied to the individual suffering from drug dependency, people 'should be supported to make informed decisions about their drug use' not coerced.[144] On the basis that diversion means genuine diversion to services, which are voluntary in nature, then horizontal fidelity can be met.

In addition, a determination that someone is drug-dependent must not lead to any form of stigmatisation, this again speaks to sufficient esteem. This conclusion however raises a much harder question as to why we are then justified in treating the 'recreational user' so harshly and whether horizontal fidelity has anything to say on the matter? To answer this question consideration needs to be given to the grounds for discriminating against the recreational user.

The discrimination can best be understood as discrimination against the 'recreational user' for a 'lifestyle choice', much like the decision to take up competitive horse racing or boxing (two lifestyle choices which come with significant risks). Lifestyle choices are not intuitively offered any protection by civic-equality-plus, they are things that come after the rule of law, and as such, civic-equality-plus is silent on them. If we are assuming the choice is made with full, or at least sufficiently full, capacity, that is knowledge of the rules and how they apply to them,

[143] Lacey and Pickard (n 34).
[144] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3) 9.

the recreational user is not suffering from a disorder that would interfere with their ability to offer horizontal fidelity. The recreational use of drugs, just as the decision to sky dive for example, is not an adequately accidental characteristic in the same way as something like ethnicity, height, mental illness or gender is.

Again to strike a note of caution the classification and subsequent punishment of someone for recreational use must not lead us to fail to hold them in 'sufficient esteem'. We ought to be particularly concerned in light of recent work on collateral consequences, and the Government's 'threat' to get tougher on recreational drug users. Collateral consequences can range from social stigmatisation and loss of self-esteem to loss of employment, loss of the right to vote, and being assaulted in the community. The important thing is that they are all in some way burdensome.[145] Zach Hoskins notes that over 65 million US adults have criminal records[146] a huge number of them for drug-related offences, thus if a policy is proposed that wishes to be tougher on existing recreational drug users then it needs to guard against collateral consequences unintentionally leading to a failure to treat those users with sufficient esteem.

In summary a policy that bifurcates individuals based on their drug consumption status is justified and passes the conditions of civic-equality-plus provided the following apply: first, when being considered the policy adheres to deliberative norms that consider all parties interests, second, any subsequent policy is equally applied. Finally, drug dependency is recognised as a genuine health condition, which has severe effects on capacity, and that all subsequent 'treatment' for the condition is voluntary with both those that are and aren't drug-dependent continuing to be treated with sufficient esteem.

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[145] Zachary Hoskins, 'Criminalization and the Collateral Consequences of Conviction' (2018) 12(4) Crim Law and Philos 625, 626–628.
[146] ibid 637.

It is worth noting that for such a policy to be successfully implemented there are legislative inconsistencies and amendments that need to be considered. Both the Mental Health Act and the Equality Act need to be updated, to remove the carve out of drug dependency as a mental disorder or impairment,[147,148] the latter in line with demands made by the Changing Lives White Paper.[149] A brief example illustrates the importance of this amendment, if an individual suffering from drug dependency is not defined as suffering from an impairment this could result in them being unfairly disbarred from appropriate housing or employment, employers would be able to unfairly discriminate against them, with appropriate jobs failing to be tailored to the specific needs of someone in treatment or recovery while also not qualifying for certain welfare benefits. This may seem like a big ask, however much of this stems from a complete lack of understanding of what the lives of most people suffering from drug dependency might be like given proper treatment and dignity. Instead it is based on our experience of rife, life-ruining, untreated drug dependency. Carl Hart probably puts it best, in quite startling language, when he talks of his surprising year-long experience of working with the most entrenched heroin users receiving high-quality and holistic treatment in Switzerland, a country which has been offering such treatment for over 20 years:

> Like a Swiss watch, so-called junkies were reliably on time. They were almost never late … they were happy and living responsible lives. It became impossible for me to retain the misguided notion that heroin addicts are irresponsible degenerates.[150]

[147] See Mental Health Act 1983, s 1(3).
[148] See Equality Act 2010 (Disability) Regulations 2010, s 3(1).
[149] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3) 23.
[150] Carl Hart, *Drug Use for Grown-Ups: Chasing Liberty in the Land of Fear* (Penguin Press 2021) 226.

Without these key changes to existing legislation the bifurcation of drug users would serve no purpose, and society would lose the chance to benefit from the transformation of so many lives, a reduction in crime, the depopulation of prisons, and the restoration of dignity.

5 Conclusion

This article, taking it's lead from the recent UK Government 'From Harm to Hope' proposal, set out to evaluate the moral defensibility of a drugs policy that operates two separate legal regimes for drug use dependent on drug use 'status'. After setting out the key terms of the debate, the Government's proposal for a dual regime was fleshed out. At the core of this proposal is the separation of users into 'recreational' and 'drug-dependent' categories, with the former group being dealt with via punishment through the criminal justice system and the latter being diverted into treatment.

Subsequently a legal-political theory against which any proposed policy could be tested was put forward. Starting with a relatively thin rule of law theory, it was expanded along the lines of Postema's fidelity thesis. Unlike Postema, the theory relies heavily upon the concept of 'basic human moral equality', which generates the vertical and horizontal commitments and duties owed to one another under a thick conception of the rule of law. In addition individuals require capacity of a specific kind to be held accountable to the duties generated by 'basic human moral equality', while maintaining that a lack of capacity does not obviate an individual's moral equality. Collectively this legal-political theory is called civic-equality-plus, which establishes three conditions for compliance, namely: non-arbitrariness, full fidelity and capacity.

Having set out a policy along the lines of the UK Government's proposal and committed to a legal-political theory, the proposed theory was put to the test to see if it could be morally justified, concluding that it could, subject to a number of provisions. Most crucial amongst those provisions was that drug dependency be treated by the law, and society,

as a chronic yet treatable, health condition which seriously impairs drug users' capacity in relation to use. The article argues against the use of punishment of those suffering from drug dependency whilst treating all users with sufficient esteem due to their status as moral equals. Finally it is proposed that for such a policy to work in the UK key changes to existing UK mental health and equalities legislation would be required.

Overall, a proposal of the type put forward by the UK Government does offer some hope for meaningful drug reform in polities where there may be deep-rooted aversion to drug use generally. By understanding addiction as a mental health condition and thus something requiring a public-health response such polities may find a way out of the current mess caused by purely prohibitionist policies. This article has tried to give such a policy a normative grounding in the hope that it will not be simply rejected by those who want a swifter and more comprehensive route to decriminalisation and legalisation, while attempting to allay the fears of those against more progressive drug reform.