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## RACE AND PROHIBITION MOVEMENTS

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### I. INTRODUCTION

What do various prohibition movements in the United States have in common? This article explores one apparent connection between opium, alcohol, and marijuana prohibition movements in the United States: racism towards non-white people.

To a layperson, the basics of different prohibition movements may be familiar. For example, alcohol prohibition (or, simply, Prohibition) resulted from religious and temperance movements, the Anti-Saloon League, and women standing up against the economic and moral wasteland that saloons represented for their families.<sup>2</sup> These are the stories commonly told and generally understood within the American imagination. Missing from these familiar histories is an understanding of the role, if any, that race and ethnicity played in the trajectory of state and national alcohol prohibition movements between the end of the Civil War and the passage of Prohibition. This paper serves as an exploratory journey into the ways in which race impacted the movement for opium, alcohol, and marijuana – especially in the American Midwest and South. From an examination of primary and secondary sources, we find that we may underestimate this importance.

Existing literature often explores the prohibition movements surrounding opium, cocaine, alcohol, and marijuana either individually or in comparison to one another.<sup>3</sup> This paper seeks to build a bridge—albeit a tiny one—through this body of work. We strive to understand the impact that race played in the desire to have prohibition in the first place and the racially disparate enforcement outcomes—especially from the War on Drugs—that resulted.

This article starts with an overview of selective racialized drug legislation and enforcement and their impacts on minority communities in the United States. Section II explores the evolving understandings of historians over time regarding

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<sup>2</sup> See *supra* Section IV.

<sup>3</sup> See *supra* Sections III–IV.

the motivations for Prohibition and the causes of its failure, and Section III examines the opioid crisis in light of these lessons learned from the alcohol and marijuana prohibition movements. Section IV discusses the racial motivations of alcohol prohibitions in the 1900s and 1910s. Using a survey of newspaper articles from *The Atlanta Constitution* during the first decade of the 20th century, we reveal the alarming linkage between racism towards Black Americans and southern advocacy for alcohol prohibition.<sup>4</sup> We learn from these articles the framework for understanding the intersection of alcohol prohibition and race, particularly in the South. We also use case studies of Alabama, Georgia, Tennessee, and North Carolina during the Civil War and up to the passage of the 18th amendment.<sup>5</sup> Section V examines how these same racial motivations carried over from alcohol prohibition to the marijuana prohibition movement that jump-started immediately after the passage of the 21st Amendment and the contemporary impact of these efforts. Section VI concludes.

## II. AN OVERVIEW OF THE IMPACTS OF SELECTIVE RACIALIZED LEGISLATION AND ENFORCEMENT ON MINORITY COMMUNITIES IN THE UNITED STATES

The modern prosecutor wields extensive power to criminalize or decriminalize communities.<sup>6</sup> In the 1930s, the Chicago School of Sociology explored and claimed a nexus between criminal behavior and marginalized communities of immigrants and African Americans.<sup>7</sup> This connection between non-white communities and a presumed tendency towards lawbreaking has endured in the public imagination.<sup>8</sup> It took roughly another thirty years for scholars to understand the problematic implications of this nexus.<sup>9</sup> In the early 1960s, Kitsuse and Cicourel argued that crime and deviance statistics are social products created by social actors within organizations and institutions.<sup>10</sup> They posited that crime rates do not reflect some underlying reality of criminality but instead result from a process of people calling certain behaviors deviant and counting them in crime statistics.<sup>11</sup> Their research implied that scholars should spend more time

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<sup>4</sup> See *supra* Section IV.

<sup>5</sup> See *supra* Section IV.

<sup>6</sup> Erik Luna, *Prosecutorial Decriminalization*, 102 J. OF CRIM. L. AND CRIMINOLOGY 785, 785–819 (2012).

<sup>7</sup> Jane Schneider & Peter Schneider, *The Anthropology of Crime and Criminalization*, 37 Ann. Rev. of Anthropology 351, 352 (2008).

<sup>8</sup> *Id.*

<sup>9</sup> John I. Kitsuse & Aaron V. Cicourel, *A Note on the Uses of Official Statistics*, 11 Soc. Probs. 131, 131–39 (1963).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

understanding the social construction of deviance rather than understanding deviance through a positivist lens.<sup>12</sup>

Since the 1960s, criminologists, sociologists, and critical race scholars have repeatedly identified an aspect of American policing that has persisted throughout our country's history: law enforcement officials disproportionately focus their enforcement efforts on minorities, especially young men.<sup>13</sup> With police attention focused on non-white and poor people, less attention is directed to the enforcement of white-collar or organized crimes committed by racial majorities.<sup>14</sup>

Scholars now understand that the over-policing of minority communities dates back to America's earliest days, including the policing of enslaved people, Mexicans, and Native Americans.<sup>15</sup> Indeed, many historical antecedents help explain continued racial and class-based inequities in the American judicial system.<sup>16</sup>

The criminal justice system's overemphasis on the behavior of non-white individuals continued with the war on drugs, where law enforcement officers have routinely engaged in excessive and racially disparate enforcement practices.<sup>17</sup> The U.S. government has long viewed criminal law as an effective tool to deter the production, distribution, and use of substances that the government deems illegal, despite repeated research findings that the criminal code is ineffective in stemming the demand for black market drugs.<sup>18</sup> The futility of criminal laws to prevent drug production and consumption is due to the social desirability of these compounds.<sup>19</sup> This attraction persists despite the government's official classification of such substances.<sup>20</sup> Mere criminalization of substances categorized as illicit does little to stem such demand.<sup>21</sup>

Drug and alcohol consumption is racialized,<sup>22</sup> extending to crack cocaine in the 1990s, opium in the 19<sup>th</sup> century, and alcohol and marijuana in the 1920s and 1930s.<sup>23</sup> Disparities in the treatment of minorities by majorities—including all institutions of government, but especially law enforcement—have created an

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<sup>12</sup> *Id.*

<sup>13</sup> Schneider & Schneider, *supra* note 7, at 354.

<sup>14</sup> *Id.*

<sup>15</sup> ALEX S. VITALE, *THE END OF POLICING* 132 (2018).

<sup>16</sup> Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 *CRIME AND JUST.* 49, 52 (2015) (x different schools of thoughts support different perspectives to explain the inequities- critical race theorist, conflict theorist, and attribution theorist).

<sup>17</sup> Schneider & Schneider, *supra* note 7, at 356.

<sup>18</sup> Luna, *supra* note 6, at 786.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 796.

<sup>21</sup> *Id.*

<sup>22</sup> David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 *STAN. L. REV.* 1283, 1283–1322 (1995).

<sup>23</sup> *Id.*

overrepresentation by the population of Black people in penal institutions compared to white people.<sup>24</sup> For instance, in 1918, Black people constituted only 11% of the general population but 22% of the imprisoned.<sup>25</sup> By 1960, Black people comprised 30% of the country's prison population;<sup>26</sup> by 1980, 44%;<sup>27</sup> and by 1990, Black people comprised fully half of the national prison population, despite making up less than 15% of the country's population at large.<sup>28</sup> By 2001, the likelihood that a Hispanic male would go to prison was 17%, compared to only 5.9% for white males.<sup>29</sup>

The strong association of drugs with racial communities has created fertile opportunities for stigma and criminalization.<sup>30</sup> Still, scholars disagree as to the cause of racial disparities in the criminal justice system. Some argue that disproportionate numbers of arrests of Black and Latino people are due to elevated levels of criminal behavior among those populations.<sup>31</sup> Others suggest that minorities are more likely to commit their offenses in public spaces; hence, their illegal activities are more visible and facilitate police response.<sup>32</sup> In contrast, white people commit their crimes in more private venues.<sup>33</sup> Some scholars take the view that over-incarceration is attributable to structural defects in the system, not racial bias.<sup>34</sup> Recently, however, scholars, including Beckett et al., argue that some fault lies with the legislative treatment of drugs—the government's determination of which substances should be made illegal in the first place.<sup>35</sup> Those drugs associated with minorities have been viewed by governmental majorities (and the public at large) as more harmful or dangerous than those consumed by white people and criminalized accordingly.<sup>36</sup> Examples include crack cocaine versus powder cocaine and consumption of opium by smoking (associated with Chinese immigrants) versus oral consumption (associated with white people).<sup>37</sup>

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<sup>24</sup> Spohn, *supra* note 16, at 54.

<sup>25</sup> *Id.* at 55.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Sklansky, *supra* note 22, at 1289.

<sup>31</sup> HEATHER MACDONALD, *THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE* 150 (2017).

<sup>32</sup> Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 420 (2005).

<sup>33</sup> *Id.* at 435.

<sup>34</sup> *Id.* at 420.

<sup>35</sup> *Id.* at 437.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 421.

Scholars have established that certain laws are drafted because they are inspired by a racial overcast that is discriminatory both in drafting and application.<sup>38</sup> This framework better explains the overrepresentation of Black and Latino people in drug possession arrests.<sup>39</sup> Yet even when substances used by white people are criminalized on the books, criminal law enforcement leaves a great deal of room for discretion.<sup>40</sup> This discretion creates additional space for racial disparities. The argument that drug arrests are race-neutral (based only on the visibility of drug activity and not on race) fails in the face of data demonstrating that more arrests are made of Black and Latino people because law enforcement has focused enforcement efforts on those drugs used by minorities, rather than those used more frequently by white people.<sup>41</sup> This fact represents a “racialized conception of ‘the drug problem.’”<sup>42</sup>

America occupies a unique position in the Western world in that we have the “world’s highest imprisonment rate, the Western world’s only use of capital punishment, the Western world’s most severe punishments short of death, and the effects of those policies on black Americans.”<sup>43</sup> In this paper, we argue that these effects extend to Latino communities and other racial and ethnic minorities. Those prohibition movements are a vital tool used over time in the criminalization of communities of color. We see prohibition movements, not as discrete moments in our nation’s history, but intimately tied to one another. In the following sections, we explore the alcohol prohibition movement and the marijuana prohibition movement and apply lessons learned to the modern opioid crisis.

### III. RACE AND CRIMINALITY: AMERICA’S FIRST WAR ON DRUGS

In March 2011, the *Batesville Herald-Tribune* (Indiana) lamented the death of 20-year-old Manda Spitler.<sup>44</sup> “Manda was the best thing that ever happened in my life, and even though Manda had two parents who loved her unconditionally, had good friends, went to good schools, and had good teachers....she let the beast of drug addiction take over her.”<sup>45</sup> This style of reporting has become somewhat characteristic of the so-called “opioid epidemic.” White victims are often

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 422.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME AND JUST. 1, 1 (2008).

<sup>44</sup> Diane Raver, Heroin Death: *She Thought It Would Be Fun*, BATESVILLE HERALD TRIB. (May 1, 2020) [http://www.batesvilleheraldtribune.com/news/local\\_news/heroin-death-she-thought-it-would-befun/article\\_26ca9e08-158e-5cb2-b1cc-560d7fea10f5.html](http://www.batesvilleheraldtribune.com/news/local_news/heroin-death-she-thought-it-would-befun/article_26ca9e08-158e-5cb2-b1cc-560d7fea10f5.html).

<sup>45</sup> *Id.*

memorialized fondly, with their bright futures lamented as needlessly lost, as poor souls succumbed to some evil peer.<sup>46</sup> Scholars have also noted that Black victims are treated with less affection, their deaths reported matter-of-factly, or worse, as the criminal bringers of their demise.<sup>47</sup> Race has become inextricably linked to criminality, especially in movements for substance prohibition.<sup>48</sup> Examples of disparate media reporting are not modern inventions, however.

We begin with this anecdote to show that this phenomenon finds its roots in the earliest anti-drug campaign in American history: the push to ban smoking opium at the end of the 19th century. When nineteen-year-old Albert Reggel died from the side effects of smoking opium, the local paper dedicated a string of articles to remembering the victim and denouncing the “evils of Chinese opium dens.”<sup>49</sup> That journalistic gusto was not extended to the death of a Chinese railroad worker, who also died from similar effects of opium consumption.<sup>50</sup> No investigation into his death was made, and no article was written to commemorate a life lost.<sup>51</sup>

While the media reporting is obviously unequal, it is hardly the only theme present during that period that made its way to succeeding generations. As we shall see, the campaign against opium had little to do with opium but was a single wave in a monsoon of anti-Chinese sentiment. The media and labor organizers decried the Chinese as social villains, and the habit of smoking opium was an element of their supposed inherent lawlessness.<sup>52</sup> The actions of media, legislators, and prominent Americans would not simply ignite the first war on drugs; they conspired to develop the racially infused rhetoric employed by future prohibition advocates.

### A. Golden Spikes and Gold in the River

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<sup>46</sup> *Id.*

<sup>47</sup> See Kristin N. Dukes & Sarah E. Gaither, *Black Racial Stereotypes and Victim Blaming: Implications for Media Coverage and Criminal Proceedings in Cases of Police Violence against Racial and Ethnic Minorities*, 73 J. OF SOC. ISSUES 789, 789 (2017) (finding that information released about a victim can significantly sway attitudes about both the victim and the assailant); Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," and Race in Media Coverage of Prescription Opioid Misuse* 40 CULTURE, MED. AND PSYCHIATRY 665, 667 (2016) (reporting that coverage of white opioid users was sympathetic as opposed to Black opioid users).

<sup>48</sup> See Dukes & Gaither, *supra* note 47, at 789; see also Netherland & Hansen, *supra* note 47, at 667.

<sup>49</sup> DIANA AHMAD, THE OPIUM DEBATE AND CHINESE EXCLUSION LAWS IN THE NINETEENTH-CENTURY AMERICAN WEST 44 (2007).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 89.

The mid-19th century witnessed an unprecedented rise in immigration to the American West from Asia.<sup>53</sup> Historians have typically attributed this phenomenon to two major events: the discovery of gold at Sutter’s Mill in 1848 and the construction of the Trans-Continental Railroad from 1865–1869.<sup>54</sup> Many of these immigrants arrived from the Chinese port city Canton, a historical hotbed of international opium smuggling and political turmoil.<sup>55</sup> In the twenty years from 1852–1870, over 70,000 Chinese workers flocked to the United States, often working in the most dangerous jobs.<sup>56</sup>

Initially, Chinese immigrants were a welcome sight to fill labor shortages arising from the gold rush.<sup>57</sup> However, as time progressed, American sentiments of “curiosity” devolved into “hatred espousing total exclusion.”<sup>58</sup> When the gold rush eventually lost popularity, and the railroad was completed, there was suddenly a surplus of Chinese labor and no jobs needing filling.<sup>59</sup> The lack of employment was true across the country, but acutely so in San Francisco, one of the hardest-hit areas in the country.<sup>60</sup>

To make matters direr for the immigrants, the United States plunged into economic depression triggered by a major banking collapse four years after completing the Transcontinental Railroad.<sup>61</sup> The “Panic of 1873” was so devastating; it was dubbed “the Great Depression” before the infamous stock market collapse in 1929 took the title.<sup>62</sup> Income plummeted, and unemployment increased, with cities like New York seeing 25% unemployment in the first year.<sup>63</sup> Railroad construction, often supported by now-failing banks, ceased.<sup>64</sup>

This economic turmoil fueled racial tensions between cheap Chinese immigrant labor and white working-class labor.<sup>65</sup> In some cases, Chinese laborers

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<sup>53</sup> See Gregory Yee Mark, *Racial, Economic and Political Factors in the Development of America’s First Drug Laws*, 10 *Issues in Criminology* 49, 51 (1975) (detailing the immigration landscape in the 19<sup>th</sup> century).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 59.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 56.

<sup>60</sup> GREGORY A. AUSTIN, *PERSPECTIVES ON THE HISTORY OF PSYCHOACTIVE SUBSTANCE USE* 210 (1978).

<sup>61</sup> ROBERT WHAPLES & RANDALL E. PARKER, *ROUTLEDGE HANDBOOK OF MAJOR EVENTS IN ECONOMIC HISTORY* 21 (2013).

<sup>62</sup> Scott Reynolds Nelson, *The Real Great Depression*, *The Chronicle of Higher Education* (2008).

<sup>63</sup> See WHAPLES & PARKER, *supra* note 61, at 21.

<sup>64</sup> *Id.*

<sup>65</sup> Mark Kanazawa, *Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California*, 65 *J. OF ECON. HIST.* 779, 780 (2005).



were preferred over their white counterparts because of the workers' willingness to endure long hours and earn lower wages.<sup>66</sup> White people were all too eager to see immigrants perform grueling railroad construction or fill the most dangerous mining jobs.<sup>67</sup> The fragile coexistence was quickly toppled when the economy soured.<sup>68</sup> Scholars have studied the intersection between economic interests and Chinese immigration, concluding that anti-Chinese sentiment stemmed from the perceived threat posed by Chinese laborers.<sup>69</sup> Organized labor unions, responding to labor shortages and the needs of their white members, spoke out against that perceived threat. In 1877, the Workingman's Party of California (WPC) was founded in San Francisco by Dennis Kearney, an Irish immigrant.<sup>70</sup> Kearney's WPC attacked the apparent enemies of the white working-class—the economic elite and Chinese laborers.<sup>71</sup> Throughout the late 1870s, the WPC campaigned for the expulsion of the Chinese from California, evidenced in their motto, "The Chinese Must Go."<sup>72</sup> In 1879, the WPC found political success, securing seats for a California Constitutional Convention, which produced a constitution replete with anti-Chinese articles.<sup>73</sup>

In 1886, the Knights of Labor led mobs against Chinese workers in Seattle, Washington, expelling hundreds from the city.<sup>74</sup> In Tacoma, the newly formed "Workingman's Union" expelled hundreds of Chinese, and fires burned down the Chinese quarter of the city.<sup>75</sup> And the anti-Chinese sentiment was not confined to local incidents. Samuel Gompers penned *Meat Vs. Rice, American Manhood Against Asiatic Coolieism, Which Shall Survive?* in 1902, evidencing continued racism in organized labor.<sup>76</sup> Gompers, famous as the decades-long leader of the American Federation of Labor, hoped to inform the nation of the "Chinese menace" which for so long had "absolutely doomed... the white laborer."<sup>77</sup> Economic despair created a vacuum filled with xenophobia.<sup>78</sup>

The anti-Chinese scapegoating was not limited to labor groups; the media also played on racist Chinese tropes. On March 10, 1873, still a full six months

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<sup>66</sup> *Id.* at 782.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 802.

<sup>69</sup> *Id.*

<sup>70</sup> *The Workingmen's Party of California, 1877-1882*, 55 CAL. HIST. Q. 58, 59 (1976).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 64.

<sup>73</sup> *Id.* at 70.

<sup>74</sup> Jules Alexander Karlin, *The Anti-Chinese Outbreaks in Seattle, 1885-1886*, 39 PAC. NW. Q. 103, 105 (1948).

<sup>75</sup> *Id.* at 106.

<sup>76</sup> SAMUEL GOMPERS & HERMAN GUTSTADT, *MEAT VS. RICE: AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM, WHICH SHALL SURVIVE?* 3-6 (1902).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

before the Panic hit, the *San Francisco Chronicle* ran a piece decrying Chinese labor.<sup>79</sup> According to the article, the large influx of Chinese laborers had “driven white men, women, and children out of the factories to starve, be idle and vicious.”<sup>80</sup> The *Tacoma Ledger* also warned locals of “this gigantic invasion of chinamen” who were coming to compete with white people for jobs.<sup>81</sup> Amid the economic fueled chaos, a new flavor of rhetoric bubbled: the link between race and criminality. In what will become a theme of American prohibition laws for generations, the Chinese are early victims of racialized criminality. This racialization is realized with anti-opium laws. Initially, though, the media equated the Chinese with illicit “heathen” behavior on many counts.<sup>82</sup> The *Chronicle* and *Los Angeles Times* both ran pieces identifying the “Heathen Chinese” as lawless, unhygienic, and lazy.<sup>83</sup> Another San Francisco paper hailed their Chinese residents as “highbinders, prostitutes, and thieves.”<sup>84</sup> In their reporting, the articles reflected the prevalent attitudes of their readers. Anti-Asiatic Leagues began cropping up, and Chinese citizens were the subject of public beatings, killings, and arsons across the country.<sup>85</sup>

State governments responded to the growing negativity by passing laws targeting Chinese residents. In 1853, a few years after California’s gold rush brought Chinese miners to the American West Coast, California passed a Foreign Miner’s License Tax which required monthly four-dollar payment by Chinese miners.<sup>86</sup> An 1859 law forbade Chinese miners from claims in Gold Hill, Nevada.<sup>87</sup> Still, other laws enforced Chinese “Police Taxes,”<sup>88</sup> requiring special licenses for Chinese to hold fishing rights,<sup>89</sup> and even demanded prisoners have their heads shaved to their scalp.<sup>90</sup> Shaving the scalp was especially pointed for Chinese

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<sup>79</sup> *The Chinese Invasion*, S.F. CHRON., Mar. 10, 1873, at 27.

<sup>80</sup> *Id.*

<sup>81</sup> Jules Alexander Karlin, *The Anti-Chinese Outbreak in Tacoma*, 1885 23 PAC. HIST. REV. 271, 273 (1954).

<sup>82</sup> *See id.* at 272.

<sup>83</sup> *Anti-Chinese: General Convention of the People’s Protection Alliance*, S.F. CHRON., Nov. 12, 1873; *The Heathen Chinese*, S.F. CHRON., Nov. 5, 1873; *The Local Chinese Problem*, L.A. TIMES, June 2, 1889.

<sup>84</sup> AHMAD, *supra* note 49, at 54.

<sup>85</sup> Mark, *supra* note 53, at 59.

<sup>86</sup> WILLIAM L. WHITE, *SLAYING THE DRAGON: THE HISTORY OF ADDICTION TREATMENT AND RECOVERY IN AMERICA* 779, 784–87 (2014).

<sup>87</sup> AHMAD, *supra* note 49, at 51.

<sup>88</sup> FRANKLIN ODO, *THE COLUMBIA DOCUMENTARY HISTORY OF THE ASIAN AMERICAN EXPERIENCE* 27 (2002).

<sup>89</sup> AHMAD, *supra* note 49, at 52.

<sup>90</sup> *Pigtail Ordinance 1878*, RECORDS OF RIGHTS, NATIONAL ARCHIVES, <http://recordsofrights.org/events/125/pigtail-ordinance>.

immigrants; the loss of the braided queue hair was a sign of cultural humiliation.<sup>91</sup> Many of these laws are overturned after successful court challenges; nonetheless, they highlight the growing government response to anti-Chinese anxieties.<sup>92</sup> In this era, xenophobia went largely unchecked, and once it infiltrated the halls of government, there was seldom recourse for the marginalized community.<sup>93</sup>

Furthermore, the legislation suggests a subconscious reinforcement that the Chinese were lawless peoples, precisely as the papers suggested. The California state legislature found the Chinese so “dangerous to the wellbeing” that the state provided for removing them from the state altogether in 1880.<sup>94</sup> National politicians also began taking note. One Congressman feared that if the state did not take action to contain the Chinese, they would rise and “destroy our Christian nation.”<sup>95</sup> Anti-Chinese fervor went from a regional to national hysteria, putting pressure on politicians to pass restrictive legislation.<sup>96</sup> In 1882, President Chester Arthur signed the Chinese Exclusion Act, which barred most Chinese immigration to the United States.<sup>97</sup> The law was the first immigration bill that discriminated based on race or ethnicity.<sup>98</sup> Later legislation, like the Scott Act and Geary Act, prohibited Chinese reentry unless certain property thresholds were met and required Chinese-Americans to carry internal passport papers to prove citizenship.<sup>99</sup> This legislation created an environment that allowed racialized drug laws to flourish. Undoubtedly, each new piece of legislation bolstered the link between race and criminality. As we will see, this latent link between race and crime would grow more robust and pronounced with the criminalization of opium. While society was creating a *de facto* racial hierarchy, the government was complicit in building one *de jure*.

Against this historical backdrop, the development of opium laws during this period had little to do with the physical perils of drug use. The link between criminality and race is established, and it joins forces with the criminalization of opium. Anti-opium laws were merely another tool to restrict the Chinese in the United States. As far as legislators were concerned, the dangers of opium did not come from side effects of drug *use*; the danger is side effects of the races mixing.

## **B. The First War on Drugs**

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See, e.g.*, ERIKA LEE, AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA 23–46 (2003).

<sup>94</sup> AHMAD, *supra* note 49, at 54.

<sup>95</sup> GOMPERS & GUTSTADT, *supra* note 76, at 30.

<sup>96</sup> *Id.*

<sup>97</sup> Lee, *supra* note 93, at 24.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 42.

Both racism and what would come to be called “pharmacological Calvinism” launched America’s first war on drugs—white versus yellow, an image of therapeutic drug use versus an image of self-indulgent pleasure seeking. The public came to recognize two addicts, one a victim and the other a villain. The former’s addiction was considered accidental, harmless, and deserving of pity. The latter’s addiction was considered voluntary, dangerous, and a source of fear. Addiction in the former was a disease; addiction in the latter was a vice. The former was white; the latter was Chinese.<sup>100</sup>

Critically, the rhetoric surrounding addicted opium *smokers* and addicts from *prescription* differed considerably. Prescribed opium derivatives, such as morphine, were administered to Americans throughout the nineteenth century as a pain reliever.<sup>101</sup> And as a prescribed medicine, it was seemingly given a pass for the deleterious effects it had on its users. And opium prescription was hardly a new occurrence. During the American Civil War, opium was frequently doled out as a post-battle pain reliever.<sup>102</sup> Before 1900, dependence was most prevalent in upper and middle classes, social castes dominated by white individuals.<sup>103</sup> The most common addict of medically prescribed morphine in this period was white women.<sup>104</sup> In an 1880 Chicago survey of opium addicts, over 70% of the respondents were female.<sup>105</sup> It has been hypothesized that many of these female addicts, confined to housework, perhaps saw drug use as an escape from the sphere of domesticity.<sup>106</sup> Some scholars have cast the *To Kill a Mockingbird* character “Mrs. Dubose” as the personification of 19th and 20th-century opium addiction.<sup>107</sup> As a white, widowed, older woman addicted by her physician, the fictitious character provides a strong caricature for medically prescribed opium addiction.<sup>108</sup> Despite widespread use, this form of opium rarely had the criminal connotations that smoking opium carried.<sup>109</sup> The fact that prescribed opium carried the imprimatur of a doctor’s signature made the addiction more palatable, even

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<sup>100</sup> WHITE, *supra* note 86, at 6.

<sup>101</sup> Erick Trickey, *Inside the Story of America’s 19th-Century Opiate Addiction*, SMITHSONIAN MAGAZINE, <https://www.smithsonianmag.com/history/inside-story-americas-19th-century-opiate-addiction-180967673/>.

<sup>102</sup> DAVID T. COURTWRIGHT, DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940 36 (2001). In surveys of morphine addicts between 1878 and 1885, nearly a third of respondents were female.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 40.

<sup>105</sup> *Id.* at 36.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 42.

<sup>108</sup> *Id.*

<sup>109</sup> Trickey, *supra* note 101.

*romanticized*. Generally, there was no linkage between white opium addiction and inherent deviant behavior.<sup>110</sup>

These facts do not support any argument that legislators did not criminalize opium consumption; they did. Condemnation, however, was primarily confined to *smoking* opium rather than addiction from prescription.<sup>111</sup> The media and medical community wasted no time warning the country of the evils of opium smoking.<sup>112</sup> And early on in the reporting, the ills of opium smoking were linked to Chinese immigrants.<sup>113</sup> Part of the general lawless “heathen” stereotype attributed to the Chinese was the “dope fiend” or opium addict.<sup>114</sup> The term “dope fiend” entered the American vocabulary in 1897, during anti-Chinese socio-political development.<sup>115</sup> The word “dope” itself even derives from a Dutch translation of opium syrup.<sup>116</sup> A highly regarded book on the subject titled *Opium-Smoking in America and China* reported that smoking opium “is a fertile cause of crime, lying, insanity, debt, and suicide.”<sup>117</sup> Another suggested the Workingmen’s Party shift focus away from labor competition to opium smoking, another fault to which “the Chinese were working...the most harm.”<sup>118</sup>

Another newspaper agreed with the sentiment, stating the real danger of Chinese immigration rested not in threats to job security but rather the proliferation of opium usage, which hurt the “morals and health of the people.”<sup>119</sup> In New York, the *Daily Tribune* warned that opium “saps the moral strength and enfeebles the will.”<sup>120</sup> Even Gompers, in his racist 1902 manifesto, describes the “Opium Habit” as evidence of Chinese moral depravity.<sup>121</sup> In drawing a stark contrast between opium addiction, one doctor noted that “medicinal opium was used because of ‘physical infirmity,’ whereas opium smoking was ‘instigated by moral depravity.’”<sup>122</sup> Included in “moral depravity” were beliefs that the drug bolstered

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<sup>110</sup> COURTWRIGHT, *supra* note 102, at 42.

<sup>111</sup> Trickey, *supra* note 101.

<sup>112</sup> COURTWRIGHT, *supra* note 102, at 61.

<sup>113</sup> *Id.* at 62.

<sup>114</sup> See JERALD W. CLOYD, *DRUGS AND INFORMATIONAL CONTROL: THE ROLE OF MEN AND MANIPULATION IN THE CONTROL OF DRUG TRAFFICKING* (1982).

<sup>115</sup> William L. White, *Race and Class in Early Anti-Drug Legislation in the United States*, WILLIAM WHITE PAPERS, [http://www.williamwhitepapers.com/pr/dlm\\_uploads/2014-Race-and-Class-in-Early-Anti-Drug-Legislation.pdf](http://www.williamwhitepapers.com/pr/dlm_uploads/2014-Race-and-Class-in-Early-Anti-Drug-Legislation.pdf).

<sup>116</sup> WHITE, *supra* note 86, at 7 (citing JOHN AYTO, *DICTIONARY OF WORD ORIGINS*: (2011) and JAMES A. INCIARDI, *THE WAR ON DRUGS: HEROIN, COCAINE, CRIME, AND PUBLIC POLICY* (1986)).

<sup>117</sup> AHMAD, *supra* note 49, at 37.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 42.

<sup>120</sup> *Id.*

<sup>121</sup> GOMPERS & GUTSTADT, *supra* note 76, at 19.

<sup>122</sup> AHMAD, *supra* note 49, at 38.

users' sexual appetites and led to prostitution and miscegenation.<sup>123</sup> Some doctors went so far as to call for a ban on opium smoking and Chinese immigration "to preserve the purity of the race" from "amalgamation with inferior types."<sup>124</sup> This sense of "moral depravity" amongst non-medicinal opium users only contributed to public perception of Chinese inferiority.<sup>125</sup> Public disapproval of opium smoking had little to do with the dangers of addiction; the perceived dangers of racial mixing engendered the disapproval.<sup>126</sup> Chinese-operated opium dens became crude lairs where these men lured lily-pure white people to their demise.<sup>127</sup> And the media eagerly printed out racially charged columns condemning the opium dens. A Montana paper ran a story titled "*Demonical Dens: Benton, the Victim of Almond-Eyed Ministers of Satan.*"<sup>128</sup> Still, another reported that a group of Chinese men were enticing "little girls to their dens for immoral purposes."<sup>129</sup>

Because of the racial overtones and connection to moral depravity, opium smokers became the antithesis of the upstanding American. Opium addiction made one inherently *less American*. It was not long before this nationalist sentiment turned into xenophobia against the Chinese. Now, opium prevented proper assimilation into American society. A prominent physician of the time "believed that opium acted as a barrier 'to the spread of the true belief [Christianity] amongst these Chinese people.'"<sup>130</sup> Seen as the domain of an "inferior race," opium smoking and white Americanism were simply mutually exclusive.<sup>131</sup> And yet, an interesting phenomenon occurred around the mid-1870s—opium smoking began to spread to the white middle and upper classes.<sup>132</sup> Aghast, one physician noted that San Francisco opium dens saw racial mixing between white and Chinese individuals.<sup>133</sup> Another horrified missionary in Philadelphia feared white women cohabitating with the Chinese in smoking lairs was "the first inducement to settle down to a life of degradation."<sup>134</sup> Miscegenation was a palpable terror for onlookers. Mixing the races had only one natural conclusion: the downfall of the white race and an end to civilized society altogether.

As the link between the Chinese and the evils of opium grew more robust and the habit began spreading to white communities, the political pressure to act

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 49.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 56.

<sup>129</sup> *Id.* See also Bonnie & Whitebread, *infra* note 391, at 984.

<sup>130</sup> AHMAD, *supra* note 49, at 39.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> COURTWRIGHT, *supra* note 102, at 77.

<sup>134</sup> *Id.*

swelled. Newspapers demanded action against opium smokers.<sup>135</sup> In the mid-1870s, public outcries to curtail opium smoking began sharply increasing, just as white people began patronizing opium dens.<sup>136</sup> “[A] heavy hand should be laid on them [opium smokers], and their dissolute course checked for out of such materials graduates the criminal element,” wrote one paper.<sup>137</sup> Another article lamented that white people were becoming “slaves to the habit” of opium smoking.<sup>138</sup> “No evil...can compare with that of opium-smoking...What are you going to do about it?” asked a Montana paper.<sup>139</sup> There is also evidence that newspapers strategically placed anti-opium articles near articles about the “Chinese problem.”<sup>140</sup> This maneuver only served to subconsciously link opium to anti-Chinese sentiments, though papers hardly had to make such an implicit claim—explicit ones were not lacking.

Politicians responded to the anti-Chinese and anti-opium frenzy by passing the nation’s first anti-drug ordinance.<sup>141</sup> In 1875, the Board of Supervisors of the City and County of San Francisco passed a law prohibiting the operation and visit of opium dens.<sup>142</sup> It read:

No person shall, in the city and county of San Francisco, keep, or maintain, or become an inmate of, or visit, or shall, in any way, contribute to the support of any place, house, or room, where opium is smoked, or where persons assemble for the purpose of smoking opium or inhaling the fumes of opium.<sup>143</sup>

Punishable by fines ranging from \$50 to \$500 and up to six months in jail, the law was the first anti-narcotics bill in American history.<sup>144</sup> The law reflected the disparate treatment of opium type: smoking vs. prescribed.<sup>145</sup> San Francisco did not prohibit doctors from prescribing opiates to patients but confined the law to *smoking dens*.<sup>146</sup> From the start, law enforcement did not equally enforce the law.<sup>147</sup>

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<sup>135</sup> AHMAD, *supra* note 49, at 54.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 41.

<sup>138</sup> *Id.* at 55.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 57.

<sup>141</sup> Mark, *supra* note 53, at 61.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* See also George Fisher, *The Drug War at 100*, STANFORD LAW SCHOOL, <https://law.stanford.edu/2014/12/19/the-drug-war-at-100/>.

<sup>145</sup> Fisher, *supra* note 144.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

Opium dens frequented by white people were more likely to be raided, reflecting fears of race-mixing.<sup>148</sup>

In many cases, the law also established a legitimate legal basis for over-policing Chinese quarters in San Francisco.<sup>149</sup> There is also considerable evidence that the rules were designed not to punish white attendants of opium dens but rather to harass Chinese operators.<sup>150</sup> Other legislatures followed San Francisco's suit; Virginia City, Nevada, signed its law criminalizing opium in 1876.<sup>151</sup> By 1914, most states in the union had laws on the books penalizing the sale of opium or operation of opium dens.<sup>152</sup>

Once anti-opium laws were passed, the link between race and criminality was finally complete. Despite any façade of anti-drug rationale, there was no question the legislation against opium had a more nefarious purpose: solve the "Chinese problem." For the white political establishment, eliminating opium meant ridding the nation of Chinese immigrants who were the perceived antagonists of the economic decline in the 1880s and 1890s.<sup>153</sup> Even arbiters of justice were not immune to the xenophobic fervor around anti-opium laws. For example, one District Court in Oregon noted, "[T]his [anti-opium] legislation proceeds more from a desire to vex the 'Heathen Chinese' than to protect the people from the evil habit."<sup>154</sup> It was no secret then; anti-drug laws were not about addiction; they were about race.

The laws failed to curb the spread of opium smoking.<sup>155</sup> Newer, wealthier dens cropped up and attracted patrons.<sup>156</sup> Whenever the local government decided to crack down on a particular location, white smokers merely took their business where it was safe.<sup>157</sup> This phenomenon caused a shift in anti-opium thinking. In what would become another theme of American prohibition history, legislators found a way to profit off the dens.<sup>158</sup> San Francisco passed a new measure allowing opium dens so long as the owners secured a license to operate.<sup>159</sup> A 1909 bill passed Congress which "prohibit[ed] the importation and use of opium for other than medicinal purposes."<sup>160</sup> Again, the focus was placed acutely on non-prescription

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<sup>148</sup> *Id.*

<sup>149</sup> Mark, *supra* note 53, at 61–62.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 63.

<sup>153</sup> *See id.* at 61–63.

<sup>154</sup> *Ex parte Yung Jon*, 28 F. 308, 312 (D. Or. 1886).

<sup>155</sup> Fisher, *supra* note 144.

<sup>156</sup> Mark, *supra* note 53, at 61.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> COURTWRIGHT, *supra* note 102, at 81.



opium, a callback to unequal treatment in types of opium consumed.<sup>161</sup> As a result of the link to the Chinese, opium for smoking was targeted.<sup>162</sup> Yet even this legislation did little to prevent further addiction.<sup>163</sup> Individuals addicted to opiates merely sought out other sources to get their fix, like heroin.<sup>164</sup> This demand demonstrates the failure of legislators to address the root cause of the problem: addiction. Further, it betrays race as the real reason propelling anti-opium legislation. There were never programs developed to heal addicts, but rather the legislation was simply another in a litany designed to target Chinese communities.<sup>165</sup> If there were ever any genuine concern for addiction, medicinal opium would undoubtedly have earned the ire of the medical-legal community.<sup>166</sup> Instead, no one was served. Chinese immigrants were brutally harassed and stripped of their liberties, and white addicts continued to suffer the ills of chemical dependence.<sup>167</sup>

When Lyndon Johnson signed the Immigration and Nationality Act of 1965,<sup>168</sup> he effectively repealed forty years of American anti-Chinese immigration policy. Standing at the foot of the Statue of Liberty, he hoped the bill would “repair a very deep and painful flaw in the fabric of American justice.”<sup>169</sup> Yet, the relics of America’s anti-Chinese moment live on in the form of anti-drug rhetoric. The same themes present during America’s first war on drugs most certainly still exist—disparate treatment by race, type of drug, and the link between race and criminality persist today. Crack and cocaine addiction have been historically treated radically different in jurisprudence, despite being fundamentally the same narcotic.<sup>170</sup> This disparate treatment bears a close resemblance to the unequal treatment of prescribed opium and smoking opium addicts. Cleavages of race, class, and power all determine the penalty for usage, not the drug itself.

#### IV. ALCOHOL PROHIBITION

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 82.

<sup>164</sup> *Id.* at 83.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> The Public Papers of the Presidents of the United States: Lyndon B. Johnson: 1965 Containing the Public Messages, Speeches, and Statements of the President,” 2 PUB. PAPERS 1038 (1966).

<sup>170</sup> Allison T. Chappell & Scott R. Maggard, *Applying Black’s Theory of Law to Crack and Cocaine Dispositions*, 51 INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 264, 265 (2007).

Historians have long attempted to understand how Prohibition successfully passed and why it ultimately failed. It is easy for those of us living in the 21st century to take Prohibition's failure for granted. After all, Prohibition lasted only thirteen years,<sup>171</sup> and we are now nearing a century since the passage of the 21st Amendment, which brought the nationwide dry experiment to a close. But why was alcohol prohibition ever successful in the first place? Explanations given vary across time and discipline. Early writers like Charles Merz asserted that Prohibition was a feat of politics: Congress simultaneously attempted to keep Wets happy, bypassing the Amendment and Drys happy by refusing to enforce it.<sup>172</sup> This refusal to enforce, manifested through insufficient funding, resulted in Prohibition's failure.<sup>173</sup> Later, historians like Norman Clark saw Prohibition not as a political phenomenon but as the culmination of a social movement starting with the country's founding.<sup>174</sup> Prohibition was then repealed not because it was a failed policy but because the change the social movement sought was achieved.<sup>175</sup> Still later, historians like Daniel Okrent and Lisa McGirr view Prohibition's passage and failure in a more sinister light, exposing the xenophobic and racist motivations for the passing of the amendment and the highly selective enforcement against poor Black and brown Americans once the amendment was in place.<sup>176</sup> Only recently have historians like McGirr begun to compare the selective enforcement and growth in the penal and carceral state that resulted from Prohibition and leading ultimately to the War on Drugs, mass incarceration, and continued selective policing of Black and brown bodies the U.S. grapples with to this day.<sup>177</sup>

### A. Histories of Prohibition

We will briefly explore four histories of Prohibition. The first, by Charles Merz, was written before the 18<sup>th</sup> Amendment was repealed.<sup>178</sup> The second history, by Norman Clark, was written more than forty years later and offered a social historian's attempt to explain Prohibition's passage and failure as the culmination

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<sup>171</sup> ENCYCLOPAEDIA BRITANNICA (Aakanksha Gaur et al. eds.)

<https://www.britannica.com/story/how-long-did-prohibition-last>.

<sup>172</sup> CHARLES MERZ, *THE DRY DECADE* (Robert E. Burke ed., Doubleday, Doran 1931).

<sup>173</sup> *See Id.*

<sup>174</sup> NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* 12 (Harold M. Hyman ed., W. W. Norton & Company 1976).

<sup>175</sup> *See Id.*

<sup>176</sup> DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (Simon and Schuster 2010); *see also* LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE* (W.W. Norton & Company 2016).

<sup>177</sup> MCGIRR, *supra* note 176.

<sup>178</sup> MERZ, *supra* note 172.

of a social movement.<sup>179</sup> Despite the significant advancement of time since the end of Prohibition, Clark’s account does not explore the enduring effects of Prohibition or the parallels to the war on drugs that, at the time Clark wrote, was just beginning.<sup>180</sup> In the third history, written in 2010, Daniel Okrent focuses his efforts on providing a highly detailed account of the forces that joined together to result in national Prohibition.<sup>181</sup> His research reveals racial and nativist animus that motivated Drys, offering more depth and regional analysis than either Merz or Clark before him.<sup>182</sup> It is not until the Fourth History, a 2016 book by Lisa McGirr, that the long-term effects of Prohibition are explored.<sup>183</sup> McGirr shows that the same groups targeted by Prohibition enforcement continue to be the victims of selective enforcement in the modern criminal justice system.<sup>184</sup>

i. Charles Merz, *The Dry Decade* (1931)

Merz employed his skill as a newspaper editor to write a piece of investigative journalism published while the 18<sup>th</sup> Amendment was still in force.<sup>185</sup> He takes a non-normative stand on the merits of Prohibition. Instead, he seeks to empirically study it with what data was then available in Congressional records and the *New York Times*, the two sources on which his report is almost exclusively based.<sup>186</sup>

Merz calls Prohibition an “experiment” made possible by a strong and economically endowed lobby and the political climate of World War I.<sup>187</sup> He posits that this experiment was failing due to Congress and the President’s refusal to appropriate sufficient funds to enforce the Amendment.<sup>188</sup> For Merz, Prohibition was problematic not for its social policy implications.<sup>189</sup> It was a top-down experiment and an example of elected officials trying to please too many people simultaneously.<sup>190</sup> Merz fails to see Prohibition as inextricably linked to the

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<sup>179</sup> Clark, *supra* note 174.

<sup>180</sup> *See id.*

<sup>181</sup> Okrent, *supra* note 176.

<sup>182</sup> *See id.*

<sup>183</sup> MCGIRR, *supra* note 176.

<sup>184</sup> *See id.*

<sup>185</sup> MERZ, *supra* note 172. Merz started his career in 1915 *Harper’s Weekly*, moved on to *The New Republic* in 1916, and joined the editorial board of the *New York Times* in 1931. *See* John T. McQuiston, *Charles Merz, a Former Times Editor, Is Dead at 84*, *N.Y. TIMES* (Sept. 1, 1977), <https://www.documentcloud.org/documents/1391920-charles-merz-a-former-times-editor-is-dead-at-84.html>.

<sup>186</sup> *See* MERZ, *supra* note 172.

<sup>187</sup> *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> *See id.*

<sup>190</sup> *See id.*

pervasive policing of “Americanism” before and during World War I.<sup>191</sup> He also fails to discuss the nuance and the intentionality of selective enforcement.<sup>192</sup>

Merz’s understanding of the Amendment’s failure is rooted in his knowledge of its genesis during World War I.<sup>193</sup> He asserts that the powerful Anti-Saloon League (ASL) lobby used the War as an opportunity to push through their bone-dry Amendment.<sup>194</sup> Bone-dryers had many reasons to feel hopeful in 1917: the political and religious power of the ASL, increasing resentment nationwide against saloons, lack of effective mobilization by breweries and distilleries, and lack of a coherent movement supporting a more moderate reform.<sup>195</sup> Ultimately, however, it was the War that eventually tipped the scales.<sup>196</sup> The war did three things for prohibition: “it centralized authority in Washington; it stressed the importance of saving food; and it outlawed all things, German.”<sup>197</sup> Arriving on the floors of Congress a mere three months after the declaration of war, Merz foreshadowed the resolution’s victory from the start.<sup>198</sup> Prohibition “would release large numbers of men for the army, for shipbuilding and munitions work...[and] by shutting off grain from the breweries and distilleries the country would save the equivalent of 11,000,000 loaves of bread a day.”<sup>199</sup>

Merz blames the War for shifting the American public’s attention away from Prohibition and blames Congress for failing to give the Amendment teeth.<sup>200</sup> Prohibition was failing because Congress and the President had not appropriated enough funds to enforce it, not because of its more significant social implications or any unbalanced way it was executed.<sup>201</sup> The failure of the Amendment to achieve its stated goals rested squarely on the shoulders of the executive and legislature (“a dry majority which had at all times ample power to multiply its appropriations but consistently refused to act”).<sup>202</sup>

Merz fails to delve deeper into which populations suffered from selective enforcement. He aims to reveal a flaw in the political system, not to discuss more significant implications of race and class divisions.<sup>203</sup> The biggest problem for Merz is not xenophobia, racism, or economic disparity, but self-interested

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<sup>191</sup> *See id.*

<sup>192</sup> *See id.*

<sup>193</sup> *See id.* at 45.

<sup>194</sup> *Id.* at 63.

<sup>195</sup> *Id.* at 37.

<sup>196</sup> *Id.* at 24.

<sup>197</sup> *Id.* at 25.

<sup>198</sup> *Id.* at 28.

<sup>199</sup> *Id.* at 29.

<sup>200</sup> *Id.* at 38–39.

<sup>201</sup> *Id.* at 105–09.

<sup>202</sup> *Id.* at 129.

<sup>203</sup> *See generally* MERZ, *supra* note 172.

politicians who wanted Drys off their backs without engendering too much discontent among Wets by spending sufficient money on enforcement.<sup>204</sup>

Merz doesn't ascribe Prohibition's passage to nativist sentiment and doesn't see Prohibition as an example of the policing of Americanism that was otherwise widespread during World War I (e.g., the 1917 Espionage Act and the 1918 Sedition Act).<sup>205</sup> Rather than blaming nativist animus for the amendment's passage, Merz believes that the country was too distracted by war to care and that it was voters'—and brewers'—inaction and preoccupation with War that allowed the ASL to succeed in its dry mission.<sup>206</sup> Neither does he characterize the Amendment as federal overreach or a fundamental redefinition of the federal government's role, as do later historians.<sup>207</sup>

Merz's account lacks regional nuance in enforcement that later historians explore, be it racially motivated southerners or nativist northeasterners. This lack of clarity is mainly due to his reliance on federal Congressional records and the New York Times rather than local newspapers or state legislative history.<sup>208</sup> While Merz acknowledges that Congress didn't appropriate enough money to fully enforce, thereby implicitly recognizing the resulting selective enforcement of the 18<sup>th</sup> Amendment, he fails to discuss which populations were targeted most and hardest hit by the little enforcement action that did take place.<sup>209</sup> With the distance of time and other approaches, later historians would delve deeper into Prohibition's social implications, racial motivations, and unequal enforcement.

ii. Norman H. Clark, *Deliver Us from Evil: An Interpretation of American Prohibition* (1976)

Clark seeks to explain the 18<sup>th</sup> Amendment not as a political incident whose success depended on the occurrence of a World War but as the culmination of a centuries-long process of social transformation that took place on the American

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<sup>204</sup> *See id.*

<sup>205</sup> *Id.* at 92–100. Merz briefly discusses how negative attitudes towards all things German had something to do with the amendment's passage, stating that it became politically unpopular to oppose the amendment, and briefly acknowledges that post-ratification, Congress "sav[ed] its thunder for the aliens and the diplomats" *Id.* at 100. The House, looking "for an opportunity to contribute something," proposed a law in 1922 that would make alien violators deportable for a first offense (this failed in the Senate), and in 1923 proposed a resolution calling on the Secretary of the Treasury "to reveal what shipments of intoxicating liquors had been received by the embassies and legations in Washington since January, 1920." *Id.* at 92. These discussions appear as mere asides, however, in his account.

<sup>206</sup> *See id.*

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

continent, starting with Columbus.<sup>210</sup> Clark finds the origins of the temperance movement in the “disorder and chaos” of the 19<sup>th</sup> century.<sup>211</sup>

In the face of economic, spiritual, social, and geographic turmoil, drunkenness became a social problem; temperance gained social force as a rational reaction and attempted to “protect the values sheltered by the American nuclear family.”<sup>212</sup>

Like his own earlier work,<sup>213</sup> Clark seeks to place Prohibition in a larger context of social change in the United States. Still, the influences of the “new approaches” to social history are particularly prevalent in this work.

Unlike later historians who emphasize the racist motivations for Prohibition’s passage and its selective enforcement, Clark repeatedly congratulates those who promoted the temperance movement, comparing their efforts to mitigate the social devastation and turmoil caused by drunkenness to earlier efforts of abolitionists.<sup>214</sup> The disorder of American life justified the moral anxieties of Drys, and Clark compares the temperance movement’s ambitions to the campaign to rid the country of racism and civil war:

The 18<sup>th</sup> Amendment was close in spirit to those amendments which gave citizenship to former slaves (and covered laws that might abolish racism), allowed for a tax on incomes (and might help abolish poverty) ...and extended the franchise to women (and might help toward the realization of true democracy) ...these were expressions of a lofty idealism. They were reforms, not experiments.<sup>215</sup>

Rather than criticizing the political process that resulted in the passage of Prohibition, the amendment was the culmination of a social revolution.<sup>216</sup>

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<sup>210</sup> Clark, *supra* note 174.

<sup>211</sup> *Id.* at 29. Clark argues that the structures of Anglo society were “perilously undermined by the fall of the established church, by the rush for cheap land, by the complex impact of the cotton gin and the textile factories, the canals, and the commerce.” *Id.*

<sup>212</sup> *Id.* at 13.

<sup>213</sup> *Deliver Us from Evil* is not Clark’s first exploration of Prohibition. In 1965, he published *The Dry Years: Prohibition and Social Change in Washington*. In his own words, *Deliver Us From Evil* is an attempt to reevaluate the ideas he published in 1965 and “integrate my reevaluation with the new approaches to social history which are now having a profound influence on most thinking about writing about the American past.” *Id.* at 227.

<sup>214</sup> *Id.* at 27.

<sup>215</sup> *Id.* at 10.

<sup>216</sup> *Id.*

Clark acknowledges that the federal government wasn't in a place to enforce the amendment but defends the unenforceable amendment as a ceremonial act of great significance.<sup>217</sup>

Far from addressing what later historians recognize as enforcement selectively applied against minority groups, Clark continually praises Prohibition and compares it to the Civil War amendments.<sup>218</sup>

Prohibition failed, Clark asserts, because values changed.<sup>219</sup> This first change in social values brought about Prohibition—and the second change in social values repealed it.<sup>220</sup> Once the social values inspiring Prohibition lost their function, the natural course was to rid the country of the now unnecessary legal limitation on the production, transportation, and sale of alcohol.<sup>221</sup>

Clark's history of Prohibition offers a more sociological analysis than did Merz's, mainly due to the vastly different sources upon which he relied in crafting his book and his training as a historian.<sup>222</sup> His view that both the enactment and repeal of Prohibition were the benign culmination of a social movement offers a depth of analysis not available in earlier accounts of Prohibition written contemporaneously to the amendment's existence.<sup>223</sup> Yet Clark's version misses the central critique of Prohibition featured in later histories: Prohibition's more sinister implications for federal overreach and selective enforcement targeting immigrants and minorities.

iii. Daniel Okrent, *Last Call* (2010)

Unlike Merz, Okrent writes with a dazzling array of 21st-century research tools and sources. Okrent's bibliography is 18 pages long, citing various sources like newspapers, magazines, oral histories, and websites.<sup>224</sup> He conducted original interviews.<sup>225</sup> He accessed archives, books, scholarly journal articles, dissertations, and unpublished papers.<sup>226</sup>

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<sup>217</sup> *Id.* at 134. He argues that “[t]he most important thing about Prohibition to many people was to have the federal Constitution and the law of the land condemn alcohol, and by indisputable implication, to condemn all that the alcohol-soaked lifestyle represented.” *Id.*

<sup>218</sup> *See id.*

<sup>219</sup> *See id.*

<sup>220</sup> *Id.* at 178–79. “Because the saloon was dead,” Clark explains, “Prohibition could be repealed.” *Id.*

<sup>221</sup> *See id.*

<sup>222</sup> Clark had a Ph.D. in American History from the University of Washington. *See* THE HERALD, Feb. 15, 2004, <http://www.legacy.com/obituaries/heraldnet/obituary.aspx?n=norman-h-clark&pid=17513359>.

<sup>223</sup> *See id.*

<sup>224</sup> Okrent, *supra* note 176.

<sup>225</sup> *See id.*

<sup>226</sup> *Id.* at 436.

With the benefit of nearly eighty years of hindsight since Prohibition's repeal, Okrent seeks to explain "how the hell did it happen?"<sup>227</sup> To answer this question, he digs—as did Clark—into the history of drunkenness in the United States and the social movements that advocated for Prohibition well before the 18<sup>th</sup> Amendment's passage.<sup>228</sup> Okrent agrees with Clark that Prohibition was passed mainly due to a war on alcohol raged by those, especially Protestants, who felt besieged by rapid changes in the country.<sup>229</sup> But he adds another layer of analysis to Clark's: racism and xenophobia.

While Clark implies that the nation was swept into a singular social movement to oppose alcohol, Okrent notes that "five distinct, if occasionally overlapping, components make up this unspoken coalition: racists, progressives, suffragists, populists...and nativists."<sup>230</sup> Racists, particularly "across the southern states in the resentful formation that had risen from the ruins of the Civil War," touted the "terrible condition of affairs that prevailed when swarms of negroes, many of them drunk with whiskey...roamed the country at large."<sup>231</sup> Freed slaves were brutes who could not have the tolerance for liquor and committed heinous crimes while drunk. Many blamed the brewing industry, primarily occupied by foreign-born, as responsible for debauching the Black man.<sup>232</sup>

In addition to racism, Okrent asserts that xenophobia drove Americans to support the amendment.<sup>233</sup> Americans who despised German and Irish immigrants and their ways of life saw Prohibition as a means to force a change in their lifestyle and to reduce immigrants' political power.<sup>234</sup> Teddy Roosevelt and his allies detested the political culture of the Irish Democrats.<sup>235</sup> Notably, the Ku Klux Klan advocated for Prohibition as a means to suppress immigrants, Jews, and Catholics.<sup>236</sup>

Okrent's narrative paints a far darker picture than either Merz or Clark. Merz critiques the political system, but his account does not reveal animus towards particular subsets of society.<sup>237</sup> Clark's account is even more benign; Prohibition as a social reform was the almost inevitable result of a relatively uniform, well-

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<sup>227</sup> *Id.* at 4.

<sup>228</sup> *See id.*

<sup>229</sup> *Id.* at 37–38.

<sup>230</sup> *Id.* at 42.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 42–46.

<sup>233</sup> *Id.* at 244: "Nativism could find no better running mate than Prohibition."

<sup>234</sup> *See id.*

<sup>235</sup> *Id.* at 47: "Just as the urban saloon served as a mail drop, hiring hall, and social center for the immigrant masses, so too was its birthplace, incubator, and academy for the potent political machines that captured control of the big cities of the East and Midwest in the last quarter of the nineteenth century."

<sup>236</sup> *Id.* at 86.

<sup>237</sup> *See id.*



intended public resisting the chaos of rapid geographic, social, and cultural change in the 19<sup>th</sup> century.<sup>238</sup> Okrent's detailed narrative exposes undertones missing from both of these prior histories.<sup>239</sup>

The reasons Okrent cites for Prohibition's failure largely echo Merz's: a legislature unwilling to allocate sufficient funds to adequately enforce the amendment, mass flouting of the law, a plunge in government revenues, and public health concerns after mass poisoning from bootleg liquor.<sup>240</sup> Despite his exhaustively researched account of Prohibition, which reveals much more nuance to the national push for Prohibition, he fails to meaningfully address the selective way in which the amendment was enforced when it was enforced at all.<sup>241</sup> This deficit is where Lisa McGirr's 2016 books help fill in the gap.

iv. Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (2016)

This recent book echoes severable sentiments of the three earlier accounts of Prohibition discussed above but is the first to explicitly address the selective

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<sup>238</sup> *See id.*

<sup>239</sup> Okrent's narrative does, however, include certain elements of what Merz and Clark found most compelling about Prohibition: the former, manipulating the political process, and the latter, a powerful social movement. Okrent discussed the powerful Anti-Saloon lobby willing to go to any end to push its agenda—including promoting women's suffrage, the establishment of a federal income tax to replace lost liquor tax revenue, and the manipulation of fear surrounding the entry into World War I. *Id.* at 15, 55–58, 98. While Merz asserts that the ASL acted opportunistically during the war to rally support for their cause, he also believes that the war legitimately distracted the American public. Okrent's account gives more weight to the political power of the ASL, tying it to the expansion of federal power in general: "Distrust of federal power had, of course, made even some dedicated Drys oppose the idea of a constitutional amendment. But Wilson's expression and exaltation of national purpose, which provided a noble soundtrack for the federal government's sudden leap into countless aspects of American life, would make the idea of federal enforcement of Prohibition no more alien than, say, the military draft. The war emergency handed proponents of government activism a hunting license." *Id.* at 100. Okrent's account of the Anti-Saloon lobby echoed a familiar tactic—manipulating public sentiment in a time of war to expand federal governmental power. Okrent lived and worked through the 9/11 attacks and the patriotic rallying around President George Bush and support for expanded executive powers during the War on Terror, a topic on which Okrent has also written. He does expressly analogize the expansion of federal power during Prohibition to the growth of national power during the war on terror. Still, the War on Terror may subtly be driving him to explore the origins of and other contexts in which federal aggrandizement occurred. *Id.*

<sup>240</sup> *Id.* at 313–28.

<sup>241</sup> David Oshinsky, *Temperance to Excess*, N.Y. TIMES (May 21, 2010), <http://www.nytimes.com/2010/05/23/books/review/Oshinsky-t.html>. What is missing from Okrent's otherwise splendid account is a sense of which groups were most affected, since it is clear that enforcement varied widely among regions and social classes. We get hints, but little more, that Prohibition worked best when directed at its primary target: the working-class poor.

enforcement of Prohibition laws and the long-term significance of Prohibition, especially for the poor and people of color.<sup>242</sup> She sees Prohibition, not as an experiment or an aberrational social movement, but the harbinger of a new age in American criminal justice: “The government did not retreat from its new role in crime control after the end of the war on alcohol. Its punitive approach to recreational narcotics persisted and expanded in new directions, building on the lessons learned from federal alcohol Prohibition.”<sup>243</sup>

Unlike Clark, who examined Prohibition as the culmination of decades (if not centuries)-long social transformation, or Okrent, who wrote a captivating narrative aimed at the general public, McGirr’s mission in this book is to establish, through rigorous academic research, that Prohibition was the beginning of a new era of federal control in the United States that led to a twentieth-century drug war and mass incarceration.<sup>244</sup>

McGirr focuses her attention on the selective enforcement of Prohibition and the long-term changes the amendment wrought.<sup>245</sup> An entire chapter is titled “Selective Enforcement.”<sup>246</sup> She agrees that there was insufficient funding to enforce the amendment fully but asserts that what funding did exist was disproportionately directed towards policing the poor:

“Prohibition policing differed...most especially by race, ethnicity, and class. An unprecedented campaign of selective enforcement lurked beneath the surface glamor of the roaring twenties...Uneven enforcement was the hidden reason the white, urbane upper-middle class could laugh at the antics of Izzy Einstein and Moe Smith, while Mexicans, poor European immigrants, African-Americans, poor whites in the South, and the unlucky experienced the full brunt of Prohibition enforcement’s deadly reality.”<sup>247</sup>

Race played an essential role in the application of enforcement discretion. Using Richmond, Virginia, as a case study, McGirr reiterates the ways that police officers and prohibition agents specifically targeted people of color.<sup>248</sup> This type of targeted

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<sup>242</sup> MCGIRR, *supra* note 176.

<sup>243</sup> *Id.* at *Preface*.

<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> *Id.* at 67–102.

<sup>247</sup> *Id.* at 71.

<sup>248</sup> *Id.* at 84.

police enforcement was nothing new for the African American community.<sup>249</sup> African Americans had long suffered from legal codes applied selectively to control their communities and coerce their labor: statutes against vagrancy, gambling, and nuisance are examples that McGirr gives that had previously criminalized the conduct of African Americans throughout the south.<sup>250</sup> But African Americans were not the only ones to suffer: Mexicans were targeted in Southern California,<sup>251</sup> and immigrant communities were disproportionately arrested in Chicago, New York, and Pittsburgh.<sup>252</sup> The explanation falls time and again to money: fees provided incentives to police departments to make arrests and collect fees, but those of modest means cannot pay for protection or escape enforcement.<sup>253</sup>

McGirr's discussion of selective enforcement against Black and brown bodies resembles the public's rising awareness of racial discretion in policing highlighted by the Black Lives Matter movement.<sup>254</sup> She relays a story from Oklahoma City in 1931 when sheriff's deputies shot and killed two Mexicans they said were "bandits" running liquor but were actually students.<sup>255</sup> "The local deputies rapidly won an acquittal. . ." <sup>256</sup> The story reads like the events in the Michael Brown case; the unarmed Black teenager shot and killed by police near St. Louis in 2014.<sup>257</sup> A grand jury declined to indict the shooting officer.<sup>258</sup> When viewed through the lens of the Black Lives Matter movement, during which time this book was written and published, Prohibition is an early and tragic example of the disproportionate application of police violence against Black and brown bodies in the United States.<sup>259</sup>

Prohibition, according to McGirr, fundamentally reshaped the prison system, the courts, and criminal law doctrine.<sup>260</sup> The adoption of stricter penalties for violators created felony charges for someone purchasing a bottle and led to the mass incarceration of the poor, which required the federal government to expand

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<sup>249</sup> *Id.* at 91.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 92.

<sup>252</sup> *Id.* at 93.

<sup>253</sup> *Id.* at 92–93.

<sup>254</sup> *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/>.

<sup>255</sup> MCGIRR, *supra* note 176.

<sup>256</sup> *Id.*

<sup>257</sup> *Michael Brown's Shooting and Its Immediate Aftermath in Ferguson*, N.Y. TIMES, Aug. 25, 2014, [https://www.nytimes.com/interactive/2014/08/12/us/13police-shooting-of-black-teenager-michael-brown.html#time348\\_10366](https://www.nytimes.com/interactive/2014/08/12/us/13police-shooting-of-black-teenager-michael-brown.html#time348_10366).

<sup>258</sup> Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES, Aug. 10, 2015, <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

<sup>259</sup> *Herstory*, *supra* note 254.

<sup>260</sup> *See* MCGIRR, *supra* note 176.

and reorganize the federal prison system.<sup>261</sup> Federal courts, overburdened by a docket they could not handle (22,000 cases were pending at the end of 1924), were forced to improve efficiency through new procedural rules.<sup>262</sup> Criminal law doctrine changed rapidly as well, adopting plea bargaining and an expansion of federal power: “justices like Taft, anxious to uphold the rule of law itself, consistently decided in favor of the expansion of federal power.”<sup>263</sup>

These changes and expansions—of prisons, courts, and criminal law doctrine—proved enduring, as “the challenge of alcohol Prohibition drew federal officials into more aggressive narcotics enforcement of all kinds.”<sup>264</sup> McGirr believes that the logic of Prohibition, once made national law, hardened public opinion towards mind-altering recreational substances generally.<sup>265</sup> The years of alcohol Prohibition left an imprint on the federal government, tilting it towards policing, surveillance, and punishment.<sup>266</sup> At the same time, Americans grew accustomed to the notion that the federal government was responsible for resolving social problems.<sup>267</sup> The outcome was what McGirr calls a “second war on drugs.”<sup>268</sup>

McGirr closes her book by explicitly comparing Prohibition to the second war on drugs.<sup>269</sup> They share many features: large-scale national efforts to target social problems, with backing from prominent thought-leaders.<sup>270</sup> Notably, both campaigns morphed into state-sanctioned selective enforcement: “the uneven racial application of drug laws and discriminatory drug sentencing in some states of the union has been so blatant that one human rights organization has reported Georgia in violation of international agreements against racial discrimination.”<sup>271</sup>

More than any other author, McGirr seeks to use Prohibition to draw parallels between 21st century policing and selective enforcement during Prohibition.<sup>272</sup>

McGirr clarifies that Prohibition was the first war on drugs; the flawed criminal justice system we have in the first decades of the 21<sup>st</sup> century 2021 is the

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<sup>261</sup> *Id.* at 100, 200–04; MCGIRR, *supra* note 176, at 100, 200–04, explaining the overcrowding of penitentiaries led to riots, the construction of new prisons, and refusal of any more prisoners which eventually birthed, in 1930, the new Federal Bureau of Prisons, a subdivision of the Justice Department.

<sup>262</sup> *Id.* at 205–06.

<sup>263</sup> *Id.* at 207.

<sup>264</sup> *Id.* at 211.

<sup>265</sup> *Id.* at 212.

<sup>266</sup> *Id.* at 221.

<sup>267</sup> *Id.* at 228.

<sup>268</sup> *Id.* at 250.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 253.

<sup>272</sup> *See id.*

result of the second.<sup>273</sup> The outcomes of both are similar: selective enforcement focused on Black and brown bodies. Yet McGirr believes that the second war has even more drastic domestic and international consequences.<sup>274</sup> It is McGirr's version of Prohibition that most embodies the notion that history repeats itself, and from which we can attempt to draw the most lessons for tackling the crisis of mass incarceration and racialized enforcement of criminal laws that we face today.

## **B. Racial Motivations for Prohibition in the American South**

In this section, we survey the *Atlanta Constitution* during the first decade of the 20<sup>th</sup> century to reveal using primary sources the alarming ways in which Black Americans are linked to southern advocacy for alcohol prohibition and derive from these articles a basic framework for understanding the intersection of alcohol prohibition and race, particularly in the south. We then dive deeper into this intersection with an expanded scope, using the case studies of Alabama, Georgia, Tennessee, and North Carolina during the period between the civil war and the passage of the 18<sup>th</sup> amendment.

### **i. Survey of the Atlanta Constitution, 1900-1910**

Because we are explicitly interested in the intersection, if any, between race and prohibition, we searched for articles containing both the keywords “prohibition” and “negro.” We chose “negro” (rather than “colored,” “African American,” or “Black”) based on an understanding of racial labeling used at the time. This decision finds support in Tom Smith’s 1992 article in *Public Opinions Quarterly* titled “Changing Racial Labels.”<sup>275</sup> According to Smith, “colored” was the dominant term in the United States until the mid-to-late 19<sup>th</sup> century, when “negro” gained greater acceptance.<sup>276</sup> By the beginning of the 20<sup>th</sup> century, “colored” became viewed as too generic and took on an antiquated connotation,<sup>277</sup> leading me to conclude that “negro” was the most appropriate search term. We chose this time period because it encompasses a decade during which the nation was in turmoil debating the alcohol question.<sup>278</sup> This search returned myriad results,

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<sup>273</sup> *Id.* at 251–54.

<sup>274</sup> *See id.*

<sup>275</sup> *See* Tom W. Smith, *Changing Racial Labels: From “Colored” to “Negro” to “Black” to “African American”*, 56 PUBLIC OPINION QUARTERLY 496 (1992).

<sup>276</sup> *Id.* at 497–99.

<sup>277</sup> *Id.*

<sup>278</sup> Smith, *supra* note 275, at 498. It appears that the intersection of race and temperance movements pre-dates the civil war, although beyond the scope of this paper. Prior to the war, southern slave owners who were originally supporters of prohibition came to oppose it; they felt

many unrelated to *alcohol* prohibition specifically. We sifted through dozens of articles and found six relevant pieces spanning the first decade of the 20<sup>th</sup> century:

**“Stinson on Prohibition,” August 1904:** A black reverend, R. D. Stinson, admonishes blacks to vote with whites in promoting local prohibition laws, stating, “we have already cost the country millions of dollars, much blood and sorrow, and if we have been moved from slaves to freemen it means that we shall join in with the good people in every nook and corner of this broad land for its betterment.”<sup>279</sup>

**“Negro disenfranchisement discussed by W.H. Fleming,” October 1905:** Fleming, a Georgia attorney, wrote the piece directed at white voters urging them to vote ‘nay’ on the proposed amendment to the Georgia constitution requiring citizens, before registering to vote, to “be able to read and explain to the satisfaction of the board of registrars any paragraph of the state constitution.” Fleming asserts that this is a “fraudulent administration of the law,” explaining that “the officers of registration are to be white. An easy paragraph for a white applicant, a difficult paragraph for a negro applicant; the acceptance of any sort of explanation from a white applicant, the rejection of any sort of explanation from a negro applicant.” At first glance, this could be an enlightened attorney raising consciousness around a discriminatory amendment. Yet his advocacy takes a turn: “Nothing less than an impending overthrow of white civilization by negro domination could excuse such extreme measures. But every well informed and sensible man in Georgia knows that we are not in danger of negro domination...Every census shows that the margin of safety for white supremacy is increasing...No one but a coward or demagogue is

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that “the union of the temperance movement in the North with the anti-slavery forces was detrimental to their interest...as the conflict between the pro-slavery people and the anti-slavery people intensified, the temperance crusade in the South was drowned...and just prior to the war the whole movement in the South collapsed.” (Walton, Jr. & Taylor, *infra* note 291, at 248). A 1931 account of prohibition in the confederacy by historian William Robinson reveals that prior to the war, every southern plantation and farm had its “grape arbors” tended to by slaves. Robinson posits that “the product of the black vintners compared favorably with the vintages of Bordeaux” and ventures that any prohibition in the confederacy was the enforced product of wartime conservation of grain, rather than a moral issue. See William Robinson, Jr., *Prohibition in the Confederacy* 37 AM. HIST. REV. 50, 50 (1931). He gives no mention to race apart from mentioning its connection to viticulture.

<sup>279</sup> *Stinson on Prohibition: Urges the Negroes to Let Whisky Alone*, ATLANTA CONST., Aug. 6, 1904.

afflict at present with any serious fears of negro domination in Georgia, so long as the white people cooperate for white supremacy.” He concludes the article by stating that “race differences may justify and necessitate social distinctions, but race differences cannot repeal the moral law.”<sup>280</sup>

**“The Worst Enemies of Prohibition,” July 1908:** This article presents prohibition not primarily as a political issue but also as racial. The unknown author posits that the voting divide is not between republicans and democrats, but between white and black citizens, stating that “prohibition owed its success to the votes of democrats; for the republicans in Georgia—at least 95 per cent of them negroes—always opposed it. It was not made a party measure. The democrats did not support it as democrats, but as citizens. The republicans did not oppose it as republicans. The negroes were always controlled by the whisky element.”<sup>281</sup>

**“Conniving at the Negro's Decadence,” February 1909:** In the fieriest and impassioned article from our sample, the unknown author declares whisky and narcotics to be “the diabolical twins that are, without the semblance of a rejoinder, destroying the producing capacity of this child-people. . . . we did not discover that whisky was the bane of the Indian until it had permanently subjugated the red man. How long will it take us to discover that whisky and its deadlier partner [cocaine] are sapping the life and foreclosing the future of a race whose labor is fast slipping from beneath the control of the only people qualified to intelligently and kindly direct it?”<sup>282</sup>

**“Drink the White Man's Vice Under Southern Prohibition,” January 1910:** This article posits that Georgia's prohibition law “is doing what it was intended to do—protecting the negro,” although it is being “administered by those who claim the right to violate it,” namely, white men.<sup>283</sup>

**“For Betterment of Negro Race,” June 1910:** The article describes a speech made by Seaborn Wright, a dry politician, tracing the

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<sup>280</sup> William M. Fleming, *Negro Disfranchisement Discussed by W.H. Fleming*, ATLANTA CONST., Oct. 30, 1905, at 6.

<sup>281</sup> *The Worst Enemies of Prohibition*, ATLANTA CONST., July 2, 1908, at 6.

<sup>282</sup> *Conniving at the Negro's Decadence*, ATLANTA CONST., Feb. 15, 1909, at 4.

<sup>283</sup> *Drink the White Man's Vice Under Southern Prohibition*, ATLANTA CONST., Jan. 10, 1910, at 1.

importance of prohibition as a means of “uplifting” the colored race. Wright quotes a letter written by an Atlanta judge, John L. Hopkins (founder of the Atlanta Bar Association) that reads, “the greatest problem of our day...is the making of citizens instead of criminals out of the masses of the negroes that everywhere in the south eddy and swirl in the body politic of the Anglo-Saxon.” Wright then states, “If the negro is a criminal, we are to blame, for the negro will be just what the white man makes him.” He cites the success of the passage of Georgia's statewide prohibition in 1908 in decreasing criminal behavior: “Crime among the negro population of Georgia has decreased 50 per cent since the passing of the prohibition law...as a result of the law the prison doors were open wide and the prison empty.” No statistics are offered in support of this conclusion.<sup>284</sup>

From this brief survey, we identified three critical takeaways that are crucial when moving forward into an examination of other southern prohibition movements. First, there is overwhelming evidence in Georgia of an important nexus between race and that state’s movement for prohibition. Second, there was the vital addition of the element of political power to this nexus. The articles repeatedly refer to Black people’s political capacity as voters and their exercise of this voting power to oppose prohibition. Underlying this is an assumption, largely unexplained and unsupported by any empirical evidence, that nearly all Black people were wet. The third takeaway is the emergence of a theme of continuing white control over Black people’s voting and drinking habits despite emancipation. These themes manifest themselves in a presumed inalienable difference between Black and White people. In newspaper articles from the Prohibition era, Black people are presented as malleable, inferior “child-people,”<sup>285</sup> who “will be just what the white man makes [them].”<sup>286</sup> As “children,” they cannot self-regulate their alcohol intake and thus are seen as easy prey for the liquor industry: “Negroes were always controlled by the whisky element,”<sup>287</sup> the same whisky element which threatened to “foreclose[e] the future of a race whose labor is fast slipping from beneath the control of the only people qualified to intelligently and kindly direct it.”<sup>288</sup>

ii. Case Studies: Tennessee, Georgia, Alabama, and North Carolina

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<sup>284</sup> *For Betterment of Negro Race*, ATLANTA CONST., June 13, 1910, at 3.

<sup>285</sup> The Worst Enemies of Prohibition, *supra* note 281.

<sup>286</sup> *Drink the White Man’s Vice Under Southern Prohibition*, *supra* note 283.

<sup>287</sup> Fleming, *supra* note 280.

<sup>288</sup> The Worst Enemies of Prohibition, *supra* note 281.



Intrigued by the influential role that race played in Georgia during the prohibition movement, we expanded our scope towards a review of secondary sources, based largely on a 1971 article by Hanes Walton, Jr. and James E. Taylor titled “Blacks and the Southern Prohibition Movement.”<sup>289</sup> We also use more recent works by Joe Coker (2007) and Daniel Okrent (2010).<sup>290</sup> By briefly summarizing the nexus of prohibition, race, and the right to vote in Alabama, Georgia, Tennessee, and North Carolina, we then analyze what these realities signify and the critical and alarming questions they bring forth.

### a. Alabama

The intersection of race and prohibition dates back, not surprisingly, to before the civil war, when Alabama law prohibited the sale of liquor to slaves.<sup>291</sup> The freeing of slaves in Alabama and their newfound ability to drink legally caused social upheaval, creating what James Benson Sellers calls a “fear of the drunken black man” that “spurred the temperance people to take more vigorous measures to promote prohibition.”<sup>292</sup> In the decade after the war, Alabama’s Temperance Movement Society withdrew from the National Grand Lodge after the national body required Southern states to admit Black people to their membership.<sup>293</sup> At an 1881 Temperance Convention, white attendees expressed discontent that liquor prohibition in the South had been unsuccessful because “the ‘Whiskey power’ in the state” controlled “the ignorant colored vote.”<sup>294</sup> Prohibitionists refused to form their own state party out of fear that drawing support away from the Democratic Party would be to open themselves to the possibility that Black people would become “a balance-of-power factor.”<sup>295</sup>

Alabama’s prohibitionists blamed Black people for the failure of local option laws.<sup>296</sup> In retribution, Prohibitionists joined Democrats in advocating for the constructive disenfranchisement of Black people.<sup>297</sup> Disenfranchisement came to fruition in 1893 with the passage of a secret ballot law, drastically diminishing the Black vote by forcing Black people to enter the voting booth alone without

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<sup>289</sup> See Walton, Jr. & Taylor, *infra* note 291.

<sup>290</sup> See COKER, *infra* note 299; see also OKRENT, *supra* note 176.

<sup>291</sup> Hanes Walton, Jr. & James E. Taylor, *Blacks and the Southern Prohibition Movement*, 32 *PHYLON* 247, 247–59 (1971).

<sup>292</sup> Clarence P. Denman & James B. Sellers, *The Prohibition Movement in Alabama, 1702 to 1943*, 10 *J. of S. Hist.* 364, 364–365 (1944).

<sup>293</sup> Walton, Jr. & Taylor, *supra* note 291, at 250.

<sup>294</sup> Denman & Sellers, *supra* note 292, at 77.

<sup>295</sup> Walton, Jr. & Taylor, *supra* note 291, at 251.

<sup>296</sup> Denman & Sellers, *supra* note 292, at 102.

<sup>297</sup> *Id.*

assistance from party operatives.<sup>298</sup> Ballots listed only candidate names and not party affiliations.<sup>299</sup> Alabama further held a constitutional convention in 1901, resulting in poll taxes, literacy tests, and residency requirements.<sup>300</sup> The result reduced the number of eligible Black voters in the state from 181,000 to less than 3,000.<sup>301</sup>

Upon effectively removing Black people from the political arena, prohibitionists enacted a state-run dispensary system, calling this “the best way to keep Blacks from consuming liquor.”<sup>302</sup> After the turn of the 20<sup>th</sup> century, prohibitionists succeeded in passing additional legislation to protect the white population by restraining Black people from consuming alcohol.<sup>303</sup> Coker relates that with disenfranchisement in effect,

People’s attention could be drawn away from the power of the black man’s vote, they could with greater patience work upon the solution of the real problem...whites and Negroes could now join hands to protect the ignorant black man from the evils of intemperance, and to safeguard the white man and white woman from the violence of the liquor-crazed black.<sup>304</sup>

From this narrative, it is unclear if, in the absence of a Black population that needed “controlling,” the prohibition movement in Alabama would have existed at all.<sup>305</sup> Coker suggests that the prohibition movement may have existed independently of race but that the need to control the sale of liquor to irresponsible black men” became the genuine battle cry of the post-war temperance movement.<sup>306</sup> Thus, a double motive of both restraining Black people and protecting white people is what carried the temperance movement.<sup>307</sup>

However, when forced to choose between race and booze, Daniel Okrent relates that for white Alabamans, “race trumped booze.”<sup>308</sup> In a 1914 Democratic primary for a vacant state senate seat, a Prohibitionist with progressive views on

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<sup>298</sup> *See id.*

<sup>299</sup> JOE L. COKER, LIQUOR IN THE LAND OF THE LOST CAUSE: SOUTHERN WHITE EVANGELICALS AND THE PROHIBITION MOVEMENT 145 (2007).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Walton, Jr. & Taylor, *supra* note 291, at 141.

<sup>303</sup> Denman & Sellers, *supra* note 292, at 165–174.

<sup>304</sup> COKER, *supra* note 299, at 101.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 44.

<sup>307</sup> *Id.* at 101.

<sup>308</sup> OKRENT, *supra* note 176, at 91

race lost to a wet because “as much as white Alabamans cared about the liquor question, they cared more about the race question.”<sup>309</sup> They feared that the former’s views on race would lead “unacceptably to the national enfranchisement of the Negro.”<sup>310</sup> Thus, when forced to choose between two senators, one tough on booze and another tough on Black people, white voters revealed that maintaining a disempowered Black population was more important.<sup>311</sup> This choice suggests that passing prohibition legislation may not have been white Alabamian’s highest goal but instead was used to justify disenfranchisement.

### **b. Georgia**

The post-war period in Georgia witnessed a revitalization in the temperance movement led by a local optimist, Hoke Smith.<sup>312</sup> During the 1880s and 90s, he subscribed to a philosophy that Walton, Jr., and Taylor call “tolerant white paternalism,” and in 1899, Smith spoke up against disenfranchisement.<sup>313</sup> However, he changed his tune in 1905 by adding disenfranchisement to his platform when running for governor.<sup>314</sup> During his campaign, he announced that Black people “were better laborers and citizens when they were out of politics” and that “the Black vote was corrupt and purchasable by the liquor interest.”<sup>315</sup> Although his opponent, Clark Howell, tried to minimize Smith’s appeal to white voters, Smith won the election because he “linked prohibition and disenfranchisement.”<sup>316</sup> The combination of the liquor interest and Negroes threatened white civilization in Georgia.<sup>317</sup> Poll taxes enacted in the 1880s and a 1900 mandate for all-white primaries had already severely limited Black participation in politics.<sup>318</sup>

Nonetheless, Smith worked to secure total disenfranchisement via constitutional amendment upon taking office.<sup>319</sup> Signed in 1907, the amendment was ratified by voters in 1908, and it reportedly removed 90% of Black voters from the ballot box.<sup>320</sup> He waited until disenfranchisement was ratified to present a

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<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> Walton, Jr. & Taylor, *supra* note 291, at 252–53.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 253.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 254.

<sup>320</sup> *Id.*

prohibition law, believing that “before prohibition could be sought, Blacks had to be removed from the political arena.”<sup>321</sup>

Okrent calls the rhetoric surrounding African Americans in Georgia “toxic,” citing a 1907 article from *The Atlanta Constitution* that lamented the “terrible condition of affairs” arising when “negroes, many of them drunk with whisky, roamed the country at large.”<sup>322</sup> A survey of that newspaper reveals that even after the nearly complete disenfranchisement of Black people through constitutional amendment, a public discourse surrounding the need to control Black access to liquor continued to exist.

### c. Tennessee

As in Alabama, Tennessee had strict laws prohibiting the sale of intoxicants to free Black people and slaves.<sup>323</sup> In the post-war revival of the temperance movement in Tennessee, Black people were actively involved on both sides of the issue.<sup>324</sup> However, after an 1887 vote to dry up the state failed, people were quick to blame Black communities.<sup>325</sup> The pro-prohibitionist *Nashville American* quickly asserted that 90,000 of the 145,000 votes cast against the amendment were those of Black people and that “whites who had voted for prohibition were defeated by Blacks under the influences of money, liquor, and the appeal to prejudice.”<sup>326</sup> It continued, “If progressive movements were to succeed within the state, and if the state was to have viable reform politics, the Blacks would have to be excluded from political life.”<sup>327</sup> Tennessee, like its southern neighbors, moved quickly to achieve such exclusion.<sup>328</sup> Having failed to persuade Black voters, explains Okrent, “the dries chose instead to demonize. They conjured not an argument but an image: the waking nightmare of a Black man with a bottle of whiskey in one hand and a ballot in the other.”<sup>329</sup> This demonization succeeded in convincing the white majority, and in 1889, the legislature implemented a poll tax, voter registration restrictions, and secret ballot with the express purpose of restricting the Black vote.<sup>330</sup> The secret ballot law, called the Dortch law, contained a grandfather clause allowing those

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<sup>321</sup> *Id.*

<sup>322</sup> OKRENT, *supra* note 176, at 42.

<sup>323</sup> Walton, Jr. & Taylor, *supra* note 291, at 255.

<sup>324</sup> *Id.* at 255–57.

<sup>325</sup> *Id.* at 256.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> OKRENT, *supra* note 176, at 43.

<sup>330</sup> COKER, *supra* note 299, at 145

who had been eligible to vote in 1857 to continue to receive assistance in the ballot box, thereby creating an exception for uneducated white voters.<sup>331</sup>

Prohibitionists backed the total disenfranchisement of Black people in 1909.<sup>332</sup> In 1890, Tennessee evangelicals increasingly promoted prohibition as the principal remedy for the region's racial strife.<sup>333</sup> O.P. Fitzgerald, coeditor of Nashville's *Christian Advocate*, argued that “of the so-called race troubles in the South, whisky has been the cause of almost every case.”<sup>334</sup>

#### d. North Carolina

Before the Civil War, neither free Black people nor slaves could buy liquor in North Carolina.<sup>335</sup> White people became alarmed after emancipation gave Black individuals the freedom to drink and believed that “Blacks had taken advantage of their new freedom and often drank to an excess... Besides, liquor gave Blacks a feeling of being equal or even superior to white, an attitude which could not be tolerated.”<sup>336</sup> When prohibition efforts failed in numerous elections, Black people were blamed: “On the assumption that if Blacks were barred from voting total statewide prohibition could be achieved, the prohibitionists pleaded that Blacks be disenfranchised.”<sup>337</sup> Here, too, they succeeded: Black disenfranchisement passed in 1900, praised by one North Carolinian Presbyterian minister for removing “the shadow of Negro domination.”<sup>338</sup> Yet even with Black people politically decapitated, prohibitionists continued to push through local option laws to limit Black people’s ability to access alcohol.<sup>339</sup>

Like other southern states, the public discourse in North Carolina blurred the lines between anger over Black voters’ ability to influence prohibition vote outcomes, fear of the implication that this vote had for the potential “Black domination” of white people, and scientifically unfounded assertions that Black people under the influence of alcohol were a menace to society.

#### iii. Synthesizing Case Studies into a Holistic View of Race and Prohibition

Having established that race did indeed play an important, if not crucial, role in the prohibition movements of southern states recovering from the Civil War,

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<sup>331</sup> *Id.*

<sup>332</sup> Walton, Jr. & Taylor, *supra* note 291, at 257.

<sup>333</sup> COKER, *supra* note 299, at 142.

<sup>334</sup> *Id.*

<sup>335</sup> Walton, Jr. & Taylor, *supra* note 291, at 257.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 258.

<sup>338</sup> COKER, *supra* note 299, at 149.

<sup>339</sup> *See* OKRENT, *supra* note 176, at 42.

we turn to a discussion of areas that merit additional examination. First, we explore the domination of two metaphors in the public discourse surrounding Black people: the “wild animal” metaphor and the “child” metaphor, both damning but notably distinct. We then examine the questions left open by current literature regarding Black voters’ role in the voting arena. Finally, we look at the treatment of Black people in a larger context of fear of anything deemed “foreign” or “other.”

#### iv. Wild Animal Metaphor

The movement for alcohol prohibition was dominated by two distinct metaphors used repeatedly in public discourse to convince white voters to support both prohibition and disenfranchisement legislation. The “wild animal” metaphor is evident through the repeated use of imagery of wild animals and animal movement. In newspapers and speeches, Black people were repeatedly called “brutes” and “beasts,” both sober and under the influence of alcohol.<sup>340</sup> We can recall the *Atlanta Constitution* article previously discussed, which referred to “swarms” of Black people who “roamed” the country at large.<sup>341</sup> Coker describes how southern white people, particularly evangelicals, played on a popular image of the “black beast” when proclaiming that alcohol was the central ingredient in the perceived degradation of Black males.<sup>342</sup> The proliferation of cheap “Black Cock Vigor Gin,” marketed to poor southern Black individuals, featured a nearly nude white woman on the label.<sup>343</sup> This labeling exacerbated tensions and led a white Nashville clergyman to conclude that “this gin, with its label...is sold with the promise that it will bring white virtue into the black brute’s power.”<sup>344</sup> In this vein, concurrent to the prohibition movement was a hysteria the swept through the South in the early 1900s over Black “brutes” raping white women.<sup>345</sup> Just as wild animals are unpredictable and untamed, so too did white prohibitionists declare Black people to be “a menace to life, property, and the repose of the community” when drunk.<sup>346</sup> Ultimately, Prohibition in the south was ratified as the solution to “black savagery.”<sup>347</sup>

Missing from these public accusations are actual statistical or factual allegations. Those employing this rhetoric relied on powerful imagery rather than references to reality, playing on innate and instinctual fears to falsely activate defense mechanisms in white voters. This terminology frames Black individuals as

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<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> COKER, *supra* note 299, at 124.

<sup>343</sup> OKRENT, *supra* note 176, at 46.

<sup>344</sup> *Id.*

<sup>345</sup> COKER, *supra* note 299, at 124.

<sup>346</sup> Walton, Jr. & Taylor, *supra* note 291, at 247.

<sup>347</sup> COKER, *supra* note 299, at 124.

uncontrollable criminals and seeks to convey a propensity of alcohol to unleash a beast. Prohibitionists' use of negative stereotypes further dehumanized Black people, treating them as a species apart rather than as fellow citizens of the New South. To call Black people "beasts" is to preclude their ability to make rational and informed decisions. By invoking powerful images of wild, untamed, carnivorous creatures, white southerners were allowed to feel justified in maintaining and perpetuating the steadfast segregation that slavery had permitted. Such terminology was not an invention of the prohibition movement, yet the tendency by prohibitionists to employ it as a means of furthering their agenda demonstrates the minimal progress that had been made to improve antebellum race relations. Did the use of this graphic and violent imagery stem from real, although grossly misinformed, fear by white people that Black people were somehow biologically incapable of consuming liquor? Or was it an intentional top-down fabrication by the Southern elite resentfully clinging to the status quo and refusing to accept any sense of equality with which access to alcohol empowered Black people?

v. Child Metaphor

In southern prohibitionist rhetoric, we see the use of a second metaphor: the "helpless child."<sup>348</sup> Coker describes an image that developed in antebellum years of "slaves as simplistic, childlike creatures."<sup>349</sup> He asserts that "Southern writers, politicians, and preachers increasingly portrayed African Americans as childlike creatures who must be protected and parented by white men—the 'adults' in society, as it were—for their good."<sup>350</sup> Those employing this rhetoric tended to be less overtly racist but still viewed Black people as incapable of controlling themselves, given the newfound freedom to purchase and consume alcohol. Coker further notes that by the late 1890s, the push for Black education had been replaced in the South by condescending paternalism.<sup>351</sup> In the articles surveyed in Section 1 of this essay, we repeatedly see the patronizing need that many white individuals projected to "protect" African Americans given that "they developed no high degree of ability to resist" the evil effects of the alcohol from which they were protected under slavery.<sup>352</sup> Shouldered with the responsibility to "protect" Black people from themselves, it was a betrayal of this duty to permit alcohol sales to that segment of society unable to handle it.<sup>353</sup> Many prohibitionists proclaimed, the

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<sup>348</sup> *See id.* at 143.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 144.

“negro will be just what the white man makes him.”<sup>354</sup> Like parents hiding liquor in a liquor cabinet, southerners employing this rhetoric may have viewed prohibition as “a way to keep liquor away from blacks but allow whites to get it.”<sup>355</sup> Those using this paternalistic language considered disenfranchisement and prohibition as necessary and morally justified; after all, young children are not permitted to vote or buy whiskey, on the theory that they are unable to handle either. Only upon eliminating Black voters from the political arena could the “adults” then pass legislation in everyone’s best interest.

The interplay of the “wild animal” and “helpless child” metaphors was damning for Southern Black communities, who not only lost their right to vote in many southern states but also lost their right to buy liquor.<sup>356</sup> It is likely that these Prohibition-era images of drunken, reckless Black men promoted by white southerners were holdovers from antebellum race relations and simply repurposed to push a prohibitionist and disenfranchisement agenda.

vi. Black Communities and the Right to Vote

Our investigation highlighted the startling reality that prohibition movements played an integral role in Black disenfranchisement after the Civil War. Coker reveals a fascinating history of “New Southites,” many of them white southern evangelicals who professed to have realized the folly of slavery.<sup>357</sup> During the 1870s and 80s, many “New Southites” publicly declared that slavery had hindered the South economically and tainted it morally.<sup>358</sup> Coker goes as far as saying that “the attitude of New Southites towards blacks was one of optimism and confidence. They said good riddance to slavery and welcomed universal male suffrage.”<sup>359</sup> Yet by the 1890s, these same white southern evangelists had begun advertising “that the burden of suffrage might be too great for African Americans to bear.”<sup>360</sup> They proclaimed that the power to vote had been “thrust upon” freedmen who had proven themselves “manifestly disqualified to perform the duties of electors.”<sup>361</sup>

The proclamation that Black people were unfit to vote conceals what we believe was genuinely happening. For the first time in American history, a minority

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<sup>354</sup> *For Betterment of Negro Race*, *supra* note 284.

<sup>355</sup> Walton, Jr. & Taylor, *supra* note 291, at 247.

<sup>356</sup> COKER, *supra* note 299.

<sup>357</sup> *Id.* at 127.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 128.

<sup>360</sup> *Id.* at 139

<sup>361</sup> *Id.*



had sufficient voting power to be outcome determinative in southern elections.<sup>362</sup> Black voters could act as a swing vote, something never before witnessed in the racially binary south.<sup>363</sup> The issue of prohibition may have represented the first ballot initiative in southern states whose outcome rested mainly on how Black individuals voted. Coker would agree that southerners, who once accepted the post-war enfranchisement of Black people, shifted to supporting disenfranchisement when they realized “that black voters would not support prohibition.”<sup>364</sup> What is lacking from the existing literature is a meaningful empirical examination into the truthfulness of the presumed “black voting bloc” surrounding prohibition, perhaps because such voting data is unavailable. If procurable, voting information would reveal if Black voters *were* a swing vote on prohibition legislation. If that is the case, the argument can be made that prohibition was the white majority’s highest goal. Black disenfranchisement was merely a means to achieve prohibition because white voters correctly surmised that legislation would not be passed unless Black people were prevented from voting. However, if Black voters were *not* a swing vote, disenfranchisement may be purely a means of social control and reversion to the antebellum status quo.

Sadly, white voters in the South viewed Black people as unfit to enjoy two freedoms recently conferred upon them by emancipation: the rights to vote and purchase alcohol. The abolishment of slavery undeniably brought shocking changes to the lives of both freed slaves and white individuals in the South. But, instead of investing energy in incorporating the newly franchised Black population into civic life, white prohibitionists instead focused their efforts on continuing to deny benefits to freedmen; these included benefits of civic participation and participation in recreational socialization through alcohol consumption.

vii. Fear of the “Other”

It was not just Black people that white southerners despised. Okrent notes that southerners were xenophobic in general, likely because “in some Southern states the population was as much as 99 percent native stock.”<sup>365</sup> The ethnic diversity of San Francisco, New York, and Chicago was largely absent in the South during Reconstruction, and Southern society continued to be predominantly racially binary, leading to a lack of familiarity with any “other” besides the Black people, who had until so recently been enslaved.<sup>366</sup>

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<sup>362</sup> Olivia B. Waxman, The Legacy of the Reconstruction Era’s Black Political Leaders, *Time* (2022), <https://time.com/6145193/black-politicians-reconstruction/>.

<sup>363</sup> *Id.*

<sup>364</sup> COKER, *supra* note 299, at 144.

<sup>365</sup> OKRENT, *supra* note 176, at 86.

<sup>366</sup> *Id.*

This xenophobia of all non-white people was visible in the first iteration of the modern Ku Klux Klan (“KKK”), which focused its hatred on Jewish and Catholic immigrants; it was only later reincarnations of the KKK that transitioned its “venomous loathing on black people.”<sup>367</sup> Jewish distillers were accused of debauching the Black man; when Congressman John Tillman said that he “wished to save the Negro from lynching by denying him his liquor,” he stated that in so doing, he was not hurting southerners.<sup>368</sup> “I am not attacking an American institution. I am attacking mainly a foreign enterprise.”<sup>369</sup> In a 2011 study, Colin Trujillo describes prohibition movements as the racist attempt to suppress German and Irish immigrants.<sup>370</sup> On a national scale, then, Southerners-against-Blacks is not the only manifestation of racial motivations for prohibition.<sup>371</sup> Yet, an examination of the way white southerners discussed and treated Black people can be used as a benchmark to examine, with an expanded scope, the demeaning and dehumanizing ways in which Americans have often treated those considered “different” or “foreign.”

No matter how the above story is read, it is ultimately a question of a majority seeking to control a minority whose voting power was feared. The desire to control a child and the desire to control a savage beast, while somewhat distinct, are still about exerting domination over the body of another. Former Confederate states lost the ability to exercise this control through forced labor under slavery but continued to exert authority by other means.<sup>372</sup>

Prohibition is often regarded as a strange blip on the radar of America’s past. The prohibition-motivated disenfranchisement of Black communities and even the local and national prohibition legislation that followed were, in hindsight, temporary. But prohibition stands for something much more significant: the first instance in which southern white voters faced a franchised minority with sufficient power to be a swing vote. Their reaction and the extent to which they were willing to pass disenfranchising legislation to prevent such a swing vote are alarming.

The demonization and dehumanization of those considered “other” and “foreign” present in white prohibitionist rhetoric in the south, unfortunately, did not end with the enactment of the 18<sup>th</sup> Amendment, nor with its repeal, nor with the Voting Rights Act of 1965.

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<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 44.

<sup>370</sup> Colin W. Trujillo, *Marijuana, Mexico and the Media*, at iii (May 2011) (Master’s thesis, Humboldt State University) (on file with author). In this piece, Trujillo examined five prohibition movements: alcohol, opium, cocaine, marijuana and the war on drugs. He concludes that groups targeted in these movements are displaced immigrant labor forces.

<sup>371</sup> *Id.*

<sup>372</sup> Waxman, *supra* note 362.

## V. MARIJUANA PROHIBITION

On December 4<sup>th</sup>, 2020, the United States House of Representatives voted in favor of a historic bill to federally decriminalize marijuana and expunge all previous marijuana possession convictions.<sup>373</sup> In 2017, “more than one in five U.S. adults live in a state where they can walk into a store to purchase recreational marijuana.”<sup>374</sup> Public opinion on marijuana has drastically shifted in the last 40 years.<sup>375</sup> Understanding this change in public opinion requires evaluating why governments criminalized marijuana, the effects of marijuana criminalization on minority communities, and how public opinion has, or perhaps has not, influenced these policies.

### A. History of Marijuana Criminalization

Though associated since the mid-20 century with Mexicans, the marijuana plant is not indigenous to Mexico.<sup>376</sup> Asians were the first to cultivate marijuana; the name marijuana comes from the Spanish word for intoxication.<sup>377</sup> Marijuana’s relationship with Mexico is attributable to the Spanish importation of the plant into the New World.<sup>378</sup> Spain mandated its cultivation, and this command was supported by influential international and local personnel in Mexico.<sup>379</sup> There are multiple theories as to the reasons for marijuana criminalization. The first theory is that the

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<sup>373</sup> Deirdre Walsh, *House Approves Decriminalizing Marijuana; Bill to Stall in Senate*, NPR (Dec. 4, 2020, 1:36 PM), <https://www.npr.org/2020/12/04/942949288/house-approves-decriminalizing-marijuana-bill-to-stall-in-senate>.

<sup>374</sup> Mike Vuolo, Joy Kadowaki & Brian C. Kelly, *Marijuana’s Moral Entrepreneurs, Then and Now*, 16 CONTEXTS 20–25, 21 (2017). Cf. Senaxte Majority Leader, Chuck Schumer has offered legislation removing marijuana from the list of controlled substances. See also Nicholas Fandos, *Schumer Proposes Federal Decriminalization of Marijuana*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2021/07/14/us/politics/marijuana-legalizationschumer.html>. Although, President Joe Biden may not support decriminalization legislation. See also Kris Krane, *Enjoy Marijuana? Joe Biden Doesn’t Care about You*, FORBES (Mar. 26, 2021), <https://www.forbes.com/sites/kriskrane/2021/03/26/enjoy-marijuana-joe-biden-doesnt-care-aboutyou/?sh=3ec4404d651d>.

<sup>375</sup> Fandos, *supra* note 374.

<sup>376</sup> Louis Vyhnanek, “Muggles,” “Inchy,” and “Mud”: *Illegal Drugs in New Orleans during the 1920s*, 22 LA. HIST.: J. OF LA. HIST. ASS’N. 253, 253–79 (1981).

<sup>377</sup> *Id.*

<sup>378</sup> Averlardo Valdez & Charles D. Kaplan, *Deconstructing US Marijuana Prohibition Policies in the Early Twentieth Century*, 44 AZTLÁN: A J. OF CHICANO STUD. 111, 111–138 (2019).

<sup>379</sup> *Id.*

negative public view of marijuana, specifically the use of marijuana by minority groups, was the driving force for marijuana criminalization.<sup>380</sup> The “Mexican hypothesis” posits that marijuana use became heavily associated with the Mexican immigrant community; this association led to the racialization of marijuana, fueling negative public opinions around the drug.<sup>381</sup> This negativity resulted in a societal push for criminalization.<sup>382</sup> The racialization of marijuana also contributed to the narrative of marijuana being a harmful drug that “caused madness, crime, and violence among its users.”<sup>383</sup> Additionally, recent studies demonstrate that “marijuana use was not widespread” among Mexican immigrant communities and, instead, Mexican immigrants generally became associated with crime, but not specifically marijuana consumption.<sup>384</sup> While public opinion may not have specifically targeted marijuana use among Mexicans, it is vital to recognize the effects of “moral entrepreneurs” on the marijuana criminalization movement.<sup>385</sup>

The term “moral entrepreneurs” “refers to individuals who use the strength of their positions to encourage others to follow their moral stance.”<sup>386</sup> While there may not have been a widespread negative public opinion about marijuana use in minority communities, moral entrepreneurs did racialize marijuana. They then commodified the racialization of the drug to advocate for its prohibition.<sup>387</sup>

Marijuana prohibition started in California to address public concerns about the use of marijuana by non-white ethnic groups and the threats to white youth.<sup>388</sup> This concern arose before marijuana became federally illegal in 1937 after California prohibited the use and possession of the drug.<sup>389</sup> Also, Mexican immigrants were not the only ones this movement targeted, as marijuana was “thought to appeal to the ‘oriental mind,’” and the use of opium by east Asian immigrants helped contribute to the narrative that marijuana use resulted in crime and laziness.<sup>390</sup>

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<sup>380</sup> Isaac Campos, *Mexicans and the Origins of Marijuana Prohibition in the United States: A Reassessment*, 32 SOC. HIST. OF ALCOHOL AND DRUGS 6, 6–37(2018). However, researchers have challenged this argument as there is little evidence that public opinion surrounding marijuana was shaped by the drug’s use by Mexican immigrants.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 6.

<sup>384</sup> *Id.* at 7.

<sup>385</sup> Vuolo, *supra* note 375, at 21.

<sup>386</sup> *Id.*

<sup>387</sup> Kenneth M. White & Mirya R. Holman, *Marijuana Prohibition in California: Racial Prejudice and Selective*

*Arrests*, 19 RACE, GENDER, & CLASS 75,78 (2012).

<sup>388</sup> *Id.* at 77.

<sup>389</sup> *Id.* at 76–77.

<sup>390</sup> *Id.* at 77–78; *see also* WHITE, *supra* note 86, at 110 ,

Unlike alcohol prohibition, which lasted barely more than a decade, laws criminalizing marijuana have remained in effect since the turn of the 20th century. Marijuana legislation is inspired by racialized campaigns to criminalize the non-medical use of opium.<sup>391</sup> The language of an Oregon district court reflects this animus after the conviction of a Chinese man for distribution of the drug. Smoking opium is not our vice, and therefore it may be that this legislation proceeds more from a desire to vex and annoy the “Heathen Chinees” in this respect, than to protect the people from the evil habit. But the motives of legislators cannot be the subject of judicial investigation for the purpose of affecting the validity of their acts.<sup>392</sup>

Similar to how moral entrepreneurs created moral panic surrounding the use of marijuana in California, Henry Jacob Anslinger, an official for the Federal Bureau of Narcotics, was uniquely positioned to benefit from the authority to enforce marijuana prohibition and led the effort to have marijuana criminalized at the federal level.<sup>393</sup> Public prejudice against “Hindoos and Mexicans” was weaponized by these moral entrepreneurs to racialize marijuana, resulting in negative public opinion about the drug.<sup>394</sup> It is important to reemphasize that there is little to no evidence that marijuana laws were “rooted in public outcry or demand;” instead, the criminalization efforts were primarily the focus of political operatives and private entities.<sup>395</sup> While public opinion itself may not have contributed to the criminalization of marijuana, the moral panic fostered by anti-marijuana political figures negatively impacted public opinion surrounding marijuana, and this view of marijuana is still prevalent.<sup>396</sup> The rhetoric of moral entrepreneurs and their success in prohibiting marijuana ownership, distribution and use, not only had a significant lasting effect on public opinion, but it has posed an uphill battle for members of minority groups.

In the United States, the use of marijuana dates as far back as the 19<sup>th</sup> century.<sup>397</sup> Richard Bonnie and Charles Whitebread’s work has been significant in constructing the discursive context of the movement to criminalize marijuana.<sup>398</sup> They report that criminal penalties began in the 1920s, and attention to the drug was directly related to public discourse on alcohol prohibition.<sup>399</sup> Before the 1900s,

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<sup>391</sup> Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 984 (1970).

<sup>392</sup> *Id.* at 997.

<sup>393</sup> White & Holman, *supra* note 387, at 78.

<sup>394</sup> *Id.*

<sup>395</sup> Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIME L. & CRIMINOLOGY 379, 390 (2020).

<sup>396</sup> Thomas J. Linneman, *Reefer Normal*, 13 CONTEXTS 71, 72 (2014).

<sup>397</sup> Campos, *supra* note 380, at 17.

<sup>398</sup> *Id.* at 13.

<sup>399</sup> Bonnie & Whitebread, *supra* note 391, at 975.

there was no prohibition of any type of marijuana use; by 1914, legislation was passed in every state.<sup>400</sup>

Unlike the Temperance movement, which involved extensive public engagement on whether to criminalize alcohol, the rhetorical justification for the ad hoc anti-narcotics movement was to anticipate the evils of narcotics use and avoid those evils.<sup>401</sup> The dialogue around marijuana focused on the corruption produced by the drug, which allegedly included crime, poverty, and mental illness.<sup>402</sup> At the beginning of the marijuana prohibition movement, only 1% of the population was addicted to any type of drug, including marijuana.<sup>403</sup> Its use was concentrated among the middle-class.<sup>404</sup> Addiction was attributed to medical intervention through careless over-prescription by doctors (a phenomenon that would foreshadow the current opioid crisis).<sup>405</sup> Early legislative efforts targeted crime prevention and a public education campaign to warn against the dangers of the drug.<sup>406</sup>

The first national policy addressing marijuana occurred in 1932, in the waning years of Prohibition.<sup>407</sup> The story that is widely told regarding the motivation for the legislative movement was public concern about the problems associated with narcotics use.<sup>408</sup> Narcotics addicts were labeled “dope fiends,” and media accounts of drug use were sensationalized and dissected from the medical justification for use.<sup>409</sup>

Marijuana use gained national attention in the 1930s, drawing the public’s focus after the repeal of Prohibition.<sup>410</sup> However, in reality, early marijuana laws were a continuation of attempts by a white majority to control a non-white minority. In the case of marijuana, laws were aimed at subduing a growing Mexican population. This population had skyrocketed after the United States acquired half of Mexico’s territory in the Treaty of Guadalupe Hidalgo (1848) that ended the Mexican American War.<sup>411</sup>

Bonnie and Whitebread outline three factors that influenced the treatment of marijuana in the 1930s: racial prejudice (which they argue was the most

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<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 1043–44.

<sup>403</sup> *Id.* at 981–82.

<sup>404</sup> *Id.* at 983.

<sup>405</sup> *Id.* at 983–984.

<sup>406</sup> *Id.* at 985.

<sup>407</sup> *Id.* at 1010.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.* See also WHITE, *supra* note 86 (White posits that the term “dope fiend” is also used for the Chinese and opium use).

<sup>410</sup> Bonnie & Whitebread, *supra* note 391, at 1010.

<sup>411</sup> *Id.* at 1021.

prominent); the assumption that marijuana was an addictive drug; and Mexican immigration.<sup>412</sup> This focus combined racial animus with nativist prejudice.<sup>413</sup> This hatred explains why the legislative movement was regional. Western and southern states with more prominent Mexican and African American populations were the most active in advancing this legislation.<sup>414</sup>

Proponents of the legislative movement strongly relied on racial prejudice to support their arguments. Mexican Americans and immigrants became the face of the marijuana drug epidemic.<sup>415</sup> This finding is supported by the works of other scholars who argue that once the need for Mexican agricultural workers subsided, anti-marijuana campaigns functioned as a mechanism to argue for their exclusion from the American labor market.<sup>416</sup> Movement participants made these assertions despite the absence of facts substantiating allegations that the drug was used at a high rate in Mexican communities.<sup>417</sup> Instead, a survey of police reports reveals that alcohol and gambling were the more significant problems in these communities.<sup>418</sup> Nevertheless, the campaign against Mexicans was marked by “passion and race hatred” that disregarded facts about the social harms their communities suffered.<sup>419</sup> In other words, marijuana use was not seen as a problem, nor the target of public policy, until the movement to control its use was racialized.<sup>420</sup>

In the 1920 and 30s, media and government agents started associating the drugs with Mexicans as a mechanism to pass legislation prohibiting its cultivation and use.<sup>421</sup> The initial subjects of this focus were youth, then white prostitutes, gamblers, pimps, “hop heads (drug addicts),” low-class white people, East Indians, Black people, chauffeurs, and “hangers on of the underworld.”<sup>422</sup>

Valdez and Kaplan argue that to understand the racial motivations for marijuana prohibition, one must first understand how race works in concert with other complex factors.<sup>423</sup> They embrace a criminological frame to explain how the

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<sup>412</sup> *Id.* at 1011–12.

<sup>413</sup> Trujillo, *supra* note 370, at 8.

<sup>414</sup> *Id.*

<sup>415</sup> Bonnie & Whitebread, *supra* note 391, at 1012.

<sup>416</sup> Patricia A. Morgan, *John Helmer: “Drugs and Minority Oppression”*, 5 CRIME & SOC. JUST. 65, 66 (1976).

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* at 67.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* (Modern movements to legalize marijuana can be attributed to the fact that its use has become more common, and it has regained its footing as a middle-class drug); *see also* Trujillo, *supra* note 370, at 16.

<sup>421</sup> Valdez & Kaplan, *supra* note 378, at 114.

<sup>422</sup> Collin B. Walsh & Daniel T. Nau, *The History, Law, and Psychology of Criminalizing Marijuana: A Comparative Analysis with Alcohol and Tobacco*, SSRN ELECTRONIC J. (Nov. 2013), <https://ssrn.com/abstract=2355151>.

<sup>423</sup> Valdez & Kaplan, *supra* note 378, at 114.

“intersection of race, socioeconomic status, and ethnicity, the dangerous social classes, influenced the emergence of controls on marijuana and other illicit drugs.”<sup>424</sup>

To document their findings, Bonnie and Whitebread point to western newspapers in Montana and Colorado. A Montana newspaper reported that “Marihuana is Mexican opium, a plant used by Mexicans and cultivated for sale by Indians.”<sup>425</sup> A Colorado newspaper reported on a white girl murdered by her Mexican stepfather.<sup>426</sup> The paper alleged that the father might have been a marijuana user.<sup>427</sup> The paper’s headline was “Fiend Slayer Caught in Nebraska[;] Mexican Confesses Torture of American Baby, Prisoner Admits to Officer He is Marihuana Addict.”<sup>428</sup> Bonnie and Whitebread conclude that the affiliation of marijuana use with Mexicans was sufficient to justify its prohibition, which also explains the sensationalizing of the drug's effect.<sup>429</sup>

Bonnie and Whitebread’s accounts closely track a state-level examination of marijuana use in New Orleans by Vyhanek.<sup>430</sup> The drug was trafficked to New Orleans by distributors in New York; New Orleans was the primary drug distribution center in the south.<sup>431</sup> The drug was easily accessible to poor children because they could purchase two cigarettes for a quarter.<sup>432</sup> The drug’s introduction to the New Orleans scene promoted exaggerations about its dangers, including the threat of death.<sup>433</sup> These exaggerations were supported by the pharmaceutical industry, which included allegations that the drug leads to addiction to more dangerous drugs.<sup>434</sup> The New Orleans press took up the charges claiming that abusers could purchase drugs as easily as you would buy a sandwich.<sup>435</sup> The stories about the drug evidenced the first major press coverage on marijuana and its effects.<sup>436</sup> This coverage also fermented a growing interest in marijuana legislation<sup>437</sup> Newspaper writers and editors did not engage in anti-Mexican arguments to demonize the drug; instead, they talked about “scarlet women” and “society belles.”<sup>438</sup> Louisiana eventually passed legislation criminalizing

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<sup>424</sup> *Id.*

<sup>425</sup> Bonnie & Whitebread, *supra* note 391, at 1014.

<sup>426</sup> *Id.* at 1015.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 1016.

<sup>430</sup> *Id.* See also Vyhanek, *supra* note 377.

<sup>431</sup> *Id.* at 260.

<sup>432</sup> *Id.* at 267.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* at 267–68.

<sup>435</sup> *Id.* at 268.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 268–70.

<sup>438</sup> *Id.* at 269.



marijuana; illegal users faced a fine of up to \$500.00 and six months in prison for possessing the drug.<sup>439</sup>

The criminalization of marijuana cannot be dislodged from its racial overtones. The perception that the drug was used primarily by people of color, i.e., African Americans and Mexicans was the catalyst that prompted and curried support for criminalization.<sup>440</sup> Hence, the motivation for criminalization movements was racial and ethnic prejudice in southern and western states with large Black and Mexican populations.<sup>441</sup> Marijuana was blamed for causing murders, rapes, mayhem, the seduction of white girls by Black men, and mayhem.<sup>442</sup>

When “Reefer Films” was released in 1936, most states in the country had already outlawed marijuana.<sup>443</sup> The film caricatured Black and Mexican people as ax-wielding weed smokers.<sup>444</sup> This image became the face of marijuana illegality, wholly ignoring the widespread white use of the drug on college campuses.<sup>445</sup> This early work is the foundation for subsequent federal legislation that made minority youth the “War on Drugs” targets and all of its antecedent evils.<sup>446</sup> Today, the minority of drug arrests are not the traffickers but the possessor of the substance.<sup>447</sup> Although Black and Latino communities make up a smaller portion of the American population, they are woefully overrepresented in drug arrests.<sup>448</sup> Congress’s passage of the Marihuana Tax Act of 1937, banning all non-medical use of the substance, led to these outcomes.<sup>449</sup> Bender highlights that while most of the focus of the negative impacts of marijuana drug arrests focuses on African Americans, Latino communities are negatively affected because of the historical narrative that connects them to the supply chain and production of the drug.<sup>450</sup> Further, Latino immigrants face deportation; therefore, there is a dual consequence for the historical stereotypes ascribed to this community.<sup>451</sup>

Isaac Campos challenges this construction of the racial motivation for marijuana legislation.<sup>452</sup> He argues that the argument of racial bias sits on “unstable

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<sup>439</sup> *Id.*

<sup>440</sup> Steven Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. Rev. 689, 690 (2016).

<sup>441</sup> *Id.* at 690.

<sup>442</sup> *Id.* at 690–91.

<sup>443</sup> *Id.* at 691.

<sup>444</sup> *Id.* at 694.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* at 691.

<sup>447</sup> *Id.* at 691–92.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* at 691.

<sup>450</sup> *Id.* at 691–92.

<sup>451</sup> *Id.* at 692.

<sup>452</sup> Campos, *supra* note 380, at 7.

ground” because it is supported by evidence that reflects little knowledge of Mexicans.<sup>453</sup> Specifically, Campos argues:

Recent research has since raised fresh doubts about the paradigm, for it turns out that marijuana’s history in Mexico runs counter to the notion that the drug was used widely and casually by Mexican migrants. The most common stereotype of the marijuana user in Mexico was that of a ferocious, unpredictable, and therefore very dangerous madman. Furthermore, marijuana use was not widespread among Mexicans but, instead, mostly concentrated among prisoners and soldiers. In short, marijuana’s history in Mexico is not fully compatible with the story that has long been told about Mexican immigrants and marijuana in the United States.<sup>454</sup>

Campos criticizes Musto and Bonnie, and Whitebread’s depictions of Mexican use of marijuana to explain the criminalization movement in the U.S.<sup>455</sup> However, Campos’s arguments seem to be narrowly tailored to the truth about marijuana and Mexico and not related to the racial arguments made by Bonnie and Whitebread to support the criminalization of marijuana in America.<sup>456</sup>

The harms of marijuana were also promoted by legislators, particularly by Harry J. Anslinger, Commissioner of the Treasury Department’s Bureau of Narcotics.<sup>457</sup> An ambitious man, Anslinger used propaganda as a tool to further his career. He relied on disinformation and used the media to legitimize his claims.<sup>458</sup> Anslinger produced 15 propaganda articles.<sup>459</sup> The best known was one in which he described marijuana as “the assassin of youth” in a story of the same name about a young man turned murderer while under the spell of Cannabis.<sup>460</sup> Anslinger made these claims without any scientific data to back up his assertions.<sup>461</sup> The Marijuana Stamp Act passed with very little opposition.<sup>462</sup> Once marijuana is criminalized at the deferral level, it lost its appeal to middle-class white communities who accepted its characterization as a drug of minorities and the lower classes.<sup>463</sup> Anslinger’s

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<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 7–10.

<sup>456</sup> *Id.*

<sup>457</sup> Trujillo, *supra* note 370, at 13.

<sup>458</sup> *Id.* at 14.

<sup>459</sup> *Id.* at 14–15.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.* at 15.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* at 16.

activities reveal the true motivations for marijuana criminalization, “racist fears, political ambitions, and an economic downturn.”<sup>464</sup> Politically motivated criminalization of the drug would later be connected to communism and socialism in the McCarthy years.<sup>465</sup> Valdez and Kaplan do not contest the role that Anslinger played in demonizing communities to achieve his political objectives, but they warn against too simplistic an argument.<sup>466</sup> Instead, they posit background and foreground factors influenced “both the social construction of the stigmatized image of the Mexican as a marijuana user and the legitimation of a repressive marijuana prohibition system.”<sup>467</sup> They explained the background factors are the historical use of marijuana in Mexico, immigration, racism, and the pharmaceutical industry.<sup>468</sup> The foreground factors are cultural stereotyping and the role of the media, moral crusades and reform movements, and governmental entrepreneurship.<sup>469</sup> When these structures intersect, they create the stigma associated with Mexican immigrants, which helps explain the continued stigmatizing of minority groups today.

## **B. Modern Consequences of Criminalization**

To gauge and discuss how current public opinion has influenced marijuana policies in the most recent decade, we must begin by addressing the detrimental effects that the War on Drugs --and the criminalization of marijuana specifically -- has had on minority community members and mass incarceration. The Marijuana Tax Act of 1937 was the legislation that criminalized marijuana; while this bill was a critical factor in the development of mass incarceration, the 1970 Controlled Substance Act solidified this link from marijuana possession to the prison system.<sup>470</sup> The 1970 Controlled Substance Act is the legislative bill that classified marijuana as a Schedule I controlled substance.<sup>471</sup> This law allowed marijuana possession to be treated as a felony and listed the drug as one with a high potential for abuse with no medically accepted uses recognized by the United States government.<sup>472</sup> This act placed marijuana in the most heavily regulated category of

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<sup>464</sup> *Id.*

<sup>465</sup> Walsh & Nau, *supra* note 422.

<sup>466</sup> Valdez & Kaplan, *supra* note 378, at 113–16

<sup>467</sup> *Id.* at 116.

<sup>468</sup> *Id.*

<sup>469</sup> *Id.* at 176.

<sup>470</sup> Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?*, 42 CRIME AND JUST. 75, 80–81 (2013).

<sup>471</sup> Tracy L. Johns, *Managing a Policy Experiment: Adopting and Implementing Recreational Marijuana Policies in Colorado*, 47 ST. AND LOC. GOV'T. REV., 193, 194 (2015).

<sup>472</sup> *Id.*; Reuter, *supra* note 470, at 81.

drugs, with heroin and ecstasy.<sup>473</sup> Marijuana is more regulated than Schedule II substances, which include methamphetamine and various prescription opioid medications.<sup>474</sup> The nature of the laws surrounding marijuana combined with the policing efforts allowed through the War on Drugs posed a significant barrier to the advancement of minority groups toward equal rights and treatment.

In the 1960s and 1970s, the use of marijuana increased, specifically among white middle-class youth, who still account for a significant portion of marijuana users.<sup>475</sup> Despite the substantial amount of marijuana consumed by the white population, from the 1960s forward, “in 1990, the [B]lack arrest rates for marijuana possession were about twice those for whites,” and by 2010, Black individuals were 3.5 times more likely to be arrested for marijuana possession than white individuals, although the rate of use of marijuana among the two groups is compatible.<sup>476</sup>

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<sup>473</sup> Reuter, *supra* note 470, at 81 & n.6; *Drug Scheduling*, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION (last visited Nov. 14, 2021), <https://www.dea.gov/drug-information/drug-scheduling>.

<sup>474</sup> *Drug Scheduling*, *supra* note 473.

<sup>475</sup> Campos, *supra* note 380, at 8; see Tanya Golash-Boza, *Structural Racism, Criminalization, and Pathways to Deportation for Dominican and Jamaican Men in the United States*, 44 SOC. JUST., nos. 2/3, 2017, at 137 (2017); see also SUBSTANCE USE AND MENTAL HEALTH SERVS. ADMIN., U.S DEP’T. OF HEALTH & HUMAN SERVS., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2020 National Survey on Drug Use and Health*, at 2 (2021) [hereinafter SAMHSA Report], <https://www.samhsa.gov/data/sites/default/files/reports/rpt35325/NSDUHFFPDFWHTMLFiles2020/2020NSDUHFFR1PDFW102121.pdf> (reporting estimations based on survey data that (i) about 35 percent of young adults (ages 18-25) and about 10 percent of youth (ages 12-17) used marijuana in the past year and (ii) 1.1 million young adults and 1 million youth used marijuana for the first time in the past year). For data indicating that specifically white, middle-class youth and young adults comprised a significant portion of marijuana users in 2020, see CTR. FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, SUBSTANCE USE AND MENTAL HEALTH SERVS. ADMIN., *Results from the 2020 National Survey on Drug Use and Health: Detailed Tables*, app. B at tbls. 1.27B, 1.69B (Oct. 25, 2021) [hereinafter NSDUH Survey], <https://www.samhsa.gov/data/sites/default/files/reports/rpt35323/NSDUHDetailedTabs2020/NSDUHDetailedTabs2020/NSDUHDetTabsAppB2020.htm> (follow hyperlink “B” on lines 1.27 and 1.69). The tables present the survey data by age and then sorted by various factors such as race and socioeconomic characteristics, which include poverty level and health insurance. It is estimated that of youth who used marijuana in the past year, 11.1 percent were white, 10.1 percent had household incomes of at least twice their applicable poverty threshold, and 10.4 percent had health insurance. *Id.* For young adults who used marijuana in the past year, it is estimated that 39.4 percent were white, 33.3 percent had household incomes of at least twice their applicable poverty threshold, and 36.1 percent had health insurance. *Id.*

<sup>476</sup> Reuter, *supra* note 470; CTR. FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, SUBSTANCE USE AND MENTAL HEALTH SERVS. ADMIN., *Results from the 2020 National Survey on Drug Use and Health: Detailed Tables*, app. B at tbls. 1.27B, 1.69B (Oct. 25, 2021) [hereinafter NSDUH Survey], 473, at 91; see also Harry G. Levine & Deborah Peterson Small, *Marijuana Arrest Crusade Racial Bias and Police Policy in New York City 1997 – 2007*, NEW YORK CIVIL LIBERTIES UNION,

Similar to the G.I. Bill and welfare benefits, marijuana legislation was race-neutral; however, the application, administration, and enforcement of these anti-marijuana policies are disproportionately imposed on Black people.<sup>477</sup> While many cite the difference between crack cocaine and cocaine policies to demonstrate the disparity between white people and Black people in the crisis of mass incarceration, it is essential to note that “by 2010, the heroin and crack cocaine arrests had fallen to 371,000” while 853,000 arrests were made for marijuana-related crimes.<sup>478</sup> One of the possible reasons for the spike in marijuana arrests since the 1980s could be the stop and frisk policies employed by cities like New York.<sup>479</sup> Black men and even women are often more likely subjected to these policies.<sup>480</sup> The disproportionality in the application of drug crimes has led to the increased prison population and the severe disparity between the population proportions of minority individuals in prison compared to white individuals.<sup>481</sup>

Even if mass incarceration, in and of itself, did not disadvantage minority communities enough, it is crucial to recognize the “collateral consequences” of felony and sometimes even misdemeanor convictions.<sup>482</sup> Collateral consequences are various “civil legal constraints,” as well as social constraints, placed on an individual who is identified as a convicted felon; often, these collateral consequences are not endured until after one has completed their formal prison

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4–6 (2008) <https://www.nyclu.org/sites/default/files/publications/> (“U.S. Government surveys of high school seniors have consistently found that Whites use marijuana at higher rates than do Hispanics and Blacks. U.S. Government surveys of young adults 18 to 25 have also consistently found that young Whites use marijuana at higher rates than do young Hispanics and Blacks.”).

<sup>477</sup> IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 117 (2006).

<sup>478</sup> Reuter, *supra* note 470, at 88–89.

<sup>479</sup> *Id.* at 90–91; *see also* Levine & Peterson Small, *supra* note 476, at 4–6 (attributing the drastic increase in marijuana arrests in the late 1990s in part to New York City’s “aggressive” stop and frisk policy). *But cf.* Levine & Peterson Small, *supra* note 476, at 5 (declining to correlate the 1990–2000 arrest trends in New York City with the national trends by highlighting the stark differences between the rate of increase—10 times and 2.5 times, respectively, and noting that the increased arrest rate for marijuana possession was not due to increased marijuana use).

<sup>480</sup> *See* Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 703 (2010). In discussing the criminalization of the urban space, which is illustrated through policies like “stop and frisk” in New York City, Thompson notes, “In the 1980s . . . African Americans’ ‘share’ of drug crimes jumped from 26.9 percent to 46.0 percent, and arrested black juveniles were 37 percent more likely to be transferred to adult courts, where they faced tougher sanctions. If convicted, African Americans of every age were more likely than whites to be committed to prison instead of jail, and they were more likely to receive longer sentences.” *Id.* at 709 (quotations omitted). *See also id.* at 712 (“In 2006 alone the New York Police Department ‘stopped and frisked’ over half a million men and women.”).

<sup>481</sup> Ahrens, *supra* note 395, at 391–92, 424.

<sup>482</sup> *Id.* at 416, 422.

term.<sup>483</sup> These collateral consequences can manifest in the form of “professional, social, and personal barriers” to reintegration into the civilian community after release.<sup>484</sup> Prison can have long-lasting physical and psychological effects on an individual; the first few months of an individual’s release from prison can be critical to successful reentry into society.<sup>485</sup> Suppose an individual finds they do not have adequate resources or access to resources needed to survive and integrate back into their community. In that case, they are likely to return to the practices that resulted in their criminal conviction in the first place. These collateral consequences pose a severe threat to former prisoners’ attempts to improve themselves and their lives after prison.<sup>486</sup> One of the most crucial barriers to this critical reintegration into society is that convicted felons must disclose their criminal convictions when applying for jobs.<sup>487</sup> Employers are allowed to discriminate against convicted felons in the job application process, preventing former prisoners from obtaining the stability and financial opportunities provided by a job.<sup>488</sup>

Additionally, professional licensing organizations typically do not allow individuals with a criminal record to participate in such organizations, severely limiting employment options for convicted felons.<sup>489</sup> Other collateral consequences affect family and living situations. These include individuals with felony records being denied custody of their children, criminal records preventing parents from chaperoning on field trips, and limited housing options for these individuals, as convicted criminals cannot reside in federally funded housing.<sup>490</sup>

Another significant collateral consequence that disproportionately impacts racial and ethnic minority groups is deportation.<sup>491</sup> Black immigrants and Latino immigrants are the primary groups affected by the United States’ criminal deportation policy.<sup>492</sup> Since Latino immigrants and Black immigrants tend to reside in the same communities as Black and Latino citizens, over-policing of drugs,

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<sup>483</sup> *Id.* at 416–19 (describing how criminal convictions “can restrict a person more than the direct criminal law sentence” by preventing them “from fully engaging with their communities” through both formal and informal means).

<sup>484</sup> *Id.* at 417–18.

<sup>485</sup> *Id.* at 419.

<sup>486</sup> *Id.* at 417–19 (listing ways that a felony conviction can impact a person after they reenter their community).

<sup>487</sup> *Id.* at 418.

<sup>488</sup> *See id.* (“Employers often ask for criminal history and refuse to hire on the basis of prior convictions” which can have “serious effects . . . on the ability of persons to obtain employment.”).

<sup>489</sup> *Id.* at 419.

<sup>490</sup> *Id.* at 418.

<sup>491</sup> *Id.* at 417.

<sup>492</sup> *See* Golash-Boza, *supra* note 475, at 149 (“Data from the Office of Immigration Statistics reveal that 98 percent of all deportees are from Latin America or the Caribbean, and 90 percent are men. These punitive laws almost exclusively affect Black and Latino men . . .”).

specifically marijuana, affects the ability of these immigrants to incorporate themselves into American society.<sup>493</sup> While marijuana criminalization may have been “couched in anti-immigrant sentiment under the guise of public safety and protection of the youth,” over 80 years ago in 1937, the association of marijuana with immigrants, primarily immigrants from Mexico, Jamaica, and the Dominican Republic, demonstrate that these prejudices persist.<sup>494</sup> This association of marijuana prohibition with immigrants is akin to the association of opioid consumption with immigrants in the early 20th century.<sup>495</sup> Public and political figures described immigrants as violent and lazy when consuming the drug.<sup>496</sup> These stereotypical assignments directly impacted the narrative about immigration to the United States. For example, one of Donald Trump’s characterizations about immigrants is that immigrants contribute to United States crime rates and the importation and use of drugs, such as marijuana, to the United States.<sup>497</sup> Even if Mexicans don’t casually use marijuana, it is assumed that they do, contributing to the narrative of the modern moral entrepreneurs of that time, a description still used by moral entrepreneurs like Jeff Sessions, Trump’s first United States Attorney.<sup>498</sup>

The continued stigmatization of marijuana and its association with immigrants, almost solely from racial and ethnic minority groups, has thwarted efforts to welcome immigrants.<sup>499</sup> It also contributes to the deportation of immigrants for criminal convictions.<sup>500</sup> “Deportation is a consequence of violating immigration laws.”<sup>501</sup> “Working-class Black male deportees,” specifically Jamaican and Dominican immigrants, “are often funneled first through the criminal justice system rather than the immigration law enforcement apparatus.”<sup>502</sup> Dominican and Jamaican male immigrants are especially vulnerable because they are arrested at a disproportionate rate.<sup>503</sup> Eighty-three percent of Jamaican and 78 percent of Dominican deportees were deported following a criminal conviction in 2005.<sup>504</sup> These factors are present even when the public focus is not on Hispanic immigrants.<sup>505</sup> Moreover, Jamaican and Dominican immigrants experience similar

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<sup>493</sup> *Id.* at 137–38, 141, 153.

<sup>494</sup> WHITE, *supra* note 86, at 76.

<sup>495</sup> *Id.* at 388–89.

<sup>496</sup> Ahrens, *supra* note 395, at 389.

<sup>497</sup> DONALD F. KETTL, TRUMP’S WALL: THE BATTLE ON IMMIGRATION (2017).

<sup>498</sup> *See supra* Section V(A).

<sup>499</sup> *See, e.g.*, Golash-Boza, *supra* note 475, at 153 (detailing research findings that the association between Jamaicans and marijuana made Jamaican immigrants subject to arrest and feel that they were being targeted and harassed by police due to their national origin).

<sup>500</sup> *Id.* at 139; Ahrens, *supra* note 395, at 417 & n.185.

<sup>501</sup> Golash-Boza, *supra* note 475, at 139.

<sup>502</sup> *Id.*

<sup>503</sup> *Id.* at 142–43.

<sup>504</sup> *Id.* at 142.

<sup>505</sup> *Id.* at 143.

prejudices that Black Americans face, along with the struggles they face as immigrants; these intersectional issues result in added negative collateral consequences.<sup>506</sup>

One of the most significant collateral consequences of criminal convictions concerns the social stigma surrounding these individuals and the offenses they committed.<sup>507</sup> Criminals are often alienated from society, not just while serving their prison sentences.<sup>508</sup> Still, they are viewed and treated as the “other,” even after paying their debt to society by doing prison time for their crimes.<sup>509</sup> The War on Drugs acted as “both a popular metaphor and a mechanism for directly regulating” minority and immigrant communities by associating drugs, and thus, crime as a whole, with those communities, greatly influencing public opinion about crime and criminal perpetrators.<sup>510</sup>

While public opinion has shifted drastically over the last several decades from many Americans viewing substance use as immoral in 1937 to over 60 percent of Americans supporting marijuana legalization in 2017, the federal government has continued to advocate against marijuana decriminalization.<sup>511</sup> Between 2001 and 2008, the Office of National Drug Control Policy argued that marijuana is a dangerous drug through official publications.<sup>512</sup> In the early years of advocacy for marijuana criminalization, Harry Anslinger claimed that marijuana caused crime and insanity, but as the counter-culture of the 1960s grew (and marijuana was commonly consumed by white people), this narrative was challenging to support scientifically.<sup>513</sup> While there is scant evidence supporting the claims of dangerousness, many individuals, especially older white people, insist that marijuana is a dangerous drug only consumed by the lowest dregs of society.<sup>514</sup> These criticisms did not stop the drug from transitioning to a soft recreational drug as middle-class white communities began widespread use of marijuana.<sup>515</sup> The growing use of marijuana by white people has shifted public opinion resulting in

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<sup>506</sup> See *supra* Section V(B).

<sup>507</sup> Ahrens, *supra* note 395, at 419.

<sup>508</sup> *Id.*

<sup>509</sup> *Id.* at 419–20.

<sup>510</sup> *Id.* at 388, 390 (“As part of a political strategy to mobilize ‘the silent majority’ against other segments of society, President Richard Nixon actively sought to tie drug use . . . to [immigrant and minority] communities . . . .”); see also Vuolo, *supra* note 373, at 24 (moral entrepreneur Harry Anslinger’s “rhetoric was an effective component of the drive to criminalize marijuana, and it had lasting effects on public opinion, legislation, and the role of drug laws in mass incarceration.”).

<sup>511</sup> Vuolo, *supra* note 375, at 22.

<sup>512</sup> Reuter, *supra* note 470, at 77, 84.

<sup>513</sup> Vuolo, *supra* note 375, at 21; Campos, *supra* note 380, at 7–8.

<sup>514</sup> See Campos, *supra* note 380, at 8–9 (describing a series of essays questioning the older generation’s views of marijuana).

<sup>515</sup> *Id.* at 8.



“skyrocketing support for legalization.”<sup>516</sup> The increased public support for marijuana has grown throughout the United States, reflecting the broad popular support for decriminalizing the drug.<sup>517</sup>

Not only has public support for marijuana legalization significantly increased in the past 30 years, but many states have either decriminalized or even legalized the drug for medical use only or both medical and recreational use. As of 2015, “23 states and Washington D.C.” have adopted such policies, and, by 2020, even more states did so.<sup>518</sup> However, it is essential to note that the legalization and decriminalization of recreational marijuana often follow the legal allowance of medical marijuana.<sup>519</sup> The potential uses of medical marijuana have been a significant driver for decriminalization.<sup>520</sup> Fifteen years after states began allowing the use of medical marijuana, states have finally started decriminalizing and legalizing the drug for recreational use.<sup>521</sup> Medical cannabis can be expensive; thus, medical marijuana has been used mainly by white people.<sup>522</sup> This factor may help explain the growth in favorable public opinion about all drug uses, separating the drug’s benefits from the historical association with minority groups.<sup>523</sup> As marijuana continues to be decriminalized by states, it is important to recognize that

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<sup>516</sup> Linneman, *supra* note 396, at 71; Campos, *supra* note 380, at 8.

<sup>517</sup> Ahrens, *supra* note 395, at 401. One of the reasons for adopting these pro-marijuana policies is the growth in public support for legalization; nearly all of the survey responses from cities legalizing or permitting the use of marijuana reflect the motivating factor for the change.

<sup>518</sup> Johns, *supra* note 471, at 194 (noting that as of 2015 “twenty-three states and Washington, DC, allow comprehensive marijuana programs for qualifying medical conditions . . . voters in Alaska, Colorado, Oregon, and Washington state have passed initiatives legalizing the sale and distribution of marijuana for adults aged twenty-one and older; and more than a dozen states have decriminalized possession laws”) (quotations omitted); see Ahrens, *supra* note 395, at 396 n.82 (“ . . . Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington, and the District of Columbia have all legalized recreational marijuana use, and those states in addition permit the medical use of marijuana. An additional twenty-three states have legalized medical marijuana but not recreational marijuana: Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, and West Virginia.”).

<sup>519</sup> Ahrens, *supra* note 395, at 395, 397; Johns, *supra* note 471, at 199.

<sup>520</sup> See Johns, *supra* note 471, at 197.

<sup>521</sup> Ahrens, *supra* note 395, at 393.

<sup>522</sup> *Id.*

<sup>523</sup> *Id.* at 398.

different policies, typically unique to each jurisdiction, can have disproportionate effects on those who choose to use the drug.<sup>524</sup>

Marijuana decriminalization, or even legalization, does not dissolve all marijuana-related arrests. Even in states that have legalized marijuana, minority communities are still facing obstacles and discrimination because of marijuana convictions.<sup>525</sup> First, the barriers to entry in the legal marijuana market are difficult to overcome.<sup>526</sup> The cultivators and sellers of legal marijuana face strict regulator mandates, which impact the capacity of minority groups to participate in a costly business model.<sup>527</sup> Due to these factors, the cannabis industry is composed of a majority white population.<sup>528</sup> Hence, the groups historically disadvantaged by marijuana criminalization are left out of the economic benefits of the drug's legalization.<sup>529</sup> Even in states with legal marijuana, arrests of sellers and users track historical racial and ethnic patterns of disproportionality.<sup>530</sup> This continued disenfranchisement of racial and ethnic minorities through marijuana policies demonstrates the role that public opinion has played in the history, and progression, of marijuana laws.

Researchers have consistently found that two of the most significant reasons for support of marijuana decriminalization center around the potential benefits of medical marijuana and the economic potential for state and federal tax revenue the drug has.<sup>531</sup> It is essential to recognize that the public opinion in support of marijuana legalization is not usually framing the issue from the standpoint of social justice and improving the status of minority groups, and solving the mass incarceration problem. However, it is an active consideration of many marijuana advocates.<sup>532</sup> A chief concern is that the failure to implement aggressive programs

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<sup>524</sup> *Id.* at 392–93, 392 n.64; see also Wendy Chapkis, *Terms of Surrender*, CONTEXTS, Fall 2015, at 18 (describing the differences between legalizations policies in Washington and Colorado to demonstrate how despite the fact that both states have legalized marijuana, the differences in policies between the two states have created very different outcomes in their respective approaches).

<sup>525</sup> Ahrens, *supra* note 395, at 415–16.

<sup>526</sup> *Id.* at 404, 419.

<sup>527</sup> *Id.* at 403–04.

<sup>528</sup> *Id.* at 403.

<sup>529</sup> *Id.* at 404.

<sup>530</sup> *Id.* at 392. Additionally, states that currently allow marijuana consumption, for example, Colorado, have tried to create incentives for minority communities to become involved in the legal cannabis industry; however, there are restrictions on those with felony convictions to benefit from these programs. Economic barriers also remain in place. These barriers and conditions still favor whites. See *id.* at 404, 406.

<sup>531</sup> See, e.g., Johns, *supra* note 471, at 197.

<sup>532</sup> See, e.g., *id.* (providing an example from Colorado where “proponents of [the referendum] legalizing recreational marijuana . . . were very organized—they rallied around a common theme . . . and cited the ‘war on drugs’ as misplaced government action”); Ahrens, *supra* note 395, at 414. The

to end confinement for the drug war victims will create significant risk—especially where the general public does not seem nearly as concerned with this consequence of marijuana policy.<sup>533</sup> However, a current marijuana bill that the United States House of Representatives passed does include expungement of all previous marijuana possession convictions for individuals who have violated marijuana laws.<sup>534</sup> This bill is a necessity for federal marijuana legislation if minority communities are going to have the potential to benefit from marijuana legalization.<sup>535</sup> It is essential to note that public opinion in favor of marijuana legalization has continued to improve after states have legalized the drug and witnessed positive results.<sup>536</sup> The drug continues to be popular and beneficial for white users.<sup>537</sup>

Since the criminalization of marijuana in 1937, public opinion on marijuana has shifted over time.<sup>538</sup> When marijuana first became restricted, enforcement targeted the importation and sale of the drug, not its use.<sup>539</sup> Marijuana increasingly became associated with racial and ethnic minorities, thus shrouding marijuana in racism and nativism.<sup>540</sup> Subsequent laws reflected the negative and stereotypical prejudices targeting immigrants and minorities by the dominant cultural groups.<sup>541</sup> This linkage of marijuana with disfavored social groups inspired sanctions targeting these communities.<sup>542</sup> Influenced by the moral and racial panic surrounding marijuana, public opinion on marijuana changed.<sup>543</sup> Individuals became afraid of the drug itself and those perceived to use it the most, racial and ethnic minority groups.<sup>544</sup> In the 1970s, the drug became associated with the counter-culture movement while simultaneously maintaining its association with minority

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risk is “that legalization of marijuana will mean that a few White men . . . will make a lot of money on cannabis cultivation and sales, while many Black men . . . will remain behind bars or carry felony drug convictions forward.” Chapkis, *supra* note 524, at 18.

<sup>533</sup> See Johns, *supra* note 471, at 197 (citing a 2015 Pew Research Center report observing that among survey participants who supported legalization of marijuana, the primary reasons for their support were medicinal benefits, a belief that marijuana is more comparable to alcohol and cigarettes than other substances, and economic benefits).

<sup>534</sup> Walsh, *supra* note 373.

<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

<sup>537</sup> *Id.*

<sup>538</sup> Vuolo, *supra* note 373, at 22.

<sup>539</sup> Ahrens, *supra* note 395, at 388.

<sup>540</sup> *Id.* at 388.

<sup>541</sup> *Id.* at 388–91.

<sup>542</sup> See, e.g., *id.* at 390 (“In the 1970s, marijuana became linked with black communities as well as youthful cultural dissenters, leading to a new stream of condemnation and new efforts to crack down on its use.”).

<sup>543</sup> Reuter, *supra* note 470, at 87–88, 90.

<sup>544</sup> *Id.*

groups.<sup>545</sup> This shift left public opinion unchanged; however, as white use of marijuana became more prevalent and normalized, the public became much more accepting of marijuana, which has remained consistent to the present day.<sup>546</sup> Even as marijuana use has become more widely accepted by the American people and even legalized or decriminalized in much of the United States, minorities have continued to be disadvantaged by the policies surrounding marijuana.<sup>547</sup> While public opinion may not have led to the criminalization of marijuana, it significantly affected the drug's decriminalization. The acceptance of marijuana in mainstream American culture will be necessary for the continued development of marijuana policy. Still, the public mustn't continue to leave minority groups behind in these efforts.

## VI. CONCLUSION

The French Annale School challenges historians to engage in *longue durée* study of history; in other words, to understand the contemporary context of a condition in society, we must examine long-term historical structures that create our current environments.<sup>548</sup> With this approach, the historian recreates the past world, not just a sequence of events, to extrapolate a range of permanent data that explains the scale of choices and opportunities offered to people.<sup>549</sup> This approach helps to explain how the historical pattern of criminalizing minority communities for drugs used as frequently or more often in white society leads to social and justice inequalities for citizens and communities of color.<sup>550</sup> Scholars who examine the racial motivations for criminalizing certain drugs or how minority communities consume those drugs tend to evaluate these movements as events isolated to that historical period. We must widen our lens to discern why the pattern recreates itself over the long course of American history. Failure to do this means that we do not view these activities as symptomatic of societal and governmental structures that have existed for more than a century. Historical context helps to explain that the current criminalization of cocaine versus crack versus methamphetamine is a long-term project of a hegemonic state to engage in paternalism, stereotyping, or propaganda to advance social, political, or personal interests. If these factors are studied and explained, society can better understand these motivations and push back.

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<sup>545</sup> See *supra* note 544.

<sup>546</sup> WHITE, *supra* note 86, at 73.

<sup>547</sup> See *supra* notes 484–512, 527–32, and accompanying text.

<sup>548</sup> See generally Jean Heffer, *Is the Longue Durée Un-American?*, 24 REV. (FERNAND BRAUDEL CTR.) 125 (2001) (defining *longue durée* study of history and using it as a lens to study U.S. history).

<sup>549</sup> *Id.* at 126–27.

<sup>550</sup> Schneider & Schneider, *supra* note 7, at 352.

In her article “Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History,” Heather Thompson posits that America must reckon with a history that leads to the over-incarceration of minority communities.<sup>551</sup> In support, she raises an unsettling statistic that America incarcerated more people between 1990 and 1999 than were killed in the Vietnam War.<sup>552</sup> Thompson explains that the overcriminalization of urban spaces occurs even in the face of data that shows that these spaces are not where drug crimes occur.<sup>553</sup> We have to be vigilant when actors engineer a perception of public danger in disadvantaged communities or communities of color that vastly misstates real risk to create a politically resonant “moral panic.” Overwhelming data and scholarship from the nineteenth, twentieth, and twenty-first centuries show that Chinese, Mexican, and African Americans were unfortunate proxies in a drug war that had very little to do with addiction, violence, rape, prostitution, or urban decay. Yet, the impact of sustained criminalization campaigns wreaks havoc on these targeted communities’ social and economic well-being.

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<sup>551</sup> Thompson, *supra* note 480, at 703.

<sup>552</sup> *Id.*

<sup>553</sup> *Id.* at 707–08