

**Report of the Legal Frameworks Group
to the King County Bar Association Board of Trustees:**

**Drugs and the Drug Laws:
Historical and Cultural Contexts**

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Introduction

This report is the product the Legal Frameworks Group of the King County Bar Association Drug Policy Project, which included the participation of more than two dozen attorneys and other professionals, as well as scholars, public health experts, state and local legislative staff, current and former law enforcement representatives and current and former elected officials. The Legal Frameworks Group was established as an outgrowth of the work of the Task Force on the Use of Criminal Sanctions, which published its own report in 2001 examining the effectiveness and appropriateness of the use of criminal sanctions related to psychoactive drug use.

The Criminal Sanctions Task Force report found that the continued arrest, prosecution and incarceration of persons violating the drug laws has failed to reduce the chronic societal problem of drug abuse and its attendant public and economic costs. Further, the Task Force found that toughening drug-related penalties has not resulted in enhanced public safety nor has it deterred drug-related crime nor reduced recidivism by removing drug offenders from the community. The Task Force also chronicled the numerous “collateral” effects of current drug policy, including the erosion of public health, compromises in civil rights, clogging of the courts, disproportionately adverse effects of drug law enforcement on poor and minority communities, corruption of public officials and loss of respect for the law. Based on those findings, the Task Force concluded that the use of criminal sanctions is an ineffective means to discourage drug use or to address the problems arising from drug abuse, and it is extremely costly in both financial and human terms, unduly burdening the taxpayer and causing more harm to people than the use of drugs themselves.

The Legal Frameworks Group, building on the work of the Criminal Sanctions Task Force, moved beyond the mere criticism of the current drug control regime and set out to lay the foundation for the development of a new, state-level regulatory system to control psychoactive substances that are currently produced and distributed exclusively in illegal markets. The purposes of such a system would be to render the illegal markets in psychoactive substances unprofitable, to improve restrictions on access by young persons to psychoactive substances and to expand dramatically the opportunities for substance abuse treatment in the community. Those purposes conform to the primary objectives of drug policy reform identified by the King County Bar Association in 2001: to reduce crime and public disorder; to enhance public health; to protect children better; and to use scarce public resources more wisely.

This report is the first of five major research initiatives supporting a resolution by the King County Bar Association seeking legislative authorization for a state-sponsored study of the feasibility of establishing a regulatory system for psychoactive substances. This report surveys the history of drug use and drug control efforts, especially in the United States, and also reflects on the cultural context of drugs and drug use in America, with the intent of informing the development of a politically tenable drug control model.

DRUGS AND THE DRUG LAWS: HISTORICAL AND CULTURAL CONTEXTS

Americans are expected to be “drug-free” in a society in which both legal and illegal drugs are used to remarkable excess. While hundreds of thousands of American citizens are routinely arrested and incarcerated each year for possessing and using certain prohibited, psychoactive substances, the American commercial marketplace is flooded with attractive media images aggressively promoting other mind-altering or pleasure-inducing substances to treat various new “disorders” and “syndromes” and to satisfy the American appetite for instant gratification.

Any critical examination of current drug policies, as well as any recommendations for meaningful reform, must reflect an understanding of this paradox of drug use in America, a nation that purportedly eschews drugs yet consumes them with abandon. Crafting more effective policies to address the chronic problem of substance abuse requires an exploration of the historical and cultural contexts of the use of psychoactive substances in human societies and a review of the modern attempts to control such use, particularly in the United States.

A NATURAL PROPENSITY

Archaeological evidence from across the world has revealed a human inclination to seek altered states of consciousness through the use of psychoactive substances.¹ Stone Age peoples are thought to have consumed hallucinogenic mushrooms more than 12,000 years ago.² Sumerian tablets refer to the opium poppy through a word that means “to enjoy.”³ The earliest historical evidence of the domestication and eating of poppy seeds come from the lake dwellers of Switzerland 4,500 years ago.⁴ In the ensuing Bronze Age, opium was used widely as a balm for the pains of childbirth and of disease and an opium trade traversed Europe and the Middle East to Asia.⁵ The cultivation of cannabis, or hemp, began in China and also in Neolithic Europe almost 4,500 years ago.⁶ Indian lore from before that time recognized the intoxicating properties of cannabis, which, in the Brahman tradition, believed that it “grew at the spot where drops of divine ambrosia fell from heaven . . . [making] the mind agile while granting long life and

¹ Aldous Huxley wrote: “All the vegetables sedatives and narcotics, all the euphorics that grow on trees, the hallucinogens that ripen in berries or can be squeezed from roots – all, without exception, have been known and systematically used by human beings from time immemorial.” As quoted in Daniel Kunitz (2001), “On Drugs: Gateways to Gnosis, or Bags of Glue?” *Harper’s Magazine*, October 2001, p. 92.

² Terence McKenna (1992), *Food of the Gods: The Search for the Original Tree of Knowledge*, New York: Bantam, p. 47.

³ Alfred Lindesmith (1947), *Addiction and Opiates*, Chicago: Aldine, p. 207.

⁴ Richard Rudgley (1993), *Essential Substances: A Cultural History of Intoxicants in Society*, New York: Kodansha, pp. 24-26; Ashley Montagu (1966), “The Long Search for Euphoria,” *Reflections*, v.1, pp. 62-69.

⁵ Norman Imlah (1970), *Drugs in Modern Society*, London: Geoffrey Chapman, p. 5; Alfred Lindesmith (1965), *The Addict and the Law*, New York: Vintage, p. 194. The earliest undisputed reference to the use of poppy juice was recorded by Theophrastus (371-287 B.C.), a Greek naturalist and philosopher, around 300 B.C. See Thomas Szasz (1974), *Ceremonial Chemistry*, New York: Doubleday/Anchor, p. 184.

⁶ Richard Rudgley (1993), *op. cit.*, p. 29.

sexual prowess.”⁷ The use of coca and other stimulants in South America can also be traced back to primordial times.⁸

Our human ancestors consumed psychoactive substances not only to seek altered mental states, but also for survival, suggesting an evolutionary purpose for drug-taking. Having to endure harsh environmental conditions, hunter-gatherers sought out plants rich in alkaloids, including opium and coca, as important sources of nutrition and energy.⁹ Lower animals are also known to be attracted to fermented fruits and a host of roots and berries for their intoxicating effects, suggesting that the urge to alter consciousness extends even deeper into our evolutionary past.¹⁰ This evidence supports the proposition that intoxication is a universal human need, or what has been called the “fourth drive.”¹¹

PROHIBITIONS OF THE PAST

Mind-altering substances used throughout the ages for various religious and medicinal purposes were generally controlled carefully through rituals that often acknowledged the substances as sacred.¹² However, personal and social problems associated with psychoactive substances have also been recognized since ancient times.¹³ In the modern age in particular, beginning with colonization in the 16th century and the Great Enlightenment, Europeans took those substances sacred to the indigenous peoples in the colonies and brought them home for recreational use, which spurred efforts to proscribe them. For substances in common use today, including coffee, chocolate and tobacco, there were strict prohibitions often enforced by harsh punishment.

⁷ Antonio Escohotado (1996), *A Brief History of Drugs: From the Stone Age to the Stoned Age*, Rochester, VT: Park Street Press, p. 9

⁸ Richard Davenport-Hines (2002), *The Pursuit of Oblivion: A Global History of Narcotics*, New York: W.W. Norton, p. 26.

⁹ Abbie Thomas (2002), “Survival of the Druggies,” *New Scientist*, 30 March 2002, p.11

¹⁰ Almost all psychoactive plants were “discovered by animals, whose familiarity with the plant world protected them against poisoning and also allowed for altered “perception,” among which the koala bear’s use of eucalyptus is most celebrated. See Ronald K. Seigel (1989), *Intoxication: Life in Pursuit of Artificial Paradise*, New York: E.P. Dutton., pp. 19-146; Carol Kaesuk Yoon (2004), “Of Drunken Elephants, Topsy Fish and Scotch With a Twist,” *The New York Times*, March 23, 2004, p. D5.

¹¹ Ronald K. Seigel (1989), *op. cit.*, p. 10; See also Andrew Weil (1972), *The Natural Mind: A New Way of Looking at Drugs and the Higher Consciousness*, Boston: Houghton Mifflin; and most recently Helen Phillips and Graham Lawton (2004), “The Intoxication Instinct,” and the entire issue of *New Scientist*, v.184, n. 2473, 13 November, 2004.

¹² See, e.g., R. Gordon Wasson (1980), *The Wondrous Mushroom: Mycolatry in Mesoamerica*, New York: McGraw- Hill; R. Gordon Wasson, A. Hoffmann and Carl A. P. Ruck (1978), *The Road to Eleusis*, New York: Harcourt Brace; P. T. Furst, ed. (1976), *Flesh of the Gods: The Ritual Use of Hallucinogens*, New York: Praeger.

¹³ Robin Room (2003), “Addiction Concepts and International Control,” *Global Drug Policy: Building a New Framework, Contributions to the Lisbon International Symposium on Global Drug Policy*, October 2003, p. 16, citing references to negative outcomes associated to alcohol use that appear in the Jewish Bible and in classic Chinese poetry; Rev. Wilbur F. Crafts *et al.* (1909), *Intoxicating Drinks and Drugs in All Lands and Times*, cites the earliest prohibitionist teaching, by an Egyptian priest, who writes to his pupil: “I, thy superior, forbid thee to go to the taverns. Thou art degraded like beasts.” at p. 5. See <http://www.kingkong.demon.co.uk/ngcoba/cr.htm>.

Tobacco smokers returning from the Americas to Spain in the 16th century were subject to the tortures of the Great Inquisition.¹⁴ In 17th century England, King James I despised tobacco use by his subjects because he disliked seeing them emulate the “savage” Indians in America, while in Russia, Czar Michael Federovitch executed anyone on whom tobacco was found.¹⁵ Tobacco use was prohibited in the 17th century in Bavaria, Saxony, Zurich, Transylvania, Sweden and numerous other areas of Europe, and many Eastern Mediterranean rulers at that time imposed the death penalty on anyone smoking tobacco,¹⁶ and also on anyone owning or visiting a coffee house.¹⁷ Despite these prohibitions and the extreme sanctions imposed, both tobacco and coffee consumption continued and increased and were eventually normalized in European and Near Eastern societies.¹⁸

The motivating impulses behind drug prohibitions have often been unrelated to concerns over the effects of the drugs themselves. For example, the coffee prohibition in the Middle East had less to do with concern about health risks of caffeine than with the official view of the coffee house as a lurid meeting place for political and religious dissidents.¹⁹ The Spanish Conquistadors in the New World consumed and marketed coca liberally and used it to increase the productivity of their enslaved indigenous workers but, on the other hand, the chewing of the sacred coca leaves by those native peoples in their religious practice was strictly forbidden by the Catholic Church, which condemned such “idolatry” and considered it a hindrance to the conversion to Christianity.²⁰ In China, the 18th century opium ban, which punished keepers of opium shops with strangulation, also served purposes unrelated to the drug – discouraging Chinese citizens from co-mingling with “barbaric” Europeans, who were the drug’s primary merchants, and also attempting to protect the Chinese economy by stemming the outflow of silver sent overseas in exchange for opium.²¹

As prohibitionist sentiments have historically been in response to the clash of social and cultural traditions, the use of particular drugs has been associated with

¹⁴ The first Inquisition processes for tobacco habits charged that “only Satan can confer upon human beings the power to exhale smoke through the mouth.” Antonio Escobedo (1996), *op. cit.*, p. 56.

¹⁵ Griffith Edwards (1972), “Psychoactive Substances,” *The Listener*, March 23, 1972, p. 361.

¹⁶ Around the year 1650 Sultan Murad IV of the Ottoman Empire decreed the death penalty for smoking tobacco: “Wherever there Sultan went on his travels or on a military expedition his halting-places were always distinguished by a terrible rise in executions. Even on the battlefield he was fond of surprising men in the act of smoking, when he would punish them by beheading, hanging, quartering or crushing their hands and feet . . . Nevertheless, in spite of all the horrors and persecution . . . the passion for smoking still persisted.” Edward M. Brecher and the editors of Consumer Reports (1972), *Licit and Illicit Drugs. The Consumers Union Report on Narcotics, Stimulants Depressants, Inhalants, Hallucinogens, and Marijuana -- including Caffeine, Nicotine, and Alcohol*, Boston; Little, Brown and Co., p. 212.

¹⁷ Richard H. Blum *et al.* (1969), *Society and Drugs*, San Francisco: Jossey-Bass, p. 12.

¹⁸ Coffee use in particular was eventually authorized by Arab sultans, who were coffee addicts themselves and encouraged its use to prevent fatigue during long readings of sacred scriptures. Antonio Escobedo (1996), *op. cit.*, p. 32. Tobacco was eventually regulated and taxed in Europe by the end of the 17th century. *Id.* at 57.

¹⁹ Richard H. Blum *et al.* (1969), *op. cit.*, p. 11.

²⁰ Richard Davenport-Hines (2002), *op. cit.*, p. 47; Antonio Escobedo (1996), *op. cit.*, pp. 53-54; Richard Rudgley (1993), *op. cit.*, p. 133.

²¹ Richard Davenport-Hines (2002), *op. cit.*, p. 46.

alternative subcultures, hated minority groups and foreign enemies.²² An “us versus them” mentality frames the public debate, eventually singling out certain psychoactive substances more for their perceived relationship to unpopular social groups than for any deleterious effects of the drugs themselves.²³ Thus, drug prohibition has been a means through which dominant cultural or social groups act to preserve their own prestige and lifestyle against threats to the established social order.²⁴ The cultural clash that inspired prohibitions such as England’s Gin Act of 1736, for example, which was aimed at the lower social classes, foreshadowed the American movement for alcohol prohibition.²⁵

Millions of Americans today suffer from the misery associated with substance abuse and it is important not to underestimate the earnestness and legitimacy of many governmental efforts to address very real societal dangers linked to substance abuse. It is equally important, however, to recognize that societies’ historical reactions to drugs and drug-related activity have arisen from a mix of cultural, religious, political and economic factors rather than from the mere concern over certain chemical or pharmacological actions. Such an understanding should inform more effective public policies to address the chronic problem of substance abuse in the United States.

GROUNDWORK FOR DRUG PROHIBITION IN AMERICA

As with human consumption of psychoactive substances in all parts of the world, drugs have been used in the United States since its earliest days as a nation. Even one of the first events leading to the American Revolution – the Boston Tea Party of 1773 – was a public outcry over excessive taxation of a drug.²⁶ Peoples native to the continent

²² William L. White, “Themes in Chemical Prohibition,” in William E. Link *et al.*, *Drugs in Perspective* (1979), Washington, D.C.: National Institute on Drug Abuse, p. 171. *See also* David F. Musto (1991), “Opium, Cocaine, and Marijuana in American History,” *Scientific American*, July 1991, pp. 20-27.

²³ William L. White has identified the following eight dominant themes in the development of chemical prohibitionist movements:

1. The drug is associated with a hated subgroup of the society or a foreign enemy;
2. The drug is identified as solely responsible for many problems in the culture, *i.e.*, crime, violence, and insanity;
3. The survival of the culture is pictured as being dependent on the prohibition of the drug;
4. The concept of "controlled" usage is destroyed and replaced by a "domino theory" of chemical progression;
5. The drug is associated with the corruption of young children, particularly their sexual corruption;
6. Both the user and supplier of the drug are defined as fiends, always in search of new victims; usage of the drug is considered "contagious;"
7. Policy options are presented as total prohibition or total access; and
8. Anyone questioning any of the above assumptions is bitterly attacked and characterized as part of the problem that needs to be eliminated. *See* William L. White (1979), *op. cit.*

²⁴ Joseph Gusfield (1986), *Symbolic Crusade: Status Politics and the American Temperance Movement*, Urbana and Chicago: University of Illinois Press, p. 3.

²⁵ The Gin Act had the stated purpose of making spirits "come so dear to the consumer that the poor will not be able to launch into excessive use of them." As with all prohibitions, however, the effort was unsuccessful and resulted in general lawbreaking and a failure to halt the steady rise in the consumption of even legally produced liquor. George E.G. Catlin (1931), *Liquor Control*, London: Thornton Butterworth, Home University Library, p. 15.

²⁶ The British Coercive Acts, passed in response to colonial resistance to the tax on tea, led to the formation of the First Continental Congress, which, in turn, led to the War of Independence. *See* Alexander T.

introduced the world to tobacco, which eventually financed America's early development as a nation.²⁷ Coffee, tea, alcohol, hemp and the opiates, which had been known for centuries, were brought to America by European and Asian settlers. Until the late 19th century these drugs were used legally in the United States with much public indifference and very little government interference.²⁸ Indeed, taxes on psychoactive substances provided a significant part of government revenue for most modern nations prior to the advent of income taxation.²⁹

The 19th Century: A Rudimentary Pharmacopoeia

Prior to 1800, opium was widely available in the United States, and throughout the world, as an ingredient in numerous products and "multidrug prescriptions."³⁰ It was hailed by doctors and peddlers of patent medicines for its "calming and soporific effects" and was often recommended to patients as a treatment for whatever condition ailed them.³¹ Opium use by women was particularly widespread because of its favored status as a physician's treatment for "female troubles" related to menstrual and menopausal disorders.³² Although physicians were generally aware of the potentially harmful effects of uncontrolled opium use, for most of the century such a danger was rarely thought to outweigh the drug's medicinal value.³³

Morphine, a derivative of opium, was first discovered in 1804 and appeared later in the 19th century in many patent medicines readily available to American consumers.³⁴

Shulgin (1988), *Controlled Substances: A Chemical and Legal Guide to the Federal Drug Laws*, Berkeley: Ronin Publishing, p. 243, discussing taxation as the primary means of drug control. Even after the American Revolution, during the Whisky Rebellion of 1792, riotous protests by farmers in western Pennsylvania against a federal tax on liquor had to be put down by overwhelming force sent to the area by George Washington.

²⁷ See Iain Gately (2001), *Tobacco: A Cultural History of How an Exotic Plant Seduced Civilization*, NY: Grove Press.

²⁸ The National Commission on Marijuana and Drug Abuse reported to Congress in 1973, "Drug policy as we know it today is a creature of the 20th Century. Until the last third of the 19th Century, America's total legal policy regarding drugs was limited to regulation of alcohol distribution, localized restrictions on tobacco smoking, and the laws of the various states regulating pharmacies and restricting the distribution of 'poisons.'" See "Drug Use in America: Problem in Perspective," *Second Report of the National Commission on Marijuana and Drug Abuse*, p. 14 (1973).

²⁹ Robin Room (2003), *op. cit.*, p. 15.

³⁰ David F. Musto (1999), *The American Disease: Origins of Narcotic Control*, 3rd ed., New York: Oxford University Press, p. 1.

³¹ *Id.* at 70.

³² Edward M. Brecher *et al.* (1972), *op. cit.*, p. 17.

³³ Dr. George Wood, a professor of the theory and practice of medicine at the University of Pennsylvania, president of the American Philosophical Society, and the author of the leading American text, *Treatise on Therapeutics*, wrote in 1868 of the pharmacological effects of opium: "A sensation of fullness is felt in the head, soon to be followed by a universal feeling of delicious ease and comfort, with an elevation and expansion of the whole moral and intellectual nature, which is, I think, the most characteristic of its effects. . . . It seems to make the individual, for the time, a better and greater man. . . . The hallucinations, the delirious imaginations of alcoholic intoxication, are, in general, quite wanting. Along with this emotional and intellectual elevation, there is also increased muscular energy; and the capacity to act, and to bear fatigue, is greatly augmented." in David F. Musto (1999), *op. cit.*, pp. 71-72.

³⁴ David F. Musto (1999), *op. cit.*, p. 72; Friedrich Wilhelm Adam Serturmer, a German chemist, first isolated and described morphine and by 1826 the Merck Company was producing morphine in substantial

Morphine was manufactured legally in the U.S. from both imported and domestically grown poppies and its popularity as a painkiller further expanded the American use of opiates. Morphine use increased substantially in the 1870s following the invention of the hypodermic syringe, the rapid spread of patent medicines and the broad acceptance of morphine in medical practice during and after the Civil War.³⁵

Heroin, an opiate derived from morphine through chemical processes, was a later addition to the American pharmacopoeia. It was “discovered” in 1874 but first came to market in 1898 when Bayer Pharmaceuticals introduced it as “The Sedative for Coughs.” Heroin was first thought to be a cure for morphine dependency and was used briefly to relieve morphine withdrawal symptoms,³⁶ but it was mostly in great demand for treating patients suffering from tuberculosis, pneumonia and other common respiratory conditions of the time. Named for its tendency to make the user feel “heroisch” (“powerful” in German),³⁷ heroin’s own propensity to foster dependency was debated but did not initially arouse much concern.³⁸ Heroin was widely prescribed by doctors into the 1920s.

Coca has been used in South America for thousands of years for its effects as a stimulant and for religious and mystical purposes. The active element of coca, cocaine, was first isolated from the coca plant in 1844 and became popular in Europe and North America as a drink additive. French Wine of Coca, Ideal Tonic, was registered under the trademark “Coca-Cola” in 1885; due to the “dry laws” at the time, alcohol was replaced by cola nuts in 1886.³⁹ Originally advertised as a medicinal beverage, Coca-Cola contained both coca and caffeine until the coca was removed in 1903.⁴⁰ Cocaine was made famous by Sigmund Freud for its “exhilarating” effect on the body and as a treatment for depression and morphine addiction.⁴¹ The medical use of cocaine was also publicly endorsed by the Surgeon-General of the United States Army.⁴² Between 1890 and 1905 cocaine’s popularity surged as a treatment for fatigue and respiratory ailments and as an ingredient in various tonics, ointments and sprays.⁴³

quantities. In the 1830’s pharmaceutical manufacturers in Philadelphia became the major source of morphine for Americans. See Thomas Szasz (1974), *op. cit.*, p.189.

³⁵ Edward M. Brecher *et al.* (1972), *op. cit.*, p. 3.

³⁶ David T. Courtwright, “The Roads to H: The Emergence of the American Heroin Complex, 1899-1956,” in David F. Musto, ed. (2002), *One Hundred Years of Heroin*, Westport, CT: Auburn House, p. 3.

³⁷ Daniel Patrick Moynihan, “One Hundred Years of Heroics,” in David F. Musto, ed. (2002), *op. cit.*, p. 23.

³⁸ Heroin was widely lauded as a “safe preparation free from addiction-forming properties.” Ashley Montagu (1966), *op. cit.*, p. 68; James R. L. Daly declared in 1900 in the *Boston Medical and Surgical Journal* that heroin “possesses many advantages over morphine. . . . It is not hypnotic; and there is no danger of acquiring the habit. . . .” Quoted in Henry H. Lennard *et al.* (1973), “Methadone Treatment,” *Science*, v.179, p. 1079, March 16, 1973.

³⁹ Antonio Escobedo (1996), *op. cit.*, p. 71.

⁴⁰ David F. Musto (1999), *op. cit.*, p. 43.

⁴¹ E. M. Thornton (1983), *Freud and Cocaine: The Freudian Fallacy*, London: Blond and Briggs, p. 46; Freud was considered the world’s authority on cocaine and was thought to have used it daily for almost a decade. Advertising both for the Parke-Davis and Merck pharmaceutical companies, Freud was quoted as claiming that cocaine would allow “doing away with all asylums for alcoholics.” See also Ernest Jones (1953), *The Life and Work of Sigmund Freud*, New York: Basic Books, v.1, p. 82.

⁴² Jill Jonnes (1996), *Hep-Cats, Narcs, and Pipe Dreams: A History of America’s Romance with Illegal Drugs*, New York: Scribner, p. 22.

⁴³ David F. Musto (1999), *op. cit.*, p. 7.

The Puritan and the Progressive: Confluence of Cultural Strains

In early America many drugs now considered illicit were widely and often used. George Washington and Thomas Jefferson, in fact, documented their cultivation and use of hemp for pain relief and other purposes.⁴⁴ Drug use was not without its critics and was certainly attended by numerous personal and family problems, but the vast majority of drug users were able to lead productive lives and their drug use or dependency did not prevent them from being fully functioning contributors to American society.⁴⁵ Drug use in the 19th century generally lacked the stigma of today and indeed was just as prevalent in high society as it was in the nation's ghettos and slums, as President William McKinley, Queen Victoria and other European royalty celebrated and entertained with coca wine, for example.⁴⁶

The 19th century featured Western imperialism, growing international commerce, the industrial revolution and waves of immigration, bringing about massive social and cultural changes in the United States. The nation's economy began moving away from its agricultural roots and cities grew in size and importance, as factory work increased and traditional living conditions and lifestyles changed dramatically. Substances such as opium, tobacco, tea and coffee had become more easily obtainable through foreign trade and alcoholic beverages became industrial commodities that were available year round. Heavy use of substances that had once been available only to the wealthy was becoming increasingly common in the lower classes and popular understanding of drug usage began to change.⁴⁷ While the use of many different drugs was both legal and widespread in 19th century America, it was not universally accepted and doctors, religious leaders and government officials warned against excess and advocated for moderation or restriction. Arguments for prohibition began to gain political traction as the social and economic upheavals helped bring the issue to mainstream America.

Alcohol was the earliest and most prominent target of social crusaders in the 1800s.⁴⁸ The temperance movement first became active at the state and local levels and the first national anti-alcohol association, the American Society for the Promotion of Temperance, was founded in 1826. Protestant church leaders of the temperance charge were largely motivated by old-world Puritan notions of a Christian social order and concern that overindulgence in alcohol "seriously interfered with their soul saving mission because it destroyed man's health, impaired his reason and distracted him from

⁴⁴ Ernest Abel (1980), *Marijuana: The First 12,000 Years*, New York: Plenum Press, quoting from the diaries of Jefferson and Washington and from Jefferson's Farm Books.

⁴⁵ Edward M. Brecher *et al.* (1972), *op. cit.*, pp. 6-7, 33-41.

⁴⁶ *Id.*; See also E.G. Eberle *et al.* (1903), "Report of Committee on the Acquirement of Drug Habits," *Proceedings of the American Pharmaceutical Association*, v. 51, pp. 477, 481, in *American Journal of Pharmacy*, Oct. 1903.

⁴⁷ *Id.*

⁴⁸ The clergyman Benjamin Parsons declared in 1840: ". . . alcohol stands preeminent as a destroyer. . . . I never knew a person become insane who was not in the habit of taking a portion of alcohol every day." Parsons listed forty-two distinct diseases caused by alcohol, among them inflammation of the brain, scrofula, mania, dropsy, nephritis and gout. Quoted in Burton Roueche (1960), *The Neutral Spirit: A Portrait of Alcohol*, Boston: Little, Brown & Co., pp. 87-88.

the love of God.”⁴⁹ Traditional Puritan doctrine did not actually advocate total abstinence from alcohol, however, but moderate and careful use.⁵⁰ Therefore, while the temperance movement represented Puritan values of self-control and pious reverence, the rising influence and motivations of anti-alcohol crusaders in the early 19th century were also attributed to other factors.

The early temperance movement had strong social and political overtones, particularly reflecting the rising importance of the “common man” in the United States.⁵¹ The emerging new “middle class” was increasingly active in the nation’s economic, political and social life – and also heavily used psychoactive substances – and exhibited a certain moral independence that shunned traditional church teachings and rejected the social standards and political power of the old American “aristocracy.” In this sense, temperance can be viewed as an attempt by a declining ruling class to cling to traditional values and institutions and to stake out its moral superiority by demonizing the common man’s indulgence in drink.⁵²

As the temperance movement grew in popularity it eventually lost its association with aristocratic dominance and was ironically co-opted by the middle and lower classes against which it had originally been aimed. Over time, “temperance became a sign of middle-class respectability and a symbol of egalitarianism” and was a key tenet of the emerging popular movement toward self-improvement and the “perfectability” of man.⁵³ By the early 1900s this sentiment converged with the Progressive movement and thus became a powerful political influence.

Until the 20th century the federal government had traditionally been very weak, playing a minimal role in people’s daily lives. As urban life became a major hardship for millions of people, however, citizens grew restless with political corruption and local governments’ inability to respond to crises. Economic depression in the 1890s had led to dissatisfaction with the government, while railroads, trusts and holding companies and industrial monopolies wielded considerable political influence. The rich consolidated their economic power, but the poor and middle class also agitated for change and from this discontent the Progressive movement emerged.

Progressivism was based on the concept that human nature is basically good and that government should be the tool for improving and perfecting society to create a better world.⁵⁴ As a middle-class movement, Progressivism sought to “preserve economic opportunity and restore social and political democracy so that all American’s might continue to prosper.”⁵⁵ For all its concern about social justice, however, the Progressive

⁴⁹ David E. Kyvig (1979), *Repealing National Prohibition*, Chicago: University of Chicago Press, p. 8.

⁵⁰ Joseph R. Gusfield (1986), *Symbolic Crusade Status Politics and the American Temperance Movement*, Urbana and Chicago: University of Illinois Press, p. 36.

⁵¹ *Id.*

⁵² Joseph R. Gusfield (1986), *op. cit.*, p. 5.

⁵³ *Id.* at 44.

⁵⁴ Lewis L. Gould (2001), *America in the Progressive Era, 1890-1914*, Harlow: Pearson Education, p. 22.

⁵⁵ James H. Timberlake (1963), *Prohibition and the Progressive Movement 1900-1920*, Cambridge: Harvard University Press, p. 101. Progressivism has been described as a melding of “Calvinistic Protestantism, Scientific Materialism and Uninhibited Capitalism.” See Henry Steele Commager (1950), *The American Mind: An Interpretation of American Thought and Character Since the 1880’s*, New Haven:

movement was markedly racist and xenophobic. Progressives sought to protect their own social status by attempting to assimilate poor immigrants and racial minorities into their ideal of a homogeneous American lifestyle. As part of their zeal to reform government, to curb big business and to improve people's lives, Progressives took up the cause of the temperance movement and quickly adopted a strong stance against alcohol.⁵⁶

Progressives were concerned about the consequences of drinking among the lower classes and the potential for civil discord: "Fearful of the growing unrest from below, the middle classes became deeply concerned lest the sale of liquor increase this discontent."⁵⁷ Saloons attracted the lower classes and were regarded as dens of debauchery that fostered un-Americanism and prevented assimilation into American society, breeding lawlessness and violence and conjuring up fears of rebellion by poor immigrants and laborers.⁵⁸ As the 20th century unfolded, similar fears were aroused in the public campaigns against heroin, cocaine and other drugs.

Old Puritan values of piety, frugality and industriousness framed a new Progressive agenda to achieve middle-class utopia through democracy and strong government controls. The Progressives' fervor against alcohol did not extend to heroin, cocaine, cannabis or other drugs, however, which were thought to be benign compared with alcohol and its tendency to lead men to social and moral ruin.⁵⁹ Thus, the anti-narcotics movement and the anti-alcohol movement actually arose quite independently from one other. Nevertheless, as David Musto explains:

the interrelation between the battles against alcohol and against narcotics is an important one. The anti-alcohol crusade helped establish the attitude that there could be no compromise with the forces of evil, that 'moderation' was a false concept..." and that prohibition was the only logical or moral policy when dealing with such a great national problem.⁶⁰

Yale University Press; See generally George E. Mowry (1958), *The Era of Theodore Roosevelt and the Birth of the Modern America 1900-1912*, New York: Harper & Row; Richard Hofstadter (1966), *The Age of Reform: From Bryan to F. D. R.*, New York: Alfred A. Knopf; and Merle Curti (1964), *The Growth of American Thought*, 3rd ed., New York: Harper & Row.

⁵⁶ James H. Timberlake (1963), *op. cit.*, p. 102.

⁵⁷ *Id.* at 115.

⁵⁸ *Id.*; The Progressive's battle against alcohol also served as a gateway for women to enter the national political scene. Saloons were notorious for drawing men away from their wives and children and toward prostitution, gambling and laziness, raising concern for women who were charged with maintaining the nation's home life. The movement for universal suffrage was also gaining momentum in the late 1800s and the alcohol industry had used its political power to oppose women's rights to the vote. Campaigning against alcohol gave women a relevant cause upon which to begin asserting political influence, and the Women's Christian Temperance Union joined with the Anti-Saloon League to become a powerful political force. See Norman H. Clark (1976), *Deliver Us From Evil: An Interpretation of American Prohibition*, New York: W.W. Norton & Company, p. 4.

⁵⁹ James H. Timberlake (1963), *op. cit.*, p. 219. In contrast to alcohol, opiates "had never been associated with the comportment of social irresponsibility, lust, or violence." *Id.*

⁶⁰ See summary by David F. Musto of David T. Courtwright's *Dark Paradise: Opiate Addiction in America Before 1940*, Cambridge: Harvard University Press (1982), in "The History of Legislative Control Over Opium, Cocaine, and Their Derivatives," in R. Hamowy ed. (1987), *Dealing with Drugs*, San Francisco: Pacific Institute for Research on Public Policy, pp. 36-37.

By 1905, in fact, Senator Henry W. Blair (R-NH) declared that “the temperance movement must include all poisonous substances which create unnatural appetite, and international prohibition is the goal.”⁶¹

Patterns of Drug Prohibition and Race

Concern about drug use in America arose from distinct associations of certain drugs with unpopular and vulnerable societal sub-groups – of opium with the Chinese, of cocaine with “Negroes,” of alcohol with urban Catholic immigrants, of heroin with urban immigrants and of marijuana with Mexicans – and from the claim that a myriad of foreign enemies were using these drugs against the United States.⁶² Propaganda often contributed to popular understanding of drugs more than factual or scientific accounts.

Throughout the 1800s Chinese exclusionary laws were commonplace, especially in the American West, and anti-Chinese hostility intensified when Chinese workers became a scapegoat for bad economic conditions. After the economic depression of the 1870s the California legislature began studying the “moral” aspects of its Chinese inhabitants, with specific attention paid to the problem of “vice” in Chinese communities.⁶³ Anti-Chinese sentiment in the U.S. thereby created strong negative perceptions about opium.

While opium use was common among all classes and races, opium smoking was a distinctly Chinese practice that became an exclusive target of the public and of state legislatures. This was particularly so once the public consciousness was awakened to the “special problem” of white men and women who “began to ‘contaminate’ themselves by frequenting the dens in Chinatown.”⁶⁴ As the Progressive Era commenced, middle class America struck against this threat to morality and social order.

Associating Chinese opium use with corruption of American values and female chastity was an easily alluring explanation for social problems of the day and it became an influential point of view.⁶⁵ Smoking opium, like the Chinamen who introduced the habit, became a despicable practice to Progressive reformers. All the while, opium in its various other forms, including morphine and laudanum, continued for many years to be freely dispensed by pharmacists, doctors, and purveyors of patent medicines.⁶⁶

⁶¹ Quoted in Rev. Wilbur F. Crafts *et al.* (1909), *op. cit.*, p. 230.

⁶² William L. White (1979), *op. cit.*

⁶³ Patricia A. Morgan (1978), “The Legislation of Drug Law: Economic Crisis and Social Control,” *Journal of Drug Issues*, v.8, n.1, p. 56. As Professor Morgan explains, this strategy served to help “maintain an ideology, developing during this time, which transferred onus from the business class as cause of economic problems to a moral attack against a race that could be perceived as the cause of a wide range of problems. *Id.* at 57.

⁶⁴ *Id.* at 58.

⁶⁵ In 1878 the San Francisco police department reported that, while visiting these opium dens they “found white women and Chinamen side by side under the effects of this drug—a humiliating sight to anyone who has anything left of manhood.” Testimony of the San Francisco Police Department recorded in California State Senate Committee, *Chinese Immigration, Its Social, Moral and Political Effects*, Sacramento, CA: State Publishing Office, 1878. At the same time, the *San Francisco Post* railed against the Chinese for having “impoverished our country, degraded our free labor and hoodlumized our children. He is now destroying our young men with opium.”

⁶⁶ Richard Davenport-Hines (2002), *op. cit.*, pp. 83-88.

Changing perceptions of cocaine at the turn of the 20th century were also linked to race. In the late 1800s poor black laborers in South took to the habit of snorting cocaine to help them endure strenuous conditions. Sniffing was the quickest and cheapest way to ingest cocaine and, as a crude method of use, clearly distinguished common people from the upper and professional class users who preferred injecting it with a needle.⁶⁷ Plantation owners and other employers soon found great value in cocaine as a means of improving productivity and controlling workers, and some even began supplying it to their black crews.⁶⁸ Poor blacks and cocaine became firmly linked in the public mind.

Racial tensions in the South soon transformed the image of black cocaine use into a source of white fear. Fantasized stories stirred panic about “cocainized” blacks leaving plantations and construction sites on sexual rampages having their way with white women.⁶⁹ Medical publications supported this myth with stories of how cocaine could transform law-abiding Negroes into menacing predators with increased and perverted sexual desire.⁷⁰ Also appealing to anti-Semitic sentiments, newspapers reported that there was “little doubt that every Jew peddler in the South carries the stuff.”⁷¹ Other popular legends attributed cocaine to giving blacks superhuman strength and that southern police departments switched from .32 caliber to .38 caliber revolvers because cocaine made crazed blacks impervious to the smaller rounds.⁷²

Thus, the anticipation that blacks might “rise up” above their place in society gave rise to considerable white alarm.⁷³ The racist roots of this image are further exposed by the fact that blacks were not the predominant users of cocaine in the early 20th century.⁷⁴ Cocaine sniffing was more popular with whites and was especially associated with the criminal cultures of prostitutes, pimps, gamblers and other white “urban hoodlums.”⁷⁵

The national prohibition of alcohol sales in the 1920s stimulated an increase in cannabis smoking, called “marihuana” by the Mexican immigrants who brought it with them for recreational and medicinal use.⁷⁶ In the 1930s marijuana use was found to be widespread from schools to neighborhood bridge parties.⁷⁷ Despite such common usage, however, public concern about marijuana was aroused through its association with

⁶⁷ Charles E. de M. Sajous (1902), *Analytical Cyclopaedia of Practical Medicine, III*, Philadelphia: F.A. Davis, p. 506.

⁶⁸ Richard Davenport-Hines (2002), *op. cit.*, p. 200.

⁶⁹ *Id.* Dr. Edward H. Williams cited Dr. Christopher Kochs: “Most of the attacks upon white women of the South are the direct result of the cocaine crazed Negro brain” and Dr. Williams concluded that “Negro cocaine fiends are now a known Southern menace.” “Negro Cocaine ‘Fiends’ Are A New Southern Menace,” *The New York Times*, Feb. 8, 1914, IV, p 12.

⁷⁰ Joseph F. Spillane (2000), *Cocaine: From Medical Marvel to Modern Menace in the United States, 1884-1920*, Baltimore: Johns Hopkins University Press, pp. 92-93.

⁷¹ William L. White (1979), *op. cit.*

⁷² David F. Musto (1999), *op. cit.*, p. 7.

⁷³ David F. Musto (1999), *op. cit.*, p. 7.

⁷⁴ William O. Walker, III (1981), *op. cit.*, p. 14.

⁷⁵ Richard Davenport-Hines (2002), *op. cit.*, p. 200.

⁷⁶ Ronald K. Siegel (1989), *op. cit.*, p. 273.

⁷⁷ William O. Walker, III (1981), *op. cit.*, p. 102; Marijuana “tea pads,” reminiscent of opium dens of days gone by, began to appear in New Orleans and other southern port cities and by 1930 they were all over the United States, with 500 or so in New York City alone. Ronald K. Siegel, *op. cit.*, p. 273.

Mexicans; and fear of marijuana in the United States was most intense in areas with high concentrations of Mexican immigrants.⁷⁸

Like the Chinese before them, Mexican immigrants were a targeted scapegoat for high unemployment rates in the 1930s and their association with marijuana helped raise public alarm.⁷⁹ The medical community also appealed to public prejudices, suggesting that marijuana “releases inhibitions and restraints imposed by society” and “acts as a sexual stimulant” that particularly affects “overt homosexuals.”⁸⁰

Fast-forwarding to the 1980s and 1990s, the national panic over “crack” cocaine has fostered the perception of the drug’s predominance in poor, black urban settings and yet, according to the U.S. Sentencing Commission, “nearly 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American while the majority of crack cocaine users are white.”⁸¹ The disproportionately adverse effect of drug law enforcement on the poor and racial minorities now spans more than a century.

A close examination of the legislative history of America’s drug laws reveals a host of uncharitable sentiments that have helped shape public perceptions of disfavored social subgroups and their practices. Any meaningful effort to reform drug policy in the United States must acknowledge this uncomfortable historical nexus between racial animus and American public attitudes towards certain drugs.

LEGISLATIVE BEGINNINGS IN THE STATES

There was no national drug control policy in the United States during the 19th century as state and local governments promulgated the earliest drug laws, and even those laws were limited to regulation of alcohol distribution, local restrictions on smoking tobacco and regulation of pharmacies.⁸² During that time “statutory vocabulary was simple and direct: arsenic, tobacco, alcohol, morphine, and other opium alkaloids were all

⁷⁸ David F. Musto (1999), *op. cit.*, p. 219. The Federal Bureau of Narcotics contributed to public fears over marijuana by promulgating official statements about police estimates that “fifty percent of the violent crimes committed in districts occupied by Mexicans, Spaniards, Latin Americans, Greeks or Negroes may be traced to this evil” of marijuana. Richard J. Bonnie & Charles H. Whitebread II (1974), *The Marijuana Conviction*, Charlottesville: University Press of Virginia, p. 100, citing a statement from Will S. Wood to Aaron W. Uris.

⁷⁹ C.M Goethe of the American Coalition stated that, “marijuana, perhaps now the most insidious of our narcotics, is a direct by-product of unrestricted Mexican immigration.” He added that, “Mexican peddlers have been caught distributing sample marijuana cigarets [sic] to school children” and concluded by saying “our nation has more than enough laborers.” *The New York Times*, September 15, 1935, IV, p. 9; A Texas police captain summed up the Mexican marijuana problem, describing how it made Mexicans “very violent, especially when they become angry.... They seem to have no fear, I have also noted that under the influence of this weed they have enormous strength and that it will take several men to handle one man while under ordinary circumstances one man could handle him with ease.” Ernest L. Abel (1980), *op. cit.*, p. 207.

⁸⁰ David F. Musto (1999), *op. cit.*, p. 220, quoting a leading researcher’s presentation to the American Psychiatric Association in 1934.

⁸¹ U.S. Sentencing Commission (1997), *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, Washington, DC: US Sentencing Commission, April 1997, p. 8.

⁸² “Drug Use in America: Problem in Perspective” (1973), *Second Report of the National Commission on Marijuana and Drug Abuse*, p. 14.

‘poisons’” and, when they were regulated at all the law put the onus on the health professions to police their distribution.⁸³

Early state and local drug laws varied immensely in scope and effect. In 1860 Pennsylvania enacted an early anti-morphine law. In 1875 San Francisco passed an anti-opium law that is widely considered the first of its kind, targeting only the smoking of opium, which was common among Chinese immigrants, and not affecting the myriad other forms of opium use favored by most Americans. The California state legislature enacted a similar law in 1881 that focused only on opium smoking dens.⁸⁴ Virginia City, Nevada had passed a similar anti-opium ordinance in 1876 and this law was expanded and adopted statewide a year later. Other cities and states across the nation soon followed suit. These laws were all different and, for the most part, full of so many loopholes and exceptions that they were largely ineffective in actually preventing or limiting opium smoking.

Almost none of the early drug laws imposed a blanket prohibition on any substance. “A typical law would provide for the sale of narcotized proprietaries without restriction, but would confine provision of pure drugs to pharmacists and physicians, requiring a prescription that would be retained by the pharmacist for inspection for a period of time.”⁸⁵ Some of these laws were so complicated that compliance was impossible, while others were practically nugatory due to exceptions for patent medicines and domestic remedies.⁸⁶ Despite the relative laxity of the laws, they were enforced to varying degrees against targeted or guileless violators. Passage of these laws marked the first time in United States history when people began getting arrested for possession of drugs, and punishments were frequently “prompt and thorough.”⁸⁷

THE FIRST FEDERAL DRUG LAWS

Federal involvement in regulating drugs first emerged to bolster state efforts and reflected a similar concern about social groups using certain drugs rather than the drugs themselves. In 1883 Congress raised the import tariff on smoking opium, leaving opium imported for other purposes unaffected.⁸⁸ In 1887 Congress prohibited the import of opium into the United States by any subject of China; the law did not apply to non-Chinese and importation from Canada remained legal.⁸⁹ In 1890 a new federal law permitted only American citizens to manufacture opium for smoking.⁹⁰

⁸³ *Id.*

⁸⁴ Smoking opium alone or with friends in a private residence was not covered by the California legislation. See Elaine Casey (1978), *History of Drug Users and Drug Use in the United States*, Facts About Drug Abuse Participant Manual, The National Drug Abuse Center for Training Resource and Development, U.S. Govt. Publication No. 79-FADA-041P.

⁸⁵ David F. Musto (1999), *op. cit.*, p. 91.

⁸⁶ *Id.*

⁸⁷ Edward M. Brecher *et al.* (1972), *op. cit.*, p. 43.

⁸⁸ Charles E. Terry and Mildred Pellens (1928), *The Opium Problem*, New York: Committee on Drug Addictions, Bureau of Social Hygiene, p. 747.

⁸⁹ Alexander T. Shulgin (1988), *Controlled Substances: A Chemical and Legal Guide to the Federal Drug Laws*, Berkeley: Ronin Publishing, p. 244.

⁹⁰ Edward M. Brecher *et al.* (1972), *op. cit.*, p. 44.

The early federal opium laws produced mixed results. They were effective to the extent they were intended to marginalize the Chinese and to clarify social distinctions; indeed, maltreatment of the Chinese in the United States was so prevalent that it raised the ire of the Chinese government and threatened to destabilize trade and international relations.⁹¹ However, from the viewpoint of actually improving the nation's health and safety and reducing use of drugs these laws did very little. Opium and other drugs continued to be legally available in many forms, and they were used for various purposes in all strata of American society.

Government officials were aware of the opium laws' failures and of their consequences. The U.S. Treasury reported in 1888 that the effect of federal efforts had been "to stimulate smuggling...by systematic organizations on the Pacific coast" and that "although all possible efforts have been made by this Department to suppress the traffic, it is found practically impossible to do so."⁹² These early difficulties, however, did not prevent the Congress from promulgating even more stringent measures in the future.

The Pure Food and Drug Act

A new chapter in the history of U.S. drug regulation began with the passage of the federal Pure Food and Drug Act of 1906, which required foods and medicines to be properly labeled as to their ingredients and contents. The Pure Food and Drug Act did not impose prohibitions on any substance; rather, it required only that certain products containing dangerous or potentially habit-forming drugs include appropriate notices to the public. The measure was the most prominent example of federal consumer protection legislation that emerged from the American Progressive movement.

At the turn of the 20th century Americans read stories of graft and greed and the works of famous "muckraking" journalists such as Upton Sinclair were popular favorites, and public sentiment supported congressional action to regulate the food and drug industries. A principal target of the muckrakers was the patent medicine industry, portrayed as peddling adulterated, mislabeled products in a reckless manner. "Poisonous substances provided an issue on which prohibitionists, social reformers and proponents of federal intervention combined with enduring results."⁹³ Public officials responded by targeting patent medicine-makers with regulation, all for the sake of "purification" and to "protect the children."⁹⁴

The Pure Food and Drug Act marked a significant change in the conception of the constitutional power of the federal government. Matters of public health and safety were long considered the exclusive realm of the states and the federal government had no ability to exercise a general police power. This was especially true in an area that affected business interests, so Congress had to be creative in the drafting the Pure Food

⁹¹ David F. Musto (1982), "The History of Legislative Control Over Opium, Cocaine, and Their Derivatives," *op. cit.*, summarizing David T. Courtwright (1982), *op. cit.*

⁹² *Id.*

⁹³ Richard Davenport-Hines (2002), *op. cit.*, p. 212.

⁹⁴ *Id.*

and Drug Act as a criminal statute, ultimately relying on the Commerce Clause for its authority.⁹⁵

Although the Pure Food and Drug Act did not impose any prohibitions, it had a historically demonstrable effect on reducing opiate addiction.⁹⁶ New purity and labeling requirements markedly improved the safety of medicines and drugs available to the public. This record of success was interrupted, however, by the passage of the Harrison Narcotic Act of 1914, which essentially cut off access to the legal, well-regulated supply of opiates and enabled the growth of an illicit market in adulterated, misbranded and contaminated drugs of all kinds.⁹⁷

The national “anti-drug” movement in the United States was only in its infancy at the time of the Pure Food and Drug Act, whereas alcohol had been the primary target of moral and social crusaders for quite some time. The Anti-Saloon League and the influential alcohol prohibition movement had overshadowed “anti-drug” forces, which lacked any strong central organization. It is peculiar, therefore, that the nation’s first major “anti-drug” law, the Harrison Narcotics Act of 1914, was adopted a full five years before National Alcohol Prohibition.⁹⁸ This historical anomaly stems directly from the efforts of a few charismatic, driven and influential individuals and from America’s changing role in world politics at the dawn of the 20th century.

Opium and U.S. Occupation of the Philippines

Victory in the Spanish-American War in 1899 turned the United States into a world power, which acquired Puerto Rico, Guam, Cuba and the Philippines, embracing its moral duty to uplift the inferior peoples in these territories.⁹⁹ The Filipinos were less enthusiastic about U.S. domination, however, and they rose up against the American occupiers in a prolonged insurrection. Upon suppressing this uprising, the United States took over governance of the Philippines and William Howard Taft was appointed civil governor. One of the first major problems he had to face was how to deal with island’s “opium problem.”

⁹⁵ At the time of its passage, some members of Congress expressed deep concern that the Pure Food and Drug Act represented an illegal exertion of power not expressly delegated to it by the Constitution. Nevertheless, the law was enacted and subsequently upheld as a valid exercise of Congress’ constitutional power to regulate commerce between the states. *See United States v. Seventy-Four Cases of Grape Juice*, 181 F. 629 (W.D.N.Y. 1910); *See also Shawnee Milling Co. v. Temple*, 179 F. 517 (S.D. Iowa 1910). *See also* the discussion of evolving federal commerce power in “States Rights: Toward a Federalist Drug Policy.” *Report of the Legal Frameworks group to the King County Bar Association Board of Trustees*, 2005.

⁹⁶ *See* Lawrence Kolb and A.G. Du Mez (1924), *The Prevalence and Trend of Drug Addiction in the United States and Factors Influencing It*, Treasury Department, US Public Health Service, Reprint No. 924, Washington D.C.: US Government Printing Office, p. 14.

⁹⁷ *Id.*

⁹⁸ Since the late 1800s the Anti-Saloon League presented a powerful political front against alcohol and the liquor industry. Its power grew and was manifested in the rising popularity of the Prohibition Party, which influenced presidential politics, culminating in 1919 with passage of the 18th Amendment prohibiting the sale of alcohol in the United States.

⁹⁹ H.U. Faulkner (1959), *Politics, Reform, and Expansion, 1890-1900*, New York: Harper and Row, p. 239.

Opium use in the Philippines was very common and the Spanish had previously operated an opium monopoly on the islands that entailed licensing narcotics addicts and legally supplying them with their requirements of the drug.¹⁰⁰ Despite Governor Taft's support for continuing this practice, the notion was extremely offensive to two influential American religious leaders in the Philippines, Reverend Wilbur Crafts, a Roosevelt administration official and leader of the International Reform Bureau, and the Reverend Charles H. Brent, the Episcopal Bishop of the Philippines. Both of these men strongly opposed, on moral grounds, American involvement in supporting such a vice as opium taking, especially in providing it to our foreign charges.¹⁰¹ The vocal opposition of Bishop Brent and Wilbur Crafts proved to be decisive in preventing the U.S. from reinstating the Spanish opium monopoly in the Philippines.

In 1905 Congress ordered that all Filipinos be prohibited from obtaining opium for any non-medical purpose and that all legal sales of the drug would be prohibited by 1908.¹⁰² This policy set a powerful precedent and had long-term implications. Even though American officials acknowledged that "prohibition of opium smoking in the Philippines does not in fact prohibit,"¹⁰³ Congress was nevertheless disposed to support outright prohibition and the United States established itself as the world leader in the area of international narcotics control.¹⁰⁴

Opium and Tension With China

By 1900 China was outwardly expressing deep concern about foreign interference and about opium use by its people, culminating in the Boxer Rebellion, which was the strongest manifestation of Chinese nationalism and anti-imperialism to date.¹⁰⁵ President Roosevelt even considered deploying troops to China to protect American investments.¹⁰⁶ However, this international crisis provided a unique window of opportunity that was seized upon by the fledgling American anti-drug movement.

Bishop Brent urged President Roosevelt to help China in its battle against opium.¹⁰⁷ U.S. efforts in the Philippines had been considered a success and inspired hope that it may serve as a successful model elsewhere. Bishop Brent and Reverend Crafts called for an international meeting between the United States, Japan and the other powerful nations with interests in the Far East, and President Roosevelt agreed with this

¹⁰⁰ Richard Davenport-Hines (2002), *op. cit.*, pp. 202-203.

¹⁰¹ Reverend Crafts was a well-known advocate for an "international civilizing crusade against alcohol and drugs" and he supported "a policy of prohibition in all indigenous races, in the interest of commerce as well as conscience." Antonio Escohotado (1996), *op. cit.*, p. 77. Bishop Brent worked closely with the United States War Department in managing the Philippines and was dedicated to freeing Asia from opium and was an international leader in the anti-opium movement. *Id.*; See also David F. Musto (1999), *op. cit.*, pp. 25-26. The influence of Reverend Craft and Bishop Brent largely shaped America's international and national drug policy for decades to come.

¹⁰² *Id.*; See Philippine Tariff Revision Act, 3 March 1905, 33 *Stat. L.* 944.

¹⁰³ Richard Davenport-Hines (2002), *op. cit.*, p. 205.

¹⁰⁴ David F. Musto, "The History of Legislative Control Over Opium, Cocaine, and Their Derivatives," *op. cit.*, summarizing David T. Courtwright (1982), *op. cit.*

¹⁰⁵ David F. Musto (1999), *op. cit.*, p. 29.

¹⁰⁶ Antonio Escohotado (1996), *op. cit.*, p. 78.

¹⁰⁷ *Id.*

approach, eventually convening the Conference of the International Opium Commission in Shanghai in 1909.¹⁰⁸

Along with Bishop Brent and Reverend Wilbur Crafts, the third major seminal figure in the development of American drug policy was an ambitious, Washington, D.C. doctor named Hamilton Wright, who had some knowledge about opium and “Oriental” cultures. The State Department had appointed Wright to the American delegation to the Shanghai Opium Conference. Dr. Wright began many years of tireless work that eventually earned him the informal title of “father of American narcotic laws.”

By calling and convening an international meeting on the Chinese opium trade, the United States was again holding itself out as a world leader on the issue of drug policy, and Hamilton Wright believed the U.S. should serve as a model for other nations by enacting its own “exemplary” opium laws.¹⁰⁹ Ironically, the U.S. itself had no laws limiting the use, sale or manufacture of products containing opium and coca, so to save face in advance of the international opium conference, Wright worked with Secretary of State Elihu Root and others to remedy this situation before the meeting, helping to secure the enactment of national opium prohibition.¹¹⁰

The 1909 Opium Exclusion Act

The Opium Exclusion Act was the first federal drug prohibition law, passed quickly just as the Shanghai Opium Conference was convening as a message of U.S. intolerance toward recreational drug use. Constitutional concerns led the State Department to recommend that Congress impose a prohibition through a national ban on imported, non-medicinal smoking opium.¹¹¹ Section 11 of the Pure Food and Drug Act had already authorized the federal government to ban any imported drug deemed dangerous to the public’s health, but Congress went ahead and approved the Opium Exclusion Act in any event, on February 9, 1909.¹¹²

The Foster Antinarcotics Bill: Prelude to the Harrison Act

Upon his immediate return from Shanghai, Hamilton Wright sought sweeping federal anti-drug legislation, to be founded upon Congress’ constitutionally granted taxing power, and he drafted just such a proposal. Representative David Foster of Vermont, chairman of the House Committee on Foreign Affairs, introduced Wright’s legislation in 1910. Known as the Foster Antinarcotics Bill, it called for a federal tax on

¹⁰⁸ The 1909 Shanghai Opium Conference produced mixed results. Delegates from thirteen nations were present, but they were unable to reach any binding agreements or accords. They did, however, air “the issue of international control and looked ahead to subsequent meetings.” William O. Walker, III (1981), *op. cit.*, p. 15. Most of the attendees expressed little interest in taking efforts to prohibit drugs, and there was not even agreement about the evil or immorality of non-medicinal drug use. David F. Musto (1999), *op. cit.*, p. 36.

¹⁰⁹ David F. Musto (1999), *op. cit.*, p. 33.

¹¹⁰ See Edward Marshall (1911), “Uncle Sam is the Worst Drug Fiend in the World,” *The New York Times*, March 12, 1911, V, p. 12.

¹¹¹ David F. Musto (1999), *op. cit.*, p. 34.

¹¹² *Id.* at 34-35.

all drug transactions in the nation and would have required all sellers of drugs to register with the government and to record and report all of their transactions.

Supporters of the Foster Antinarcotics Bill appealed to popular fears and myths about racial minorities.¹¹³ The interests opposed to the bill, however, including the nation's drug manufacturers and retailers, opposed the bill for its cumbersome record-keeping and reporting requirements and, since the public was not enthusiastically driving a national anti-narcotic movement, the arguments of business and industry carried their weight in Congress. Despite calls from Hamilton Wright and President Taft that the United States had to show the world that it "had its house in order" before the second International Opium Conference in the Hague in 1912,¹¹⁴ the measure failed.

The Harrison Act of 1914 and its Interpretation

Still resolved to see domestic drug prohibition enacted, Hamilton Wright had his legislation introduced in the next session. This time, Representative Francis Burton Harrison (D-NY), who himself had been Governor General of the Philippines from 1913 to 1921, agreed to shepherd it through the House. The bill met again with strong opposition, especially from the American Medical Association, so the bill's proponents reluctantly agreed to modify its record-keeping provisions, to reduce the penalties and to continue to allow the sale of patent medicines with small amounts of narcotics in them.¹¹⁵ After the grudging compromise of all parties, the result was the Harrison Narcotic Act of 1914, a major watershed in the federal effort to regulate drugs.¹¹⁶

The Harrison Act required all manufacturers and purveyors of narcotics to register their activity with the federal government, to keep records of their sales and to pay a tax on each transaction.¹¹⁷ Although ostensibly only a tax measure, the practical effect of the Harrison Act was to severely limit the availability of opium and cocaine for non-medical, recreational purposes. The bill was not presented as a prohibitionist measure in reaction to domestic morality concerns; rather, the congressional debate focused on comporting

¹¹³ With continuing regard to opium, Wright noted that "one of the most unfortunate phases of the habit" was a "large number of women who have become involved and were living as common-law wives or cohabiting with Chinese in the Chinatowns of our various cities." Hamilton Wright (1910), *Report on the International Opium Commission and on the Opium Problem as Seen within the United States and Its Possessions*, Opium Problem: Message from the President of the United States, Senate Doc. No. 377, 61st Cong., 2nd Sess., 21 Feb. 1910, p. 45. Speaking of the danger of cocaine Wright reported that "it has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the Negroes of the South and other sections of the country." *Id.* at 48-49.

¹¹⁴ *Id.* at 45.

¹¹⁵ David F. Musto, "The History of Legislative Control Over Opium, Cocaine, and Their Derivatives," *op cit.*, summarizing David T. Courtwright (1982), *op. cit.*

¹¹⁶ Signed into law on December 17, 1914, the official title of the Harrison Act was: "An Act to provide for the registration of, with collectors of internal revenue and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives or preparations, and for other purposes." United States Statutes at Large, v.36, 63 Cong., 3 Sess, Part I, pp. 785-90.

¹¹⁷ Eva Bertram, Morris Blachman, Kenneth Sharpe, & Peter Andreas (1996), *Drug War Politics: The Price of Denial*, Berkeley: University of California Press, p. 68.

with international treaty obligations imposed by the Hague Opium Convention of 1912.¹¹⁸ In only a few short years, however, the Harrison Act was transformed from a relatively innocuous revenue measure into a powerful tool for federal authorities to regulate, and ultimately prohibit, a wide range of narcotics-related activity.

Linking the Harrison Act to The Hague Opium Convention was a clever means to circumvent constitutional concerns at the time. The power of Congress to regulate interstate commerce and to raise revenue was considered to be very limited in 1914 and the prevailing view was that the power to regulate “local” affairs was reserved to the states by the Tenth Amendment.¹¹⁹ Therefore, federal control of narcotics and medical prescriptions was thought to be unconstitutional.¹²⁰ However, Hamilton Wright and his cohorts had purposefully engineered the Hague Opium Convention in order to establish a mandatory international legal foundation on which U.S. drug laws would be built.¹²¹

To the U.S. medical community the Harrison Narcotic Act was seen mostly as “a law for the orderly marketing of opium, morphine, heroin, and other drugs—in small quantities over the counter and in larger quantities on a physician’s prescription.”¹²² Doctors and pharmacists felt protected by the language of the statute, which they had a hand in drafting, specifically shielding them from government interference in their medical practices.¹²³ However, instead of protecting doctors, the language of the Act was subject to multiple interpretations and it was not long before undercover U.S. Treasury agents – the original “narcs” – began arresting thousands of doctors and pharmacists for prescribing and administering drugs to narcotics addicts.¹²⁴

Although the Harrison Act was vague about what it meant for physicians to act only “in pursuit of their professional practice,” the U.S. Treasury Department took initiative to promulgate rules forbidding doctors from providing drugs for addiction

¹¹⁸ The Hague Opium Convention of 1912 was the result of Hamilton Wright’s efforts to achieve international consensus on narcotics control. The treaty urged signatories “to use best endeavors” to suppress the illicit drug trade. William O. Walker, III (1981), *op. cit.*, p. 16.

¹¹⁹ Richard J. Bonnie & Charles H. Whitebread II (1974), *op. cit.*, p. 16. See “States Rights: Toward a Federalist Drug Policy,” *op. cit.*

¹²⁰ Eva Bertram *et al.* (1996), *op. cit.*, p. 9.

¹²¹ Article VI of the U.S. Constitution makes international treaties the supreme law of the land and presenting the Harrison Act as necessary to comply with The Hague Convention lent the Act constitutional legitimacy. William O. Walker, III (1981), *op. cit.*, p. 16.

¹²² Edward M. Brecher *et al.* (1972), *op. cit.*, p. 48.

¹²³ The Harrison Act stated, in relevant part: “Nothing contained in this section shall apply to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only.” Public Law No. 223, 63rd Cong., approved December 17, 1914.

¹²⁴ Richard Davenport-Hines (2002), *op. cit.*, p. 230; Eva Bertram *et al.* (1996), *op. cit.*, p. 69. The federal crackdown on doctors was also generally justified by reports discrediting the medical profession, especially the Carnegie Foundation’s Flexner Report of 1910, which revealed defective medical training and shoddy medical research practices. As a result, not only was drug addiction criminalized, but scientific research on psychoactive drugs was virtually halted. See Norman E. Zinberg and John A. Robertson (1969), *Drugs and the Public*, New York: Simon and Schuster, pp. 69-69.

maintenance in cases where addiction was deemed unrelated to medical issues.¹²⁵ The question of whether Congress had the power to regulate doctors and to punish the mere possession of drugs quickly became a contentious legal issue and the Treasury Department's efforts to enforce the Harrison Act as a prohibitionist law against doctors and their patients were initially rebuffed by the courts.¹²⁶

The *Doremus* and *Webb* Decisions

Undaunted by adverse court rulings, the Treasury Department continued attempts to regulate the prescription practices of doctors and pharmacists under the guise of tax law enforcement. Finally, in the 1919 case of *United States v. Doremus*, the Supreme Court explicitly upheld the Harrison Narcotic Act as a legitimate revenue measure, confirming federal authority to control the manner in which physicians could dispense drugs.¹²⁷ In the companion case of *Webb v. United States*, decided on the same day as *Doremus*, the Supreme Court held that the legitimate practice of medicine could not include prescribing drugs to patients simply to maintain their addiction with no intent to cure them.¹²⁸ The Treasury Department used this decision to support its enforcement against physicians who were distributing drugs to patients “for the purpose of gratifying his appetite for the drug.”¹²⁹

A New Political Climate

During the brief period when the Supreme Court expanded its interpretation of the permissible scope of the Harrison Narcotic Act, dramatic events around the world and at home profoundly affected Americans' sense of purpose and security. Between 1914 and 1919 the First World War raged in Europe, ratification of the 18th Amendment imposed national alcohol prohibition in the United States and the Progressive Era of middle-class

¹²⁵ This vagueness in the statute may have been intentional on the part of Congress: “The manifest lack of federal power to regulate medical practice as well as the need to unify professional support of the Harrison Act may have required these vague phrases.” David F. Musto (1999), *op. cit.*, p. 125.

¹²⁶ The first major legal challenge to the constitutionality of the Harrison Narcotic Act came in 1916 when the Supreme Court limited the scope of the Act in the case of *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916), denying the U.S. Treasury Department's attempt to prosecute a doctor for prescribing drugs to an addict and to criminalize the addict's possession of an illicit drug. The Court recognized that an act of Congress is only valid if carried out pursuant to an expressly granted constitutional power and, in so doing, held that the Harrison Act was not required under international treaty and, therefore, where the Act was passed under Congress' taxing power, it could only be valid for raising revenue. The Court then found that both preventing a doctor from exercising professional judgment to prescribe drugs and prohibiting mere possession of drugs were actions unrelated to revenue collection and that the federal government could not use the Harrison Act to prosecute doctors who prescribe drugs or to prosecute individuals who possess drugs. *United States v. Jin Fuey Moy*, *supra*, at 401.

¹²⁷ Justice Day wrote that, “[i]f the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it....The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue.” *United States v. Doremus*, 249 U.S. 86, 93, 94 (1919).

¹²⁸ The *Webb* case arose from a factual scenario in which a doctor was arrested and prosecuted for selling thousands of prescriptions to addicts. The Court's majority opinion summarily concluded that, to call “such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required.” *Webb v. United States*, 249 U.S. 96 (1919).

¹²⁹ Eva Bertram *et al.* (1996), *op. cit.*, p. 74.

egalitarianism quickly faded into history. It was a time when “the liberalizing movements of LaFollette, Theodore Roosevelt and Woodrow Wilson had declined into a fervent and intolerant nationalism” and America was gripped with fear of anarchy and communism following the Bolshevik Revolution.¹³⁰

By 1919 Americans were in no mood to take a soft stance on any perceived national threat. The use of narcotics was being demonized as antisocial and personally degenerating and the public willingly opposed any suggestion of maintaining such a vice at that time.¹³¹ Prohibitionist sentiments ran high and not just in regard to alcohol and narcotics; tobacco was also gaining critics and by 1921 cigarettes would be prohibited in fourteen states, with 92 other anti-cigarette bills under consideration in another 28 state legislatures.¹³²

The *Behrman* and *Linder* Decisions

The Treasury Department continued to pursue its prohibitionist agenda before the Supreme Court, and in 1922 the case of *United States v. Behrman* expanded upon prior court decisions. The *Behrman* decision specifically upheld the Treasury Department’s rule that made it illegal for doctors to prescribe drugs to addicts whose only ailment was addiction itself. The 6-3 decision affirmed the Treasury’s position that a narcotics prescription for an addict was a *de facto* criminal act, regardless of the intent or “good faith” of the physician.¹³³

In 1925 the Supreme Court drew back from the *Behrman* holding in *Linder v. United States*, unanimously declaring that:

“[t]he opinion cannot be accepted as authority for holding that a physician, who acts *bona fide* and according to fair medical standards, may never give an addict moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction. Enforcement of the tax demands no such drastic rule, and if the Act had such scope it would certainly encounter grave constitutional difficulties.”¹³⁴

The Court also expressed its view that drug addiction is a disease and that relieving the “conditions incident to the addiction” may be medically appropriate.¹³⁵

In the short span between the *Behrman* and *Linder* decisions, however, the die had been cast and the Court’s reversal had little effect on national drug enforcement policy. The Treasury Department’s punitive enforcement practices were so firmly established by 1925 that “few were willing to challenge Treasury’s actions politically or in court, and the ruling had little real impact.”¹³⁶ The *Linder* decision’s irrelevance is evidence of just how embedded the “anti-drug” sentiment had become in American

¹³⁰ David F. Musto (1999), *op. cit.*, p. 132.

¹³¹ *Id.* at 134.

¹³² Elaine Casey (1978), *op. cit.*

¹³³ *United States v. Behrman*, 258 U.S. 280, 289 (1922).

¹³⁴ *Linder v. United States*, 168 U.S. 5, 22 (1925)

¹³⁵ Eva Bertram, *et al.* (1996), *supra* note 3, at 75.

¹³⁶ *Id.*

politics in such a short time, as the changing social and political climate allowed Congress to expand its police powers to calm the temporary passions of the time. In any event, with the foundation firmly laid the nation embarked on an era of drug prohibition that continues to this day.

DRUG PROHIBITION AND BUREAUCRATIC ENTRENCHMENT

Concerns about the constitutionality and wisdom of the Harrison Narcotic Act continued throughout the 1920s. In 1928, however, the Supreme Court partly settled the issue by specifically upholding the constitutionality of the Act.¹³⁷ By that time there was a widespread national debate about alcohol prohibition, but apart from the continuing controversy between the medical community and the federal government, there was comparatively little national discussion about the Harrison Act.

Heavy enforcement of the Harrison Narcotic Act led to prison overcrowding, however, and to calls for alternatives to imprisonment. By the late 1920s more federal prisoners were being housed for Harrison Act violations than for any other class of offense.¹³⁸ Representative Stephen G. Porter (R-PA), chair of the House Committee on Foreign Affairs, who had emerged as a new leader in the fight against narcotics, took up the idea of creating “federal narcotics farms” where drug addicts convicted under the Harrison Act could be housed and treated for their addiction. President Coolidge signed into law the Porter Narcotic Farm Act in 1929, which established one farm in Lexington, Kentucky and another in Fort Worth, Texas.¹³⁹

The Porter Act of 1930

Following the success of his Narcotic Farm bill, Rep. Porter turned his attention to the creation of a new government agency to take up enforcement of the Harrison Act. It was Porter’s desire to have a separate drug enforcement agency both to streamline the bureaucracy and to represent the United States at foreign conferences. In 1930 Congress thereby established the Bureau of Narcotics, to be housed in the Treasury Department, and Treasury Secretary Andrew Mellon appointed his nephew-in-law Harry J. Anslinger as its first commissioner.¹⁴⁰ Although not fully realized at the time, Anslinger’s appointment was an extremely significant event, as he would go on to become one of the most prominent and influential figures in the history of American drug control policy.

“Reefer Madness”

Marijuana became the next major target of U.S. anti-drug efforts, which was a curious development given the fact that for several years the Bureau of Narcotics had consistently minimized the dangers of the drug.¹⁴¹ Only a decade earlier, the U.S.

¹³⁷ *Nigro v. U.S.*, 276 U.S. 332 (1928).

¹³⁸ *Id.* at 204.

¹³⁹ 21 U.S.C. §§ 221-237 (1934) (repealed 1944).

¹⁴⁰ Alexander T. Shulgin (1988), *op. cit.*, p. 245.

¹⁴¹ With regard to popular accounts of a marijuana threat, the Bureau wrote: “This publicity tends to magnify the extent of the evil and lends color to an inference that there is an alarming spread of the improper use of the drug, whereas the actual increase in such use may not have been inordinately large.”

Agriculture Department had published pamphlets urging Americans to grow marijuana (cannabis) as a profitable undertaking.¹⁴² Narcotics Commissioner Harry Anslinger had stated that heroin was a much greater danger, that marijuana was only a “problem” in areas with large Mexican populations and that marijuana legislation would be most effective at the state level.¹⁴³

A closer look at the behind-the-scenes intrigue involving certain influential Americans in the 1930s reveals how the sudden federal campaign against marijuana was more likely related to economic factors and to commercial interests more than to any legitimate fears over the drug itself. In the 1920s the Du Pont Company had developed and patented numerous petroleum-based products, including fuel additives, chemical processes for the manufacture of paper from wood pulp and numerous synthetic products such as nylon, cellophane and other plastics. At the same time other firms were developing synthetic products from renewable biomass resources, especially from hemp (cannabis). By 1935 raw cellulose from hemp had become a viable option for fuel, fabric and plastics and paper – a cheaper, cleaner and renewable raw material compared to petroleum. Faced with this competition, Lammont DuPont lobbied the U.S. Treasury Department to seek the prohibition of hemp.¹⁴⁴

Business interests of William Randolph Hearst, the newspaper magnate, were also threatened by hemp, as his timber holdings and his joint enterprises with DuPont for wood-based pulp papermaking would have been rendered uncompetitive.¹⁴⁵ Hearst used his chain of newspapers to aggravate racial tensions, portraying Mexicans in particular as lazy, degenerate and violent and as job stealers and smokers of “marihuana” – a word brought into the common parlance due in part to frequent mentions in Hearst’s publications.¹⁴⁶ The aggressive efforts to demonize cannabis were effective, as the sheer number of newspapers, tabloids, magazines and film reels under Hearst’s control enabled him to inundate American media with propaganda. Americans readily accepted the

Federal Bureau of Narcotics (1932), *Report by the Government of the United States of America for the Calendar Year Ended December 31, 1931: On the Traffic in Opium and Other Dangerous Drugs*, Government Printing Office, p. 51.

¹⁴² David F. Musto (1973), “An historical perspective on legal and medical responses to substance abuse,” *Villanova L. Rev.*, v.18, May 1973, p. 816.

¹⁴³ William O. Walker, III (1981), *op. cit.*, p. 103.

¹⁴⁴ See John Craig Lupien (1995), *Unraveling an American Dilemma: The Demonization of Marihuana*, thesis presented to the Faculty of the Graduate School, Pepperdine University, with exhaustive summary and analysis of Record Group 170, Accession Number: W 170-74-005, Boxes 1-5, the “Marihuana Tax Act of 1937” files from the Washington National Research Center, National Archives. See also Chris Conrad (1993), *Hemp: Lifeline to the Future*, Los Angeles: Creative Xpressions Publications; Jack Herer (1991), *The Emperor Wears No Clothes*, Van Nuys: Hemp Publishing; James B. Slaughter (1988), “Marijuana Prohibition in the United States: History and Analysis of a Failed Policy,” *Columbia Journal of Law and Social Problems*, v.21, n.4, pp. 417-474; and Michael Schaller (1970), “The Federal Prohibition of Marihuana,” *Journal of Social History*, v.4, n.1, Fall 1970, pp. 61-74.

¹⁴⁵ In the 1930s a new technique for using hemp pulp for papermaking was developed by the Department of Agriculture, in conjunction with the patenting of the hemp “decorticator,” a revolutionary new technology for harvesting hemp. See “The New Billion Dollar Crop,” *Popular Mechanics*, v.69, February 1938, pp. 238-239; and R. S. Kellogg (1936), *The Story of News Print Paper*, New York: Newsprint Service Bureau, pp. 48-49.

¹⁴⁶ Jack Herer (1991), *op. cit.*, pp. 24-25.

stories of crazed crimes incited by marijuana use, and official accounts of the “evils” of marijuana continue to color popular opinion of the drug today.

The Marihuana Tax Act of 1937

Under pressure to take a stand against marijuana, Harry Anslinger and the Bureau of Narcotics readily changed the agency’s position and sought a means by which to bring the drug under federal control. Passage of a marijuana bill under the treaty power was not feasible since Mexico declined to support a trilateral marijuana pact with the United States and Canada, and it was also unlikely that a revenue measure could provide adequate government control.¹⁴⁷ Therefore, the Bureau conceived the idea of regulating marijuana with a transfer tax, an approach taken in the National Firearms Act, which levied a tax on transfers of machine guns and which had been recently upheld by the Supreme Court.¹⁴⁸

Anslinger and the Bureau of Narcotics drafted the Marihuana Tax Act of 1937 and also worked through the media to create the marijuana “problem,” arguing principally that marijuana use produced insanity and led to violent crime.¹⁴⁹ The Senate report accompanying the bill described the danger as follows:

Under the influence of this drug marihuana the will is destroyed and all power of directing and controlling thought is lost. Inhibitions are released. As a result of these effects, many violent crimes have been committed under the influence of this drug [M]arihuana is being placed in the hands of high school children...by unscrupulous peddlers. Its continued use results many times in impotency and insanity.¹⁵⁰

Despite opposition by the American Medical Association and other moderate voices, the Marihuana Tax Act passed without a recorded vote and after only two hours of debate and was signed into law on October 1, 1937. The measure did not actually prohibit possession or sale of marijuana; rather, any person importing, selling or otherwise handling cannabis was required to register with the government and pay a transfer tax on each transaction. Those without the fiscal transfer stamp could be fined and jailed for up to twenty years.¹⁵¹

Passage of the Marihuana Tax Act cemented the power of Harry Anslinger over the direction of U.S. drug policy and further entrenched the federal government’s authority to regulate “illicit” drugs by any means. Anslinger deflected skepticism and concern about the wisdom of the hard-line policy on marijuana and pressed on for decades with an effective public relations campaign and with vigorous criminal enforcement under the growing arsenal of federal drug laws.¹⁵²

¹⁴⁷ William O. Walker, III (1981), *op. cit.*, p. 103.

¹⁴⁸ David F. Musto (1999), *op. cit.*, p. 222.

¹⁴⁹ Norman E. Zinberg and John A. Robertson (1969), *op. cit.*, p. 178.

¹⁵⁰ *Id.* at 178-179, quoting the U.S. Senate report accompanying the Marijuana Tax Act of 1937.

¹⁵¹ Alexander T. Shulgin (1988), *op. cit.*, p. 245.

¹⁵² Within a year after passage of the Marijuana Tax Act, Harry Anslinger had to rebut New York Mayor Fiorello La Guardia, who had commissioned a team of distinguished scientists to study the effects of

The Boggs Act of 1951

During the Second World War the U.S. experienced a relative decline in levels of use of opiates, cocaine and marijuana.¹⁵³ Some of the decline was due to an acute shortage in opiate supplies, where shipments from opium-producing countries were either cut off or impaired by military actions.¹⁵⁴ The opiate shortage meant, however, that persistent narcotics addicts could no longer easily obtain illicit opiates through medical supply channels as they had before and, where scarcity increased the “street” price, the huge profits in narcotics began to attract criminal enterprises in a burgeoning black market, especially for heroin.¹⁵⁵

In the years immediately following the World War II levels of illicit drug use began to rise steadily once again.¹⁵⁶ This caused concern in the Bureau of Narcotics and resulted in modification in the penalties associated with Harrison Act violations. The Boggs Act, named after Representative Hale Boggs (D-LA), was passed in 1951 and imposed the nation’s first mandatory minimum sentences for drug-related convictions.¹⁵⁷

marijuana. His concern stemmed from the abundance of sensationalistic newspaper accounts that New York’s youth was “teetering on the brink of an orgy of marihuana-induced crime and sex.” Ernest L. Abel (1980) *op. cit.*, p. 249. To Anslinger’s dismay, the findings of the La Guardia Commission contradicted the arguments which the Bureau had presented during its final assault against marihuana. Specifically, the report stated that:

“Marihuana is used extensively in the Borough of Manhattan but the problem is not as acute as it is reported to be in other sections of the United States;

“The distribution and use of marihuana is centered in Harlem;

“The majority of marihuana smokers are Negroes and Latin Americans;

“The practice of smoking marihuana does not lead to addiction in the medical sense of the word;

“The sale and distribution of marihuana is not under the control of any single organized group;

“The use of marihuana does not lead to morphine or heroin or cocaine addiction and no effort is made to create a market for these narcotics by stimulating the practice of marihuana smoking;

“Marihuana is not the determining factor in the commission of major crimes;

“Marihuana smoking is not widespread among school children; and

“Juvenile delinquency is not associated with the practice of smoking marihuana.

“The publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded.” La Guardia Commission (1973 reprint), *The Marihuana Problem in the City of New York*, Metuchen: Scarecrow Reprint Corp., pp. 24-25.

¹⁵³ William O. Walker, III (1981), *op. cit.*, pp. 170-171.

¹⁵⁴ Daniel Glaser, “Interlocking Dualities in Drug Use, Drug Control and Crime,” in James A. Inciardi and Carl D. Chambers, eds. (1974), *Drugs and the Criminal Justice System*, Beverly Hills: Sage, p. 46.

¹⁵⁵ *Id.*

¹⁵⁶ H.J. Anslinger (1951), “The Federal Narcotic Laws,” *Food, Drug, and Cosmetic Law Journal*, v.6, pp. 743-748.

¹⁵⁷ Public Law No. 255, 82nd Cong., approved 2 Nov. 1951. Under the Boggs Act, first convictions carried a mandatory minimum penalty of two years in jail and second or subsequent convictions could not be reduced by suspensions or probation.

Criticism from the Professions

The federal government's continued punitive emphasis began to attract many critics, including the American Bar Association, which succeeded in getting a congressional subcommittee to reexamine the nation's narcotic problem. The American Medical Association joined forces with the ABA in questioning America's drug policies. In response, Senator Price Daniel (D-TX) called for a study of the U.S. approach to the drug problem. The Daniel hearings were held across the country but there were signs that Harry Anslinger and the Bureau of Narcotics were integral in shaping the content and conclusions of those hearings.¹⁵⁸

There was little surprise in 1956 when Daniel's committee concluded that America's drug problem was severe and that drastic punitive measures were justified. In a nine-page report the committee "accused the Supreme Court of permitting major dope traffickers to escape trial by its too-liberal interpretation of constitutional safeguards; it found the Narcotics Bureau could not fight the traffic effectively without being freed to tap telephones; the allowance of bail in narcotics cases was intensifying the flow of drugs into the country; and Bureau agents ought to have statutory authority to carry weapons."¹⁵⁹ It further condemned the notion of drug treatment clinics, and called for increased penalties for drug offenses, including the death penalty for smuggling and heroin sales.¹⁶⁰

The Narcotic Control (Daniel) Act of 1956

The end result of Senator Daniel's work was the Narcotic Control Act of 1956, which passed with very few questions and little dissent. The measure increased both prison terms and fines for violations of narcotics laws and established new mandatory minimum sentences by eliminating suspended sentences, probation and parole. In addition, a provision for imposing the death penalty was added, applying to anyone over eighteen years of age who provided heroin to anyone under eighteen years of age.¹⁶¹ This outcome was not likely what the American Bar Association had intended when it called for a reexamination of the drug laws. Despite these severe measures, illicit drug use increased dramatically into the 1960s.

Drug Abuse Control Act of 1965

America's drug scene changed dramatically in the 1960s. Baby-boomers entered their formative years and the nation was experiencing previously unparalleled economic prosperity, but at the same time the social fabric of America was being torn apart by the conflict in Vietnam. Drugs such as marijuana and heroin once again surged in popularity along with the use of newer drugs such as barbiturates, amphetamines and LSD. Young people were encouraged to "question authority" and the prevailing culture and drug use

¹⁵⁸ Rufus King (1972), *The Drug Hang-Up, America's Fifty Year Folly*, Springfield: Bannerstone House, ch. 14.

¹⁵⁹ *Id.* at ch. 16.

¹⁶⁰ *Id.*

¹⁶¹ Alexander T. Shulgin (1988), *op. cit.*, p. 246.

was a “symbol of rejection of traditional values and patriotism.”¹⁶² Drug policy was deeply ingrained as a major issue of national political concern and even had President Kennedy’s attention.¹⁶³ A report by a Presidential advisory commission in 1963 focused on the dangers of drugs and called for new repressive legislation to fight their spread.¹⁶⁴

The Drug Abuse Control Amendments of 1965 charted a new course in federal drug laws. Under this Act, the Bureau of Drug Abuse Control was established within the Food and Drug Administration (FDA). The FDA assumed responsibility for enforcement of this new law, which in its limited scope covered stimulants and depressants and which “imposed a registration, inspection and record-keeping pattern, covering everyone concerned with the controlled traffic, which closely paralleled the Harrison [Act] requirements.”¹⁶⁵

Despite being hailed as a new front in America’s campaign against illicit psychoactive substances, the 1965 Amendments failed to curb the nation’s appetite for them. In fact, regulations promulgated under the law led to quotas on the number of pharmaceutical methamphetamine tablets that could be produced, thereby limiting supply and spawning a black market in “speed,” marketed at first by the Hell’s Angels motorcycle gang in the 1960s and later by other criminal organizations.¹⁶⁶ The “meth lab” problem plaguing Washington and other western states today is a haunting reenactment of the “speed lab” problem in California in the 1960s, each brought about by the severe restrictions placed on pharmaceutical amphetamines almost 40 years ago.

In 1968 a merger of the FDA’s relatively new Bureau of Drug Abuse Control with Treasury’s old Bureau of Narcotics created a new agency named the Bureau of Narcotics and Dangerous Drugs, housed in the Department of Justice. That same year, Congress made further amendments and modifications to the Harrison Act and, once again, increased penalties for federal law violations.¹⁶⁷

International efforts to control drugs intensified during the 1960s. The black market and trafficking of illicit drugs was taking on added importance in the United States by the end of the decade when “a torrent of Mexican and, to a lesser degree, Colombian marijuana flooded the country.”¹⁶⁸ Heroin was smuggled from Turkey in

¹⁶² David F. Musto (1999), *op. cit.*, p. 248.

¹⁶³ In 1962 President John F. Kennedy, speaking on the issue of consumer protection legislation, remarked that “one problem meriting special attention deals with the growing abuse of non-narcotic drugs, including barbiturates and amphetamines. Society’s gains will be illusory if we reduce the incidence of one kind of drug dependence, only to have new kinds of drugs substituted. The use of these drugs is increasing problems of abnormal and social behavior, highway accidents, juvenile delinquency and broken homes.”

¹⁶⁴ Rufus King (1972), *The Drug Hang-Up, America’s Fifty Year Folly*, Springfield: Bannerstone House, Ch. 26.

¹⁶⁵ Rufus King (1972), *The Drug Hang-Up, America’s Fifty Year Folly*, Springfield: Bannerstone House, Ch. 26.

¹⁶⁶ The record-keeping requirements and restrictions on amphetamine production created shortages that drove up the “street” price high enough to attract criminal organizations to profit from the traffic, as was the case with opiates in the 1940s and 1950s and with alcohol in the 1920s. Richard Davenport-Hines (2002), *op. cit.*, pp. 312-313.

¹⁶⁷ Alexander T. Shulgin (1988), *op. cit.*, p. 247.

¹⁶⁸ *Id.*

massive quantities and by 1970 the United States saw unprecedented levels of heroin use. Drugs were becoming one of the nation's most prominent issues of social concern.

THE MODERN “WAR ON DRUGS”

Under President Nixon's command the U.S. embarked on a new era of drug control. Shortly after assuming office in 1969, President Nixon announced a global campaign to stamp out drugs and drug traffickers. He launched “Operation Intercept” and ordered the closure of 2,500 miles of the Mexican border and searches of hundreds of thousands of people and vehicles.¹⁶⁹ In 1970 Nixon created the National Commission on Marijuana and Drug Abuse and in 1971 he declared drugs to be “public enemy number one.” These actions marked the initiation of the national and international “War on Drugs.”

The Comprehensive Drug Abuse Prevention and Control Act of 1970

The Controlled Substances Act of 1970 was another historic turning point in America's attitude and approach to regulating illicit drugs.¹⁷⁰ This Act completely replaced the Harrison Narcotic Act as the federal government's primary vehicle of domestic drug control. It reformed all previously existing drug laws under the federal power to regulate interstate commerce and introduced a system by which drugs were divided into categories depending upon their potential for abuse. One immediate impact of this act was to “effectively destroy the Federal-State relationship that existed between the Harrison Act and the Uniform Narcotic Drug Act.”¹⁷¹ To restore this balance the Commissioners on Uniform State Laws created the Uniform Controlled Substances Act.¹⁷² This scheme of complementary federal and state drug control laws soon became the national standard.

The “War on Drugs” came of age in the 1970s as President Nixon declared “total war...on all fronts against an enemy with many faces,”¹⁷³ a thinly-veiled reference to counter-culture protesters and racial minorities.¹⁷⁴ Nixon exhibited personal anger toward drug users in America and “as a puritan and as a man perennially frustrated with his circumstances ...detested the hedonism and easy gratification of many young people.”¹⁷⁵ This sentiment was reflected in some of the heavy-handed drug policies the Nixon administration pursued, although there was also a major thrust at the time to address the heroin addiction problem through treatment.¹⁷⁶ The federal bureaucratic mechanism for drug control was strengthened under Nixon as Congress consolidated all anti-drug activities under the new Drug Enforcement Agency in 1973.

¹⁶⁹ Richard Davenport-Hines (2002), *op. cit.*, p. 422.

¹⁷⁰ Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1236.

¹⁷¹ Alexander T. Shulgin (1988), *op. cit.*, p. 247.

¹⁷² *Id.*

¹⁷³ Richard Davenport-Hines (2002), *op. cit.*, p. 421.

¹⁷⁴ See Dan Baum (1996), *Smoke and Mirrors: The War on Drugs and the Politics of Failure*, New York: Little Brown and Co.

¹⁷⁵ *Id.*

¹⁷⁶ See Jerome H. Jaffe, “One Bite of the Apple: Establishing the Special Action Office for Drug Abuse Prevention,” in David F. Musto, ed. (2002), *op. cit.*, pp. 43-53.

The federal approach toward illegal drugs took on a slightly different tenor during the brief administration President Ford, who expressed some pragmatism about drug use. While Ford did continue to press for stronger anti-drug measures, he did so from a perspective that drug abuse was always going to be a problem and that hopes of completely eliminating it were illusory.¹⁷⁷ This new attitude was also reflected during the Carter administration, as President Carter expressed concerns about current drug policies and even suggested that marijuana should be decriminalized.¹⁷⁸ This suggestion never made its way into federal law, however, and before long, any perceived softening of attitudes towards drug use quickly dissipated.

Out of the maelstrom of Vietnam, Watergate, oil embargoes and “stagflation” in the late 1970s, popular fears rose once again to dictate national drug policy as the political center of gravity was moving back to the right. The infamous drug cartels from Colombia were becoming a fixture in international politics and trade, and parents were becoming more concerned about drug use by their pre-teen and teenage children. President Ronald Reagan came to office with an attitude toward illicit drugs that was reminiscent of the Nixon years. Nancy Reagan’s “Just Say No” campaign swept the nation in the 1980s and was very popular with parents, schools and the media. Reagan also supported a strong law enforcement approach to drug control and even replicated some of the tactics used earlier during the Nixon administration.¹⁷⁹

The Comprehensive Crime Control Act of 1984

In 1984 Congress amended the Controlled Substances Act in various ways, including providing for scheduling of certain “designer drugs,” for government seizure of profits derived from criminal acts and for temporary placement of substances into Schedule I of the CSA without the usual procedural requirements when required to avoid an imminent public safety hazard.¹⁸⁰ By this time, a new “menace” was emerging on the national scene in the form of crack cocaine. Images of street gangs, inner city violence and the growing threat of a deadly new disease called AIDS were creating fear across all across the nation and having a profound influence on public perceptions of drugs. In 1986 a college basketball star, Len Bias, died suddenly from a suspected cocaine overdose and the furor over cocaine and other drugs became front-page news.

¹⁷⁷ David F. Musto (1999), *op. cit.*, p. 257. It was during the Ford administration that the Domestic Council Drug Abuse Task Force released its *White Paper on Drug Abuse*, which recognized that governmental actions could only hope to contain the problem of drug abuse and that total elimination was an unlikely prospect. See Domestic Council Drug Abuse Task Force, *White Paper*, September 1975, p. 97-98.

¹⁷⁸ In a message to Congress, President Carter stated that “penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself; and where they are, they should be changed.” Quoted in David F. Musto (1999), *op. cit.*, p. 261.

¹⁷⁹ In 1982 the White House launched a coordinated effort in South Florida to fight illegal drugs entering the state. The government spent millions to seize over 30 tons of cocaine and 1500 tons of marijuana between 1983 and 1985. Richard Davenport-Hines (2002), *op. cit.*, p. 437. Despite this massive interdiction, drug use was estimated by the DEA to have increased substantially during that time. Yet, while more money was appropriated for law enforcement, funding for treatment and research declined. David F. Musto (1999), *op. cit.*, p. 267.

¹⁸⁰ See Pub. L. No. 98-473, Oct. 12, 1984, 98 Stat. 1976; Alexander T. Shulgin (1988), *op. cit.*, p. 250.

The Anti-Drug Abuse Act of 1986

In 1986 President Reagan signed the Anti-Drug Abuse Act of 1986¹⁸¹ and intensified the federal government's campaign against drugs and the bipartisan support for tough new penalties for drug law violators was partly a reaction to the overdose death of Len Bias. Passed with a nearly unanimous vote, the Act instituted five- and ten-year mandatory minimum sentences and also the possibility of the death penalty for certain drug offenses.

The Anti-Drug Abuse Act of 1988

The White House Office of National Drug Control Policy (ONDCP), an Executive branch office, was created with passage of the Anti-Drug Abuse Act of 1988.¹⁸² This measure was directed toward preventing the manufacture of scheduled drugs and included increased penalties to further discourage drug use. In passing this legislation, Congress avowed that, "the legalization of illegal drugs, on the Federal or State level, is unconscionable surrender in a war in which...there can be no substitute for total victory," and that "it is the declared policy of the United States Government to create a drug-free America by 1995."¹⁸³ Despite billions of dollars in spending and the incarceration of tens of thousands of drug offenders, this goal was never attained.

The "War on Drugs" into the 21st Century

Drug-related law enforcement activity and the increasing incarceration of drug offenders did not slack off during the 1990s, when "illicit" drug use was on the rise again. In fact, the last decade of the 20th century saw unprecedented law enforcement activity related to illegal drugs. Unfortunately, the increasing arrest and incarceration of drug offenders and the lengthening of prison sentences during the 1990s failed to reduce the prevalence of drug use, the problem of drug abuse, the incidence of drug offenses and drug-related crime and the related public costs.¹⁸⁴

Recent rehabilitative options for drug offenders have largely been a reaction to the perceived ineffectiveness of criminal sanctions. Some encouraging reports have come from the nation's new "drug courts," which have been shown to reduce recidivism and prohibited drug use among their participants.¹⁸⁵ Meanwhile, the vast majority of drug offenders at the state and federal levels continue to serve long prison terms, most without any rehabilitative component to their sentences, as taxpayers continue to spend hundreds of millions of dollars annually to confine repeatedly a class of non-violent offenders who have the highest recidivism rate because of their drug dependence. As the King County Bar Association stated in 2001, "The cost of drug-related criminal sanctions has been high, but the promised benefit of this policy has not been realized."¹⁸⁶

¹⁸¹ Pub. L. No. 99-570, Oct. 27, 1987, 100 Stat. 3207.

¹⁸² Pub. L. No. 100-690, Nov. 18, 1988, 102 Stat. 4181.

¹⁸³ Alexander T. Shulgin (1988), *op. cit.*, p. 250.

¹⁸⁴ See King County Bar Association (2001), *Is It Time to End the War on Drugs?*, *op. cit.*, pp. 59-65.

¹⁸⁵ See discussion of drug courts in King County Bar Association (2005), "Controlling Psychoactive Substances; The Current System and Alternative Models," *Report of the Legal Frameworks Group to the King County Bar Association Board of Trustees*, pp. 13-14.

¹⁸⁶ King County Bar Association (2001), *op. cit.*, p. 65.

The Legacy of Drug Prohibition

The unfortunate legacy of the recent federal drug laws includes a five-fold increase in federal drug convictions since the 1970s and over 67,000 sentenced drug offenders in federal prison in 2001, compared to 3,400 in 1970, where drug offenders now comprise over 55% of the federal prison population.¹⁸⁷ Meanwhile, high school seniors report that marijuana is easier to get now than it was during most of the 1980s and 1990s and more high school students use marijuana than tobacco.¹⁸⁸ In addition, heroin is also easier for high school student to obtain than it was in the 1970s and 1980s and one in three high school seniors say that it is now easy to get cocaine, crack or LSD.¹⁸⁹ Further, the death rate from the use of illegal drugs has more than doubled from 3.0 per 100,000 in 1980 to 7.2 per 100,000 in 2000.¹⁹⁰ As the purity of street drugs increases and prices continue to fall, there are signs that the criminal enterprises trafficking in drugs are becoming more efficient, selling a better product for less.¹⁹¹ The tragic failure of federal drug policy has finally led to calls for fundamental reform.

¹⁸⁷ *Sourcebook of Criminal Justice Statistics* (1997), Bureau of Justice Statistics, Washington: Department of Justice, table 5.37 p. 414; *Sourcebook of Criminal Justice Statistics* (2001), Bureau of Justice Statistics, Washington: Department of Justice, table 5.19, p. 416, and table 6.51, p. 512.

¹⁸⁸ Johnston, L. D., O'Malley, P. M., & Bachman, J. G. (2003). *Monitoring the Future National Survey Results on Drug Use, 1975-2002*, NIH Publication No. 03-5375, Bethesda: National Institute on Drug Abuse, v.I, table 13.

¹⁸⁹ *Id.*

¹⁹⁰ Office of National Drug Control Policy (2003), *National Drug Control Strategy*, Feb. 2003, table 25.

¹⁹¹ The purity of drugs on the street has increased dramatically. The average purity of the heroin sold on the street has increased more than 500% since 1979, from 4% pure to 25% pure, and the prices for illegal drugs have steadily declined. See Office of National Drug Control Policy (2003), *National Drug Control Strategy*, Feb. 2003, table 41.