The "Drug Evil":
Narcotics Law, Race, and the Making of America's Composite Penal State

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Dissertation

Submitted to the Faculty of the

Graduate School of Vanderbilt University

in partial fulfillment of the requirements

for the degree of

DOCTOR OF PHILOSOPHY

in

History

December, 2016

Nashville, Tennessee

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INTRODUCTION

During the spring and summer of 1913, lawmakers in Washington turned their attention to "the opium evil" as never before. Preparing for the Second International Opium Conference, to be held in July at The Hague, President Woodrow Wilson and Secretary of State William Jennings Bryan requested that Congress appropriate $20,000 to fund the U.S. delegation. Both thought the "abolition of the opium evil" of paramount importance, Wilson contending that this "vice" had caused "world-wide misery and degradation." For his part, Bryan lauded the U.S.'s leadership in organizing a global response to opium. He reminded Congress that the United States had raised the call that led to the first international opium commission, held in Shanghai in 1909. Despite that point of pride, though, he identified "one feature of the international and national effort" to suppress "the opium evil" that Americans should find "disquieting." While international organization against narcotics had led other counties to improve their domestic legislation, Congress had not yet made such a move. Writing in April, Bryan claimed that several bills would soon come before the national legislature. He stressed that enactment of these measures was necessary to place "this Government on a rightful position before the world."[1]

Two months later, Representative Francis Harrison, a Democrat from New York whom Wilson would appoint Commissioner General of the Philippines before the close of the year, introduced the narcotics bill that has ever since borne his name. After Congress passed it, 18 months later, the Harrison Narcotics Act established a registration and taxing scheme that limited the parties that could traffic licitly in opium, cocaine, and their derivatives.[2] While Bryan had

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[1] Comm. on Appropriations, *Abolition of the Opium Evil*, H.R. Rep. 63-33 (1913), 1-2, 5.
[2] The legal and political project I describe in this study is, in part, a story of how government actors came to define the term "narcotic." I use it to refer to the substances that policymakers then, as now, commonly subsumed under

emphasized China's opium problem, Harrison, in June 1913, argued that narcotics represented a domestic threat. He insisted that the country had seen an increase in narcotics imports that far outstripped its population growth, dismissing one explanation for the substances' increased presence in the U.S. He described an "almost shameless traffic in these drugs," explained that drug use had foist new "criminal classes" as well as "moral and economic degradation" on the country, and concluded that the U.S. had become "an opium-consuming nation."[3]

In urging passage of his bill, Harrison made a pair of concessions about federal anti-narcotics legislation. Importantly, he acknowledged that federal action followed on "strenuous efforts" already made by many state governments to "prevent the indiscriminate sales of narcotics." Indeed, he noted that "most" states had already enacted drug control laws. He pitched his bill as "aid" to the states. He also implicitly acknowledged, though, that Congress lacked the power to pass a control law modeled directly on the states' pharmacy laws. After five years of discussion among state and federal policymakers, Harrison explained, a consensus had emerged: "Only by customs law and by the exertion of the [f]ederal taxing power" could "the desired end be accomplished." He thus highlighted a key dilemma of federal power over drugs: The porousness of state borders made a federal law necessary to address domestic trafficking, but the Constitution left Congress few options to address narcotics commerce.[4]

Lawmaker and public discussions like these, about whether and how to criminalize narcotics, reveal the coexistence of two powerful and widely-held beliefs in the turn-of-the-century United States. On the one hand, as Bryan's repeated reference to the opium problem in

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that heading, including opium, cocaine, and their derivatives. As others have noted, the term is a legal construct; cocaine, pharmacologically, is a stimulant and not a narcotic. See Hardin B. Jones and Helen C. Jones, *Sensual Drugs: Deprivation and Rehabilitation of the Mind* (Cambridge, UK: Cambridge University Press, 1978), 93.

[3] *Abolition of the Opium Evil*, 4-5; Comm. of the Whole House on the State of the Union, *Registration of Producers and Importers of Opium, Etc.* H.R. Rep. 63-23 (1913), 1-2; *Los Angeles Times*, August 21, 1913.

[4] *Registration of Producers and Importers of Opium*, 1, 3.

China suggested, many white Americans viewed the immigrants coming to the United States—as well as the country's long-resident black population—with suspicion.[5] The Civil War amendments had, after all, only recently granted formal citizenship both to the American-born children of immigrants as well as to all African Americans.[6] That fact, coupled with the growth of visible non-white enclaves in cities across the county, led to regionally-specific discussions of, to use but two examples, the "Chinese question" and the "negro problem."[7] In the decades before and after the turn of the twentieth century, white Americans raised numerous complaints about racial minorities and immigrants. They searched for responses to the non-whites they described as criminals, as labor competition, and as the potential ruin of white, middle-class womanhood.[8]

On the other hand, through much of the period, many Americans expressed a commitment to limited government. As for the central state, founded on principles of classical

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[5] The assumption of an unchanging "white" race has been discredited in recent decades. See David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (London: Verso, 1999); Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge: Harvard University Press, 1999); and Ian Haney-López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 2006). Considering this scholarship alongside documents from the late nineteenth and early twentieth centuries, I am convinced of two things. First, "white" was an imprecise descriptor for many Americans who claimed its mantle. Second, Americans believed a white race existed and positioned members of that race against the Chinese-descended persons and African Americans who were the subject of much turmoil at the time. It is in this sense that I use the term "white" throughout this study.

[6] U.S. Const. amend. XIV, sec. 1. The U.S. Supreme Court definitively settled the question of whether the U.S.-born children of Chinese subjects became citizens at birth in *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898).

[7] By the 1850s, Californians referred to debates over Chinese immigration as the "Chinese question." The term encompassed whether and how to stop immigration as well as how to address the immigration that had already occurred. See *Daily Alta California*, May 1, 1852; August 26, 1854. For a pamphlet on the issue, see J. G. Kerr, *The Chinese Question Analyzed*, xF870.C5.K4, Chinese in California Collection, The Bancroft Library, University of California, Berkeley. For a response from Chinese Californians, see Augustus Layres, *Facts Upon the Other Side of the Chinese Question*, BANC xF870.C5.C51 v.1:8, Chinese in California Collection, The Bancroft Library, University of California, Berkeley. The press, especially but not exclusively in the South, made repeated reference to the "negro problem" in the decades on either side of the twentieth century. See, for but two of many examples, *Atlanta Constitution*, February 27, 1909; July 12, 1909.

[8] For a discussion of how "blackness was refashioned through crime statistics," see Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge: Harvard University Press, 2010), 5. For a demonstration of labor's attitude toward Chinese immigrants, see American Federation of Labor, *Some Reasons for Chinese Exclusion: Meat vs. Rice, American Manhood against Asiatic Coolieism: Which Shall Survive?*, 57th Cong., 1st sess., 1902, S. Doc. 137. For an argument that anti-miscegenation laws aimed to protect white womanhood from the threats of Asian-descended and African American men, see Peggy Pascoe, *What comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009), 85-104.

liberalism and constrained by federalism and a separation of powers, they viewed it as wielding only carefully-circumscribed powers.[9] Though policymakers and the public recognized that local and state governments enjoyed more capacious authority, many Americans continued to embrace a set of long-cherished personal freedoms on which even local and state authorities could not infringe.[10] Reservations about enhanced government power were not universally held, of course. Reform movements alive and well during this period often sounded calls for greater exercises of power by the states and the national government.[11] Still, the question of how local, state, and federal governments with limited powers could develop a satisfactory response to the immigrants and African Americans that so troubled the white public proved a subject of no little debate.

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[9] On Americans' antipathy toward a strong central government before, during, and after the Revolution, see Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York: Oxford University Press, 2003), 8-10. Edling explains that "nowhere in the Old World were the stakes against the strengthening of the state raised higher than in the United States," and he argues that this "strong anti-statist current in American political culture meant that popular acceptance of a powerful state could only be secured if the Federalists" could demonstrate "that it was possible to create a state that was powerful yet able to respect popular aversion to government." On the framers' efforts to balance demands for popular sovereignty against their fear of "excessive democracy," see Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005), 31-5. For an argument that opposition to a strong central state led the framers to define in limited terms the federal government's powers and that the national state's "liberal inheritance" continued to circumscribe its actions "into the twentieth and even the twenty-first century," see Gary Gerstle, *Liberty and Coercion: The Paradox of American Government* (Princeton: Princeton University Press, 2015), 21, 123. Brian Balogh has argued that, in the nineteenth century, the national state governed differently, but not necessarily less, than the central states of other western countries. By, for instance, funding private groups and partnering with local or state governments, it accomplished much while abiding constitutional limitations and Americans' preference for the federal government to take a back seat to local and private actors. Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009).

[10] One of the most widely-read treatises on government power in the nineteenth century, indeed, argued that even the states lacked the power to do more than "provide for the public order and personal security by the prevention and punishment of crimes and trespass." Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (St. Louis: The F.H. Thomas Law Book Co., 1886), vi.

[11] Indeed, the period saw a number of different reform movements insist that more coordinated government action was necessary in light of the dangers of industrial capitalism, the shift from an agricultural to an industrial economy, and the social conditions of life in crowded, diverse cities. For arguments concerning the influence of the legal system on the reform politics of labor leaders and the movement away from free labor ideology occasioned by the numerous industrial accidents in turn-of-the-twentieth-century America, see, respectively, William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991); and John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge: Harvard University Press, 2004). For an argument that Populists embraced a modernizing vision of America that saw value in a strengthened national government, see Charles Postel, *The Populist Vision* (New York: Oxford University Press, 2007). For studies of the demands progressives made of government, and the opposition they faced to some of their agenda, see Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Belknap, 1998); and Michael Willrich, *Pox: An American History* (New York: Penguin Press, 2011).

The history of early narcotics criminalization in the United States—at the local, state, and federal levels—demonstrates that the passage of new criminal laws played a central role in reconfiguring both state power and citizenship for a modern, urban, and diverse country. Beginning in the closing decades of the nineteenth century, policymakers at all levels of government determined to criminalize narcotics and to fine and incarcerate offenders. They did so in direct response to the Chinese immigrants who had entered the country before the Exclusion Act as well as the racial minorities, notably African Americans, who had long been present. Further, those charged with implementing municipal, state, and federal drug statutes bore that impetus in mind as they enforced the laws. To control these populations, then, policymakers started the work of erecting a multi-jurisdictional and layered penal state; consequently, close attention to efforts against narcotics during this period offers a potent demonstration of how lawmakers folded racism and xenophobia into formal law.

Despite the racialized motivation that underlay narcotics criminalization and the wide calls for formal responses to these very groups, state and federal legislation to make drugs illicit led to considerable handwringing. There remained much consternation about the growth of state power that effective narcotics control would require. In particular, Americans' longstanding commitment to liberalism and federalism led many in Congress to question the assertion of power involved in federal drug legislation. The same concerns motivated a number of Supreme Court justices to work for more than a decade to invalidate the Harrison Narcotic Act once Congress passed it in December 1914.[12] Aside from doubts concerning the central state's basis of

[12] By "liberalism," I mean the political philosophy that became dominant in the U.S. in the closing decades of the eighteenth century, that "spawned a new series of reinforcing routines constitutive of a market society," and that embraced "social and economic individualism, the protection of property, a filtered democracy," and, importantly, "a hobbled state." Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge, UK: Cambridge University Press, 1993), 26. On the importance of liberalism at the founding, see Andreas Kalyvas and Ira Katznelson, *Liberal Beginnings: Making a Republic for the Moderns* (New York: Cambridge University Press, 2008). On the origins of American federalism and for an argument that founding-era Americans saw the

authority to pass this law, groups of Americans also resisted federal agents' investigative techniques as overstepping constitutional limits. Still others found relief in the separation of powers, locating in the federal judiciary a means to avoid deportation for their violations of narcotics laws.[13] Though Congress criminalized narcotics in part to respond to the racial anxieties of the white public, policymaker and public animus toward immigrants and minorities did not lead inexorably or smoothly to a unified political response.

Unlike most scholarly accounts of early drug criminalization and, indeed, of the growth of American state power, this study examines in detail how subnational governments grew their power through their construction of criminal justice systems.[14] Local and state governments, which acted on the basis of their relatively broad police powers, faced less opposition when they criminalized narcotics. Nonetheless, their early efforts to pass drug possession laws raised the hackles of some policymakers, who viewed the private use and possession of narcotics to be firmly within Americans' individual liberties and protected from state interference. Even if these policymakers had some disdain for drug use, they believed it beyond the power of the states to reach. Though white Americans' desire for responses to immigrants and racial minorities ran deep, so too did their wish to maintain at least some limits on government power.[15]

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coexistence of multiple layers of government as a virtue, see Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge: Harvard University Press, 2011). On the relationship between and among founding-era liberalism and the social-democratic and state-centered liberalisms of the twentieth century, see Gary Gerstle, "The Protean Character of American Liberalism," *American Historical Review* 99, no. 4 (Oct. 1994): 1043-1073.

[13] For another study that sees in the federal judiciary and the balance of powers a source of relief for some would-be deportees from the harshness of federal immigration law, see Lucy Salyer, *Laws as Harsh as Tigers*: *Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995).

[14] Which is not to suggest a complete absence of scholarship on criminal justice at the subnational level in the late nineteenth and early twentieth centuries. For examples, see Jeffrey S. Adler, *First in Violence, Deepest in Dirt: Homicide in Chicago, 1875-1920* (Cambridge: Harvard University Press, 2006); Kali N. Gross, *Colored Amazons: Crime, Violence, and Black Women in the City of Brotherly Love, 1880-1910* (Durham: Duke University Press, 2006); and Cheryl D. Hicks, *Talk with you Like a Woman: African American Women, Justice, and Reform in New York, 1890-1935* (Chapel Hill: University of North Carolina Press, 2010).

[15] For discussions of the origins of the states' police power, see Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005); and Christopher Tomlins, "The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding

How these two interests collided at the turn of the twentieth century is the subject of this study. It offers the first detailed look at the state-building that accompanied early narcotics criminalization as well as the objections lawmakers offered against that growth in state power. It begins with the earliest, local efforts to address narcotics use legally, and it concludes at the dawn of the 1930s, as Congress formed the Bureau of Narcotics—the agency that would oversee drug law enforcement for four decades.[16] Well before 1930, limits on government power that once prevented local and state lawmakers from proscribing possession had faded as a basis to challenge such legislation. By then, most states had added possession clauses to their criminal codes and regulated a broad list of substances.[17] As for the federal government, it also erected a narcotics control apparatus. Though some argued that Congress lacked a constitutional basis to criminalize drugs, it combined a taxing scheme with evidentiary rules to restrict commerce in, as well as possession of, narcotics.[18] The scope and limits of federal authority, though, resulted in a legal framework both more capacious and constrained than those adopted by the states. If, for example, federal agents, limited by the Fourth and Fifth Amendments, operated under greater restriction when they investigated suspects, the central state also had at its disposal a penalty—deportation for non-citizens—not available to local or state officers.[19] The desire to police racial minorities and immigrants impelled state growth, in other words, but constitutional and traditional limits shaped the more powerful state that emerged.

Era to *Lochner*," in *Police and the Liberal State*, Markus D. Dubber and Mariana Valverde, eds. (Stanford: Stanford University Press, 2008): 33-53. Both see the police power as descended from earlier conceptions of sovereignty.

[16] Congress approved the law creating the Bureau of Narcotics in June 1930. 46 Stat. 585. For a biography of Harry Anslinger, who led the Federal Bureau of Narcotics for 32 years, see John C. McWilliams, *The Protectors: Harry J. Ansligner and the Federal Bureau of Narcotics* (Newark, DE: University of Delaware Press, 1990).

[17] For a helpful overview of the variety of laws state governments passed in the opening decades of the twentieth century, see United States Public Health Service, *State Laws Relating to the Control of Narcotic Drugs and the Treatment of Drug Addiction* (Washington: Government Printing Office, 1931).

[18] The relevant federal statutes are the Harrison Narcotics Tax Act, 38 Stat. 785 (1914), and the Revenue Act of 1918, 40 Stat. 1057 (1918).

[19] Immigrants viewed deportation as a punishment, though the Supreme Court disagreed. It contended "deportation [was] not a punishment for crime" but a "method of enforcing the return to his own country of an alien who [had] not complied with the conditions" of his residence. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

By increasing government power to respond to racial minorities and immigrants, moreover, policymakers dramatically altered the relationship between citizen (and, importantly, resident) and state. Over the sixty-year period included in this study, Americans found a growing list of substances and set of practices outlawed. They faced an increasingly complex web of local, state, and federal laws and penalties. And the law enforcement forces that watched over the American populace, and the investigative techniques to which that populace found itself subject, multiplied dramatically. Through narcotics restriction, criminal law at the local, state, and federal levels expanded and came to comprise an ever-more prominent means of removing unworthy citizens and residents from the general public. As this study demonstrates, there were points of both overlap and cooperation between and among these criminal justice regimes that rendered them all the more coercive. As such, lawmaker determination to criminalize narcotics played a key role in ushering in the American penal state—a term I use to refer both to the more powerful and centralized state governments and to the stronger federal government that emerged as a result of narcotics criminalization as well as the ways in which government at all levels constituted a composite criminal justice force. By 1930, the justifications policymakers offered for these changes would yield wide public acceptance of the penal state, eclipsing older views of the appropriate bounds of both state and federal authority.

Race and Citizenship

A key starting point for this study lies in the observation made by other scholars that racial animus motivated early anti-narcotics law. In their path-breaking studies of marijuana prohibition in the early 1970s, for one example, Richard Bonnie and Charles Whitebread identify anti-Mexican sentiment as a key impetus of marijuana proscription between 1915 and 1930.

During these decades, they explain, Mexican-descended populations boomed in the U.S. West, where, they conclude, marijuana's perceived Mexican use sufficed to warrant prohibition. In his history of narcotics control in the U.S., for another example, David Musto notes that in the nineteenth century the American public associated addicts "with foreign groups and internal minorities who were already actively feared," facilitating state action.[20] Later studies, too, have noted that anti-immigrant and racial animus contributed to legislators' determination to criminalize drugs in the decades before and after the turn of the twentieth century.[21]

Wanting in these accounts has been a close examination of precisely *how* lawmakers at each level of government capitalized on popular racism and xenophobia to pass their criminal statutes and ordinances. In a country as demographically diverse and geographically large as the late-nineteenth and early-twentieth century United States, after all, it would certainly be a surprise to find policymakers reflexively turning to the same strategy and deploying it in identical ways. And, in a federal system with government power widely dispersed among many actors, one should expect variation in the groups on which policymakers focused as well as in their commitment to using anti-narcotics law to police minorities and immigrants. This study moves past the observation that anti-immigrant and racial animus motivated early drug law by assessing how lawmakers and government employees refashioned state power to fulfill that purpose.

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[20] Richard J. Bonnie and Charles H. Whitebread II, "The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition," *Virginia Law Review* 56, no. 6 (October 1970): 971-1203, 971, 1011-16 (1970); David F. Musto, *The American Disease: Origins Of Narcotic Control* (New Haven: Yale University Press, 1973), 5-6.

[21] David T. Courtwright, *Dark Paradise: Opiate Addiction In America Before 1940* (Cambridge: Harvard University Press, 1982), 63-4 (arguing that, before 1870, smoking opium in the U.S. remained limited to areas of Chinese settlement); Joseph Spillane, *Cocaine: From Medical Marvel To Modern Menace In The United States, 1884-1920* (Baltimore: Johns Hopkins University Press, 1999), 91-5 (noting that an association of cocaine with African Americans prompted several states' first anti-cocaine laws); and Doris Marie Provine, *Unequal Under Law: Race in the War on Drugs* (Chicago: University of Chicago Press, 2011), 63-90 (describing how drug users became seen as "socially marginal" in the early-twentieth century anti-narcotics campaigns).

It makes three methodological moves to illuminate how anti-narcotics law intersected with government power, on the one hand, and racial and anti-immigrant hostility, on the other. First, it describes in detail both how policymakers invoked matters of race and immigration when they considered anti-narcotics law as well as what they hoped to gain from criminalization. In so doing, it makes clear that lawmakers at all levels of government endeavored to use drug law to police racial minorities and immigrants. Attention to lawmakers' professed aims for anti-narcotics laws, in turn, exposes gaps between the laws they passed and racialized goals they professed. In chapter two, for example, I argue that the public and lawmakers in Georgia expressed their greatest anxieties over cocaine use when they discussed its consumption by African Americans. Nevertheless, Georgia's early anti-narcotics laws targeted acts by druggists and physicians. Such disjuncture between expressed aim and political and legal response reveals how limits on policymakers' power, as well as lawmakers' reluctance to expand their authority, shaped the criminal apparatus they constructed.

Second, to account for how racial and anti-immigrant animus fueled early action against drugs, this study examines developments on the national and subnational levels.[22] While Congress and federal officials remain important parts of the story, local and state laws also feature prominently. To assess the role that local and state actors and laws played in narcotics criminalization, and cognizant of claims that hostility to Chinese immigrants fueled opium laws and that anti-black racism drove cocaine proscription, I opted to study these developments in the two states—California and Georgia—that had, respectively, the largest Chinese-descended and African American populations at the time.[23] I did so in the belief that these states' large minority

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[22] My blending of developments on the local and state levels with actions taken by the central state borrows its approach from Peggy Pascoe's study of anti-miscegenation law in the United States. Pascoe, *What Comes Naturally*.
[23] U.S. Census Bureau, *Twelfth Census of the United States Taken in the Year 1900* (Washington: United States Census Office, 1901), 482-83. In 1900, California had 45,753 persons of Chinese descent living in the state, while

populations may have led lawmakers to discuss them with greater regularity. Such discussions, I suspected, would offer the source material to move beyond simply identifying instances of racial and anti-immigrant animus and allow me instead to probe how lawmakers angled to use narcotics criminalization to respond to these groups.

Third, this study looks beyond statehouses and Washington to see how other government employees and law enforcement personnel understood their tasks. In their letters and statements, as well as in their enforcement records, these officials advanced their own views of whether and how to use anti-narcotics laws to police racial minorities and non-citizens. Attention to the perspectives of these employees reveals that animus to particular, vulnerable minorities motivated drug law enforcement long after it catalyzed the laws' passage.[24]

From the outset of their attention to opium in California and to cocaine in Georgia, lawmakers were motivated by anti-Chinese and anti-black animus, respectively. More than a decade after the Board of Supervisors in San Francisco passed what may have been the country's first opium den ordinance, for instance, it issued a report that assessed conditions in the city's Chinese district. That report concluded that stricter enforcement of the opium den ban might discourage future immigrants from journeying to California and also lead some Chinese Californians to repatriate.[25] Lawmakers in Georgia left a less robust record than those in

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Georgia had 1,035,037 African Americans living in the state. Of Georgia's role in black history, W. E. B. Du Bois once wrote that, in many respects, " the Negro problems" of the United States "have seemed to be centered in this state." W. E. B. Du Bois, *The Souls of Black Folk*, repr. (New York: Simon & Schuster, 2005), 110.

[24] See, for instance, my discussion in chapter four of the letters and statements made by narcotic agents when the federal Board of Parole sought their feedback about the possible release of a federal penitentiary inmate.

[25] Willard B. Farwell and San Francisco Board of Supervisors, *The Chinese at Home and Abroad, Together with the Report of the Special Committee of the Board of Supervisors on the Condition of the Chinese Quarter of that City* (San Francisco: A.L. Bancroft & Co., 1885), 67. In discussing Chinese immigrants, I follow Mae Ngai's lead (though she prefers the term "migrants"), relying on country of origin as a means of identification. The presence of U.S.-born, Chinese-descended, American citizens in subsequent generations renders the term a poor descriptor for later groups. To avoid repeating "persons of Chinese descent" ubiquitously, I use the term "Chinese Californians" to describe all persons of Chinese descent resident in California. Unlike Ngai, I do not use the term "Chinese American," because I wish to acknowledge that Chinese immigrants at this time were denied the right to naturalize

California, but municipal and state leaders' first efforts there to rein in cocaine sales and consumption dovetailed with the rise of public attention to black cocaine use. Atlanta passed the first law in the state to regulate cocaine sales in April 1901, for instance, following on more than a year of regular press accounts tying black cocaine use to acts of criminality on the city's much-maligned Decatur Street.[26] In state legislatures and local governments, then, it is possible to see clear evidence of the link between racial minorities and immigrants, on the one hand, and narcotics criminalization, on the other.

It is also possible to uncover the methods that local and state lawmakers used to target Chinese opium smokers and black cocaine users. Legislators in California began with opium den ordinances, striking at drug commerce and sales that occurred in an open and public forum. They later passed laws regulating pharmacists' and physicians' practices with opium and other narcotics and then, in 1909, enacted a statewide law prohibiting narcotics possession. Enforcement records make clear that police in California used the law to target possessors, peddlers, and users of Chinese descent almost exclusively.[27] Through the mid-1930s, on the other hand, Georgia law included no provision for the arrest of the casual cocaine user; local and state lawmakers focused their responses to cocaine on peddlers, druggists, and physicians. Nonetheless, arrest records make clear that law enforcement personnel charged large numbers of black users with vagrancy, public intoxication, and other minor crimes.[28] Authorities in

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and become U.S. citizens. Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004), xx.

[26] City Council Minutes and Index, Volume 19, Page 79, Line 18, Atlanta City Council and Board of Alderman Records, Row 5, Section C, Shelf 5, City of Atlanta Records, Atlanta History Center; *Atlanta Constitution*, February 7, 1900; November 12, 1900; November 28, 1900; December 3, 1900; December 15, 1900; February 5, 1901.

[27] During the year that ended June 30, 1911, for instance, the Board of Pharmacy brought 112 possession cases, 103 of which named Chinese-descended persons as defendants. Report of the California State Board of Pharmacy for Fiscal Year Ending June 30th, 1911, Governor's Office Records, California State Archives Inventory No. 4, California State Archives.

[28] For only a handful of press accounts of the Atlanta Police Department using vagrancy and disturbing the peace ordinances against cocaine users, see *Atlanta Constitution*, October 16, 1911; August 23, 1912; November 1, 1912;

California augmented state power to respond to Chinese immigrants and smoking opium, in other words; officials in Georgia instead relied on old statutes to police African American use.

Evidence of race's centrality to narcotics criminalization proved more submerged in the federal government's passage of anti-narcotics law. Federal lawmakers, however, did not legislate in a vacuum. Several decades of local- and state-level public and policymaker debate, much of it rife with racist and anti-immigrant invective, influenced Washington policymakers' increased attention to drugs. Though federal officials voiced their motivation less frequently than did their state counterparts, it surfaced in references to Chinese vice when Congress debated anti-opium laws. It appeared also in narcotic agents' self-conception of their work as culling undesirable citizens—a group in which non-whites figured prominently—from the body politic. It came through as well in congressional debates over whether and how to deport non-citizen violators. Race and racialized views of citizenship thus proved critical in both federal and state officials' consideration of anti-narcotics law. The tools they chose to accomplish these desired ends, though, depended on officials' different bases of power.

Ideas about Government Power

Local and state governments and the central state succeeded in passing a spate of anti-narcotic laws, which increased their authority and curtailed some traditional prerogatives of U.S. citizenship, in an era remembered for Americans' putatively strong support for liberal anti-statism. Attention to lawmakers' anti-narcotics efforts during this 60-year period reveals both how government power shifted during these decades as well as how some limitations on state action persisted. On the one hand, despite a growth of federal power during the Civil War and Reconstruction and the *Lochner* Court's invalidation of some exercises of the states' police

October 27, 1913; and December 27, 1914. For the 1935 law that made possession of drugs unlawful in Georgia, see *Acts and Resolutions of the General Assembly of the State of Georgia, 1935*, 1935 Vol. 1 418.

power, the states' authority to legislate for the general welfare expanded during these years.[29] Well before 1930, policymakers had all but abandoned what tenets of liberal ideology might have once constrained state governments. On the other, while the federal government grew in power and size during the Civil War and its aftermath, the central state's ability to enact and enforce broad legislative schemes remained circumscribed by Americans' commitment to both liberalism and federalism. Even as central state action grew more commonplace, in other words, the challenges of expanding a liberal state in a federal system remained.[30]

Local and state governments first began to enact anti-narcotics legislation in the 1870s and early 1880s, when the configuration of authority in the U.S. was, more than ever before, uncertain. In the early Republic and during the Antebellum years, recent scholarship has made clear, states both had and exercised broader authority than historians once understood.[31] The Civil War and Reconstruction ushered in a profound increase in the size and power of the national government, though, and the Reconstruction Amendments suggested that this enhanced national authority might continue in perpetuity.[32] Despite this weakening of the states' power, legislatures successfully enacted a flurry of anti-narcotic laws and consolidated new authority in the process. How did they accomplish this?

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[29] For an argument that, though the Civil War posed a sharp challenge to the states' police power, state legislatures, revived the doctrine after the war and used it to reverse some of the centralizations of federal power that occurred during the war and Reconstruction, see Gary Gerstle, "The Resilient Power of the States Across the Long Nineteenth Century: An Inquiry into a Pattern of American Governance," *in The Unsustainable American State*, Lawrence Jacobs & Desmond King, eds. (New York: Oxford University Press, 2008): 61-87, 63.
[30] For an argument that the central state developed a number of strategies to expand its authority while maintaining formal compliance with its liberal foundation, see Gerstle, *Liberty and Coercion*, 89-123.
[31] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).
[32] For discussions of the federal state-building that occurred incident to the Civil War, see Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (New York: Cambridge University Press, 1990); Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge: Belknap Press, 1977); and Peter Zavodnyik, *The Rise of the Federal Colossus: The Growth of Federal Power from Lincoln to F.D.R.* (Santa Barbara: Praeger, 2011). For a suggestion that the Supreme Court eroded the transformative powers of the Civil War Amendments, see William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press, 2011).

A shift in how lawmakers and jurists viewed the states' police powers provides one answer. While, during the second half of the nineteenth century legislators and courts deployed several definitions of the states' powers, they increasingly came to view the power as authorizing an expansive list of actions to promote the general welfare.[33] During this period, local and state governments moved from banning opium dens to regulating drug sales to proscribing certain physician practices to outlawing private possession. The scope of legislation regarded as fair game for municipal and state governments, in short, broadened considerably during these years.

The perceived dangers posed by immigrants and racial minorities offers another answer. When they confronted the presence and reported problems associated with Chinese Californians and African Americans, white Americans' anti-statist, individualistic, and egalitarian ideals gave way.[34] Whites' anxieties about these groups helped policymakers secure popular and political support for anti-narcotic laws that regulated private behavior, that increased the power of local and state governments, and that burdened specific populations more heavily than others. Americans re-embraced a strong version of the states' police power in the aftermath of the Civil War, in other words, because they came to believe that good order—the police power's legitimating principle—required addressing the threats posed by racial minorities.

None of which is to suggest that the growth of central state power during the Civil War-era had no effect on state lawmaking. As a result of the Fourteenth Amendment, state legislators had to exercise certain cautions when they passed legislation designed to target a minority racial or immigrant group. Most importantly, legislation passed for a racialized purpose had to be

[33] Markus Dubber argues that the police power "continued to expand virtually unchecked until, by the 1930s, it had become all but synonymous with immunity from constitutional review." Dubber, *The Police Power*, xiv.

[34] Americans' willingness to set aside these ideals in order to police racial minorities had an important antecedent before the Civil War. When it came to the capture of runaway slaves, for instance, adamant states-rights advocates among the South's planter class proved more than willing to expand the federal government's power. For a discussion of the Fugitive Slave Act of 1850 that makes this point, see Wilentz, *The Rise of American Democracy*, 645-53.

facially race-neutral and may have needed some cover above and beyond formal race neutrality. The Supreme Court's decision in *Yick Wo v. Hopkins*, in which the Court found a San Francisco laundry ordinance facially race-neutral but held that its enforcement only against Chinese laundry proprietors violated the Fourteenth Amendment, suggested that state legislatures could not necessarily pass a law with general application and then use it exclusively against members of a disfavored racial group.[35] Anti-narcotic laws provided just such cover. They targeted a practice that the public believed was on the rise among whites, blunting any federal constitutional challenge, yet local officials could and did enforce them in uneven ways against minority populations.

When Congress decided to step into the fray, questions abounded concerning whether it wielded sufficient authority to do so. Despite scholarship highlighting the Supreme Court's imposition of laissez-faire ideals on the states, it is now clear that the states' police power represented a quite capacious basis of authority in the early twentieth century. Critics of federal narcotics legislation, accordingly, harangued such laws as attempts by the national government to assert its own police-like powers.[36] After debates in Congress about the best way to frame federal drug law to circumvent questions of national authority, the central state succeeded in using its taxing power to enact the Harrison Act—its first comprehensive anti-narcotics law—in the last days of 1914.

The challenge of expanding a liberal state in a federal system did not end with this victory. For more than a decade after Congress enacted its first comprehensive anti-narcotic law, a vocal minority on the U.S. Supreme Court threatened to overturn it as beyond the scope of

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[35] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[36] The Seventh Circuit Court of Appeals, for one example of how widely such concerns circulated, invalidated part of the Harrison Act as overstepping congressional power. The court saw the Act's possession clause as "an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the states." *Blunt v. United States*, 255 F. 332, 336-36 (7th Cir. 1918).

national power. These judges invited challenges to the law. Further, suspects under investigation for anti-narcotics law violations invoked the Fourth Amendment's protection against unreasonable search and seizure—at the time, not applicable to state actions—to carve out important limitations on what the central state's agents could do as they enforced federal drug law. And, when strong supporters of immigration control endeavored to make narcotics violations into deportable offenses, they faced a decade of opposition and a judicial determination that violations of revenue measures could not support expulsion. Though federal policymakers who pushed for a more active central state succeeded in criminalizing narcotics, in other words, they did so neither seamlessly nor without Americans' commitment to limited government impacting the shape of their criminal justice apparatus.

In legislative and judicial discussions of drug law, policymakers debated anew some of the Republic's founding principles. In the place of liberalism, a strict view of federalism, and traditional freedoms from government interference, they substituted arguments, like those President Wilson offered in 1913, that governments had duties to protect their populations from menaces like the "narcotic evil." These discussions allowed lawmakers to develop an ideological foundation for a more powerful state and supplied jurists with a defense for these accretions of power. California lawmakers, for one example, set aside protections against government intrusion in private lives that jurists a generation earlier had found beyond the power of the state to erode.[37] If the utility of positive law to policymakers came into relief as California lawmakers defended their possession law, the extent to which federalism and liberalism would restrain the central state also became clear. Legislators opposed to the Harrison Act called it an effort to use the tax power to claim police-like authority, but their complaints failed to convince lawmakers to

[37] Compare *In the Matter of Sic,* 73 Cal. 142 (1887) to *In the Matter of Yun Quong*, 159 Cal. 508 (1911).

vote the measure down.[38] A growing number of federal lawmakers began to believe that modern problems required a central state with powers strong and flexible enough to respond.

The American Penal State

Commitments by national and subnational government actors to end drug trafficking and use outside of carefully controlled channels, I argue, helped construct the American penal state.[39] As a result of lawmakers' decision to criminalize narcotics, governments at the local, state, and federal levels grew their penal arms considerably. To punish behavior that had only recently been legal, they enacted new laws, formed and expanded bureaucracies, policed their populations with unprecedented intensity, and filled their prisons and penitentiaries. Anti-narcotics law drove state building, then, in the most tangible and institutional senses of the term.[40]

As the foregoing suggests, the penal "state" I describe refers to the combined efforts of lawmakers and enforcement officers at every level of government. Whether and how to discuss "the state" in a federal system comprised of a national government and many subnational units

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[38] See, e.g., the testimony of Representative Thomas Sisson on the Harrison Narcotic Tax Act at 1913 Cong. Rec. – House 2203 (1913).

[39] While scholars discussing late-twentieth-century mass incarceration prefer the term "carceral state," some use that term interchangeably with the "penal state." See Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 1. For two reasons, I use the latter formulation. First, at least for a time, many drug offenses did not involve incarceration. Many of the physicians charged with violating the Harrison Act, for instance, paid only small fines. In the immigration context, moreover, deportation sometimes meant that prisoners avoided prison altogether by agreeing to their removal. For its greater breadth, then, "penal" is a more accurate descriptor than "carceral" for the state that emerged in the early twentieth century. Second, "penal state" has the added benefit of distinguishing the state I describe from the period of mass incarceration that began in the 1970s and which scholars have most often described as a "carceral state."

[40] For a small sample of recent scholarship on the growth of the postwar "carceral state," see Michael Javen Fortner, *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment* (Cambridge: Harvard University Press, 2015); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (New York: Oxford University Press, 2001); Gottschalk, *The Prison and the Gallows*; Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007); Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *Journal of American History* 98, no. 3 (December 2010): 703-758; Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006); and Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007).

raises a problem that has as much to do with how one conceptualizes power as it does with terminology. On the one hand, a generation of American Political Development scholars has demonstrated that the federal state has been "more potent as an authoritative rule maker, national standardizer, and manager of the nation's affairs than earlier accounts had generally concluded."[41] One can no longer view the central state before the New Deal as "weak" without reckoning with this scholarship.[42] On the other hand, flattening moves made by local and state governments into discussions of power that assume a unitary state risks "an overly synthetic monism."[43] Accordingly, the analysis in this study balances the reality of a strong central state against the enduring power of local and state governments. While I, at times, describe the state in composite terms, as the product of government action at multiple levels, much of my analysis

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[41] The description of the central state is from Lawrence Jacobs and Desmong King, "American State Building: The Theoretical Challenge," in *The Unsustainable American State*, Lawrence Jacobs and Desmond King, eds. (New York: Oxford University Press, 2009): 299-322, 299. American Political Development scholarship is vast and the number of scholars who have called into question once-doctrinaire views of the American state is too lengthy to list here. Some key texts include Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982); Peter Evans, Dietrich Reuschemeyer, and Theda Skocpol, eds., *Bringing the State Back In* (New York: Cambridge University Press, 1985); Novak, *The People's Welfare*; and Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton: Princeton University Press, 2001).

[42] Scholars working in this tradition have demonstrated, among other things, that the federal government wielded expansive power well before the twentieth century and that the central state pursued agendas through partnerships with state governments and private actors. For an argument that the U.S. postal system reflects the existence of a central state far from absent or weak, see Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge: Harvard University Press, 1995). For a study that locates a long tradition of federal disaster relief in the central state's passing of special and general legislation, see Michele Landis Dauber, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State* (Chicago: University of Chicago Press, 2012). For an argument that a new fiscal state emerged in the early twentieth century and was headed by a coterie of administrative professionals, see Ajay Mehrotra, *Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877-1929* (New York: Cambridge University Press, 2014). For an argument that customs houses in the early republic reflected energetic federal governance that nonetheless appeared to abide liberal constraints on a powerful central state, see Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago: University of Chicago Press, 2016). For a helpful overview of historians' work in American Political Development through 2003, see Brian Balogh, "The State of the State Among Historians," *Social Science History* 27, no. 3 (Fall 2003): 455-63.

[43] James T. Sparrow, William Novak, and Stephen W. Sawyer, "Introduction," *in Boundaries of the State in U.S. History*, James T. Sparrow, William Novak, and Stephen W. Sawyer, eds. (Chicago: University of Chicago Press, 2015): 1-15, 1-2; Desmond King and Robert C. Lieberman, "Ironies of State Building: A Comparative Perspective on the American State," *World Politics* 61, no. 3 (July 2009): 547-88, 547-48.

details the roles that individuals and groups at one or another level of government played in fomenting that state.

Policymakers' building of the American penal state in the late-nineteenth and early-twentieth represents an important and understudied chapter in the formation of the modern American state.[44] That is, in and through their expansion of American criminal justice, policymakers forged a new view of the state that put criminal law and its enforcement at its center. Historian Lisa McGirr, in her recent study of national Prohibition, offers perhaps the fullest conceptualization of the role that a larger federal criminal justice system played in building a more robust and assertive central state.[45] During and through Prohibition, she contends, crime became a national problem and Americans continued what was then a new trend of turning to the federal government to solve concerns of broad scope. Moreover, the central state expanded its prison system and hired its then-largest coterie of law enforcement agents. On

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[44] By "modern American state," I mean a state organized around the assumption of centralized authority and administrative capacity rather than their absence. This definition is similar to those offered by Skowronek, *Building a New American State*, 4; and Kimberley S. Johnson, *Governing the American State: Congress and the New Federalism, 1877-1929* (Princeton: Princeton University Press, 2007), 7.

[45] Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (New York: Norton, 2016). The ideological changes that underwrote—and resulted from—a larger and more active criminal justice apparatus remain largely undertheorized. Instead, historians have described the build-up of larger criminal justice systems in the states, in the nineteenth century, and in the federal government, in the twentieth. See Lawrence Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1994); Elizabeth Dale, *Criminal Justice in the United States, 1789-1939* (New York: Cambridge University Press, 2011). Historians have also authored studies describing episodes in the construction of federal criminal law in the early twentieth century. See John A. Heitmann and Rebecca H. Morales, *Stealing Cars: Technology and Society from the Model T to the Gran Torino* (Baltimore: Johns Hopkins University Press, 2014); Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (Cambridge: Harvard University Press, 2014); and William H. Thomas, Jr., *Unsafe for Democracy: World War I and the U.S. Justice Department's Covert Campaign to Suppress Dissent* (Madison: University of Wisconsin Press, 2008). Rebecca McLennan has studied the ideological underpinnings of criminal punishment. Rebecca McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (New York: Cambridge University Press, 2008). And Claire Bond Potter, like McGirr, has offered us an important argument about the importance of criminal law and enforcement to the build-up of early-twentieth-century federal power. In her study of the New Deal-era federal campaign against crime, led by J. Edgar Hoover, she argues that Hoover's agents served as symbols of a powerful state; confrontations between government agents and criminals during the decade, she contends, helped solidify views of police work as positive and as the proper domain of the federal government. Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (New Brunswick, NJ: Rutgers University Press, 1998), 1-4. Nevertheless, we continue to know very little about how the construction of more assertive penal capacity changed public perception and policymakers' views of the state now wielding these powers. This absence in the scholarship is especially glaring on the subnational level and for periods before national Prohibition took effect.

this evidence, McGirr contends that Prohibition provides the "missing link between Progressive Era and World War I state building and the New Deal." Acting under authority given it by the Eighteenth Amendment and the Volstead Act, she concludes, the national government consolidated coercive power in the very decade—the 1920s—in which many historians have seen only "conservative retrenchment" against national state building.[46]

Like Prohibition, anti-narcotics law proved constitutive of the modern American state. Local, state, and federal moves to criminalize drugs signaled the dawn of more vigorous criminal justice action. In California, opium den raids and undercover operations followed the earliest municipal ordinances; law enforcement officers arrested hundreds of suspects annually once the legislature criminalized possession. While officers in Atlanta used the Georgia legislature's anti-cocaine law rarely, if ever, they arrested traffickers and casual users on the pretext that they had committed other petty crimes. The federal government, in turn, deputized a new batch of law enforcement agents and sent them out among the American populace on stakeout and undercover operations, sending ever-larger numbers to federal prison as a result.[47] Through anti-narcotics law, in other words, the state and federal governments made new behaviors criminal and pursued violators with new aggressiveness. Defining and punishing criminality became principal justifications for constructing a permanently larger and more powerful state.

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[46] McGirr, *The War on Alcohol*, xxi-xxii, 189-229. McGirr also highlights a key disjuncture in judicial treatment of Prohibition and other law enforcement enterprises. While a majority of the Supreme Court would soon express considerable skepticism about the build-up of state administrative capacities entailed in New Deal legislation, the Taft Court nonetheless "sharply expanded federal government power" in the realm of criminal justice. She credits a "new doctrine of judicial neoconservatism," that saw conservatives on the Court uphold federal power because of an anxiety to "uphold the rule of law." Ibid., 207-08. For a related argument, see Robert C. Post, "Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era," *William and Mary Law Review* 48, no. 1 (2006): 1-183.

[47] By 1928, almost a third of the 7,700 prisoners incarcerated in federal penitentiaries were Harrison Act violators, "more than the combined total for the next two categories—liquor prohibition and car theft." Musto, *The American Disease*, 128.

Attention to local, state, and federal anti-narcotics law in the decades before and after the twentieth century reveals, however, that even as lawmakers expanded the state and rendered criminal justice a key function of government, their preexisting ideological commitments to federalism and liberalism continued to shape the penal state they built. Congress's laws differed from those that local governments and state legislators enacted, for one example; local and state authorities passed criminal statutes expressly for the protection of the general welfare while Congress, lacking a general police power, enacted its entire drug criminalization scheme as a tax. Support for limited government also figured into the penal state that lawmakers erected in and through anti-narcotics law. Concern with government intrusion on long-cherished freedoms explains jurists' initial reluctance to allow states to criminalize possession, for instance. That same consideration also precipitated more than a decade of argument from members of the Supreme Court concerning the advisability of anti-narcotics law.[48] Even in their enthusiasm to erect a penal state, in other words, legislators could not simply call that state into being. The dispersion of government power in the country and a view of state authority as at odds with personal liberty continued to shape the penal state lawmakers could establish.

Though federalism and liberalism thus limited the penal state's growth in a number of ways, they also lay at the root of one of its strengths. The configuration of power in the U.S. led government actors at all levels to turn their attention to narcotics in the same few decades. Local, state, and federal efforts to proscribe drug use and sales, as a result, led to the passage of a dense assemblage of new criminal laws and regulations, enforced by a range of police and bureaucratic forces. The penal state that lawmakers constructed in and through narcotics criminalization, in other words, proved both multi-jurisdictional and complex, and it subjected the American public

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[48] While much of what concerned the justices who opposed the Harrison Act had to do with their view of the limits of federal power, resistance to government power and overreach more generally also crept into their opinions. See the dissent of Justice McReynolds in *Casey v. United States*, 276 U.S. 413, 420 (1928), for an example.

to oversight and intrusion from many sources.[49] The same course of conduct, for but one example, often ran afoul of crimes at multiple levels of government, giving officials multiple opportunities to pursue offenders.[50] The effect of local, state, and federal governments legislating and enforcing criminal laws on the same subjects served to amplify the power of the penal state.

Instances of overlap and cooperation among figures from multiple levels of government in both the design and enforcement of anti-narcotics laws appear throughout this study.[51] When California's Board of Pharmacy first proposed to make possession unlawful, for example, it did so at the recommendation of Dr. Harrison Wright, who visited the Board in 1909 as the federal government's representative to the first international opium conference.[52] If California's possession law owed its inspiration to a federal official, federal agents' success in enforcing national drug laws owed much to their collaboration with local and state law enforcement. By the end of the 1920s, Congress and the newly-formed Bureau of Narcotics together made cooperation between narcotic agents and local and state law enforcement formal policy.[53] In their decade of work to make narcotics law violations into deportable offenses, too, Congress and

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[49] To regulate opium dens, for instance, Los Angeles created a licensing system that allowed proprietors to pay a monthly fee to run their dens. The licensing scheme continued to operate well after state law made the running of opium dens a crime. In the aftermath of California's passage of a comprehensive narcotics law in 1907, though, agents of the state's Board of Pharmacy joined forces with local police officers and federal customs agents—interested because the opium had been smuggled into the country—to target den keepers, including those who held a license to operate their businesses. See, e.g., *Los Angeles Times*, June 4, 1907.

[50] In the 1920s, for instance, a suspect caught in New York in possession of cocaine, if the drug lacked a federally-approved stamp, could be charged with violating both the Harrison Act and New York's Boylan Act. On New York's Boylan Act, see Musto, *The American Disease*, 107-07.

[51] Policymaker and law enforcement efforts in this area represent one instance of what legal historians Sara Mayeux and Karen Tani have recently called "federalism in practice." Federalism in practice denotes the "workings of a complex polity, in which responsibility for particular functions of government spans multiple levels of authority, in intricate and historically determined ways, and with unequal impacts on citizens." Their essay is one entry point into recent scholarship that, like the argument offered here, explores federalism in practice. Sara Mayeux and Karen Tani, "Federalism Anew," *American Journal of Legal History* 56, no. 1 (March 2016): 128-38, 129.

[52] As the Supreme Court's 1916 decision in *Jin Fuey Moy* made clear, doubt remained about whether the federal government had the authority to make possession unlawful. Thus Wright recommended a state law that reached behavior the federal government likely could not have reached—at least in 1909—making clear that officials saw potential in the dispersion of power in the U.S. See *U.S. v. Jin Fuey Moy*, 241 U.S. 394 (1916).

[53] After Congress passed the Harrison Act and the Narcotic Division began sending its agents into the field to investigate suspected narcotics traffickers and users, local police cooperated often with federal agents. See chapter 4 for a discussion of this cooperation.

federal immigration officials attempted to make use of overlapping laws and jurisdictions. A number of the immigration bills before Congress during the 1920s proposed to make state and local narcotics violations into deportable offenses—to add a federal penalty to state lawmaking and investigative work.[54] In short, the penal state stood at its strongest and most coercive when national and subnational actors viewed power as something other than a zero-sum game and discovered the coercive potential of their separate bases of authority.[55]

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Part one of this study argues that, for a number of purposes that had to do with white policymakers' views of the immigrants and racial minorities in their midst, local and state governments used anti-narcotics law to centralize power and consolidate new authority. It demonstrates, furthermore, that as they claimed and exercised new powers, municipal and state governments constricted the list of privileges that attached to living within their borders. By beginning with the actions of subnational government actors, this dissertation attempts to "bring the states back in" to the study of state building and American government more broadly—conversations from which they have been sorely lacking.[56] Attention to local and state governments' state-building efforts, in turn, highlights the complexity of the American penal state that emerged in part through lawmakers' criminalizing of narcotics.

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[54] For an example of such a bill, see 67 H.R. 11118 (1922).
[55] Kimberly S. Johnson's study of "intergovernmental policy instruments" during this same era first suggested to me the possibility that state and federal government actors, instead of in competition, worked toward commonly-held goals. Whereas the agreements in Johnson's study were formal and financial, the overlaps in government authority that amplified coercive power here were informal and often worked out on the ground between law enforcement officers. The cooperative acts in Johnson's study were also devised by the federal government; here, local and state policymakers acted first and the national government followed, often enacting legislation modeled on an existing state law. Kimberley S. Johnson, *Governing the American State*.
[56] The phrase is a play on Theda Skocpol's appeal for scholars to "bring the state back in," offered by Gary Gerstle in his call for more attention to subnational government actors. Gerstle also explains why scholars have avoided studying the states and the "theory of power animating" their actions, pointing to the difficulty of taking "the measure of an institution that comes in fifty varieties." Gerstle, *Liberty and Coercion*, 11, 55-6.

Chapter one begins with the earliest municipal narcotic law in the country, San Francisco's 1875 anti-opium ordinance, and it details the anti-narcotic apparatus that local and state lawmakers built over the four decades that followed. It reveals that California legislators passed anti-opium measures to make life difficult for Chinese immigrants, to discourage future immigration to the state, and to incentivize repatriation. To achieve these ends, the legislature created a Board of Pharmacy and gave it enforcement authority. It also harnessed the state's police power to criminalize possession, a move the state's highest court had but twenty-five years earlier invalidated as legislative overreach. Anti-narcotic laws' staying power in California had much to do, then, with the stronger state that emerged as lawmakers took on drugs. They also owed a debt to the U.S. Supreme Court, which weakened the Fourteenth Amendment claim that Chinese Californians targeted under state law might have otherwise brought.

Chapter two turns to the anti-cocaine laws that municipal and state lawmakers in Georgia passed in the first decade of the twentieth century. Unlike in California, where lawmakers wished to use opium law to decrease the size of the state's Chinese population, Georgians never expressed a hope that cocaine proscription would shrink the state's black population. Instead, they voiced fears that cocaine consumption lay at the root of an alleged increase in black crime. Georgia lawmakers' attention to cocaine reached a fever pitch in the aftermath of Atlanta's 1906 race riot. Despite these anxieties, however, lawmakers in the state waited until 1935 to pass a possession statute. They waited to strengthen their cocaine laws even though they enacted a statewide alcohol prohibition law in the wake of the 1906 riot and added a possession clause to that statute in 1917. State-building in Georgia thus took a different tack than in California in at least two ways. On the one hand, the legislature proved unwilling or unable to criminalize the behaviors the state's white public found most concerning. On the other, law enforcement officers

recorded considerable success using older criminal laws to arrest, fine, and incarcerate black cocaine users. In Georgia, state-building and adherence to some limitations on government power went hand-in-hand.

Part II turns to the federal government's anti-narcotic efforts. It offers the clearest picture yet of the federal state-building that the first war on drugs occasioned. Part II begins in the late nineteenth century, when federal policymakers discussed opium only with reference to China and tariff schedules, and it ends in the 1930s, at Congress's creation of a stand-alone Bureau of Narcotics. It highlights the arguments offered by congressmen for and against narcotics criminalization. It then turns to the work of Narcotics Division agents during the 1920s, following criminalization, and to the efforts of immigration authorities to make narcotics violations into deportable offenses during the same decade. Part II makes clear that, though the central state grew in and through narcotics criminalization, the ideological attachments of some policymakers continued to constrain and channel that growth.

Chapter three details the legal and political debate over federal drug control law, placing particular emphasis on the differing viewpoints congressmen and jurists offered of the central state's authority to criminalize narcotics. While Congress heard testimony that the threat posed by black criminals and Chinese immigrants required the national state to intervene, others in Congress maintained that the Constitution did not permit the federal government to use its taxing power for such ends. Congress's passage of the Harrison Act did not settle the matter; instead, it led to 15 years of debate in the federal courts, during which time many judges contended that Congress had usurped the states' police power. Though the Supreme Court eventually approved the legislation, federal narcotics control elicited sharp political debates and pitched legal

challenges that revealed how deep ran some policymakers' commitment to a liberal state bounded by federalism and specifically-enumerated powers.

Chapter four moves to the investigative work of agents of the Treasury Department's Narcotic Division. It argues that, as one result of the Harrison Act, the Treasury Department constructed a federal enforcement apparatus that, though small and concentrated in a handful of offices in major cities, managed to bring newly intrusive investigative tactics to bear on U.S. citizens and residents. Agents filled the federal government's three penitentiaries with narcotics violators, in part because they received a great deal of help from local and state law enforcement officers. Yet the country's narcotic agents did not treat every Harrison Act violator similarly. Rather, they regularly treated physicians and pharmacists with leniency and also occasionally showed a degree of mercy to addicts against whom they had no evidence of trafficking, especially when those suspects were white. Against traffickers of every race, though, and against addicts and users of color, narcotic agents used drug law to police citizenship—to remove "unworthy citizens" from the general public both figuratively (by marking them as criminal) and literally (by imprisoning them). Suspects responded by challenging agents' investigations, laying claim to Americans' traditional right to be free of government intrusion. Nonetheless, as the 1920s came to a close, Congress mandated that federal and state officials cooperate in their investigations, which development promised additional expansions of the penal state.

Chapter five tells what may be a surprising story to some readers about the difficulty the federal government encountered in making narcotics violations into deportable offenses. Though Congress enjoyed plenary power over immigration, it took the national legislature a dozen years to pass laws that made most narcotics violations into bases for expulsion. The balance of powers that limited congressional authority stood as the greatest challenge to Congress and federal

immigration officials' achievement of that goal. Federal courts held Congress to its word, finding the Harrison Act to be a revenue measure and not a criminal law. As such, when immigration officials attempted to deport non-citizen violators on the basis of the "moral turpitude" clause of the Immigration Act of 1917, judges held that the failure to pay a small tax did not involve such turpitude. When Congress passed additional laws to make drug violators deportable more broadly, the federal courts used what power they had to keep some non-citizens in the country. The result of congressional insistence and judicial reticence yielded deportation laws that proved both incredibly punitive but that also allowed judges to continue to intervene in some instances.

In an epilogue, I argue that, when they criminalized narcotics in the late nineteenth and early twentieth centuries, lawmakers established the parameters of future expansions of government power in and through criminal law. I identify three developments during this period that set the stage for later growth of the penal state. First, as they legislated and implemented anti-narcotics law, policymakers justified extensions of government power and intrusions on Americans' liberties by referencing their need to protect the public from the menace of drugs. Public threat, state responses, and infringements on civil liberties thus became more firmly linked. Second, lawmakers discovered in their anti-narcotics campaign that they could use the white public's racism and xenophobia to realize political gains and accrete significant power. Third, and perhaps unwittingly, policymakers gave rise to a nascent cooperative federalism in legislating and enforcing criminal law. Their overlapping efforts strengthened the penal state that emerged in part as a result of narcotics criminalization. These developments, I contend, reappeared in later anti-narcotics efforts, including the late-century war on drugs.

The political move in the United States to police narcotics sales and use fundamentally recast the relationship of "the state" to the people within its borders. Together, these five

chapters make clear how racial and anti-immigrant animosity motivated anti-narcotics laws and thus demonstrate that ideas about race proved critical to the growth of state and federal power during the period. They also uncover how much Americans' willingness to forego once-cherished liberties and tolerate an expanded penal state owed to their mistrust of racial minorities and immigrants. Finally, though, we can see in the debates over anti-narcotics laws the surprising unwillingness of a sizable number of Americans to approve increased state power, even when the promised return was a partial solution to the questions of racial minorities and immigrants that so troubled them. In the final analysis, American lawmakers' wish for a government response to the country's increasingly urban and diverse population overcame their ideological commitments to liberalism and federalism. The penal state they erected, though, bore the markings of the contest between two different views of what the American state should—or could—do.

CHAPTER 1

OPIUM SMOKING IN CALIFORNIA, 1875-1911: EXPANDING STATE POWER TO 'CHECK THIS BRANCH OF THE CHINESE EVIL'

"To prohibit vice is not ordinarily considered within the police power of the state. . . . The object of the police power is to protect rights from the assaults of others, not to banish sin from the world."[1]

"The unrestricted use of poisonous drugs would be the source of ill health, pauperism, misery and insanity, the prevention of which must be numbered among the objects of all enlightened government."[2]

In the early afternoon of May 9, 1912, a crowd gathered in the heart of San Francisco's Chinatown. Power lines stretched overhead, along the cobble-stoned expanse of Dupont Avenue, called "Dupon Gai" by the neighborhood's denizens. Signs for the Sing Fat Co., the city's leading "Oriental bazaar," could be spotted a couple of blocks down the street. Where Dupont met Washington Street, onlookers gathered to watch as agents of the state's Board of Pharmacy deposited $10,000 worth of opium, cocaine, and morphine in the middle of the intersection. To this pile they added 1,200 smoking pipes, lamps, trays, and hypodermic needles.

Seized during the last six months of 1911 by state and local officials in San Francisco, Oakland, Stockton, Fresno, San Jose, and Sacramento, the wares on display that day represented the yield from 1,500 arrests and 1,100 convictions across the state. After placing the last smoking pipe and the final ounce of opium on this heap of contraband, the men who built it doused it in gasoline and handed a torch to J. O. McCown, then president of the California Board of

[1] *In re Sic,* 73 Cal. 142, 145 (1887).
[2] *Ex parte Yun Quong*, 159 Cal. 508, 513 (1911) (internal quotation marks omitted).

Pharmacy. At 1:30, he set the goods ablaze, and for the next hour the area was filled with thick, black smoke.[3]

More than drugs and paraphernalia suffered damage that day. Despite the efforts of local firemen to protect surrounding buildings, the fire damaged the property of a number of Chinese merchants. As Charles McClain and Lucy Salyer have demonstrated, San Francisco's Chinese community proved adept at pressing legal claims when harmed.[4] In like fashion, the merchants on Washington Street sought redress for the harms they suffered. Their storefronts pocked with broken windows and their merchandise bearing the marks of smoke and water damage, they worked with the Chinese Chamber of Commerce and the Chinese Merchants Association to demand restitution from the Board of Pharmacy. In the estimation of the Board's envoys, sent to investigate the destruction, the cost of repair would be "considerable."[5]

While the harm these merchants bore might be dismissed as an unfortunate consequence of the Board's choice of site, the Board acted with intention when it located the fire at Dupont and Washington. In a moment of candor, McCown explained that the Board had selected its location to send a message to the city's Chinese community. It hoped the fire would demonstrate "to the Chinese that [the Board would] keep up the work [it had] undertaken." The *San Francisco Call* put it even more bluntly. Calling the blaze an "object lesson," it claimed the

[3] *San Francisco Call*, May 10, 1912; Chinese in California Collection, The Bancroft Library, University of California, Berkeley, BANC PIC 1905.11321; *Jesse Brown Cook Scrapbooks Documenting San Francisco History and Law Enforcement, ca. 1895-1936,* BANC PIC 1996.003--fALB:28a, The Bancroft Library, University of California, Berkeley; Minutes of the State Board of Pharmacy, May 9, 1912, Department of Consumer Affairs - Board of Pharmacy Records, R126.1, California State Archives.
[4] Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); Lucy E. Salyer, *Laws as Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995).
[5] Minutes of the State Board of Pharmacy, May 10, 1912, - May 11, 1912, Department of Consumer Affairs - Board of Pharmacy Records, R126.1, California State Archives [hereinafter Board of Pharmacy Minutes].

Board set the drugs afire "that the Chinese" might "be properly impressed with the work carried on by the state board of pharmacy to stop the traffic in opium and other dangerous drugs."[6]

The *Call*'s commentary and McCown's remarks suggest the extent to which opium criminalization drew on Californians' anxieties over Chinese immigration. Less than 40 years earlier, policymakers in California had first seized on opium restriction as a direct response to Chinese immigrants. By banning opium dens, they hoped to improve conditions in urban Chinese enclaves and forestall the potential harm of Chinese influence on middle and upper-class whites—the latter fear driven by the dawning realization that whites had started smoking opium. Though lawmakers sounded alarm about drug use among whites, their focus remained squarely on Chinese Californians. It was whites' attraction to a supposedly Chinese practice, after all, and not the fact of their intoxication or addiction, that fueled policymakers' alarm over white opium use. Lawmakers hoped their den and other anti-opium laws would have tangible effect, encouraging repatriation and convincing some would-be immigrants to remain in China. And the motivation behind anti-narcotics laws remained remarkably consistent. More than 30 years after the first den bans in the state, the legislature passed a possession statute designed to increase arrests of Chinese drug users.

Formulating and deploying this response to Chinese immigration required a centralization of authority in Sacramento and the assumption of new powers by the state legislature. Local lawmakers, and particularly the San Francisco Board of Supervisors, started the work of consolidating a strong and centralized penal state as they passed the first opium criminalization laws in the country. State lawmakers quickly seized and then expanded on these local efforts. In the early 1880s, Californian's legislature passed its first statewide narcotic law, which focused on opium dens. By 1909, the legislature had enacted a statewide ban on commerce in, as well as

[6] *San Francisco Call*, May 10, 1912.

possession of, opium, cocaine, and their derivatives—an exercise of the police power the state's supreme court approved two years later.[7] While, before 1911, the California Supreme Court had had other occasion on which to discuss the parameters of the state's police power, it had approved only a small number of possession statutes. And none of the possession statutes it had found permissible reached conduct then so ordinary as the possession of a narcotic.[8] By the time the Board set its bonfire alight, in other words, it possessed an expanded power to act and enjoyed broad leeway to investigate and prosecute narcotics offenders—and to destroy the drugs it seized in the process. In 25 years, then, legislators and jurists had profoundly reshaped the boundaries of legitimate state action and constricted Californians' earlier freedom from state intervention. They had laid important groundwork for a more powerful penal state.

Two changes in American law allowed policymakers the space to do so. First, the threat of federal intervention through a Fourteenth Amendment challenged waned as the nineteenth century progressed. While some lawmakers and members of the public initially saw in the Fourteenth Amendment a means to reorder American society and permanently shift power away from state governments and to the central state, the Supreme Court sharply circumscribed the Amendment's once-capacious potential. By 1883, it had constricted the rights the Amendment protected and, through the "state action" doctrine, had immunized private acts from prosecution, leaving African Americans in the South with little recourse to address some of the worst violence

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[7] *Sic,* 73 Cal. 142; Cal. Stats. (1907) 124; Cal. Stats. (1909) 422; *Yun Quong*, 159 Cal. 508.

[8] In its brief in support of the possession statute, in *Ex parte Yun Quong*, the state cited only three previous decisions of the California Supreme Court where the court had allowed a possession statute to stand. Resp't's Br., 27-53, *Ex parte Yun Quong*, 159 Cal. 508 (1911). It had previously found that the legislature had the authority to make possession of a lottery ticket unlawful, and it had also approved acts prohibiting the possession of concealed weapons and of wild game during a season when hunting was prohibited. See *Ex parte McClain*, 134 Cal. 110 (1901); *Ex parte Maier*, 103 Cal. 481 (1894); *Ex parte Cheney*, 90 Cal. 617 (1891). While such acts may have reached many Californians, they would not have had as broad an application as the narcotic possession statute. Five years after *Yun Quong*, Justice Holmes raised a related concern when deciding the constitutionality of a federal possession law. He worried over the "probably very large proportion of citizens who have some preparation of opium in their possession" whom the federal law would make "criminal." *U.S. v. Jin Fuey Moy*, 241 U.S. 394, 402 (1916).

they suffered in the region.[9] While scholarly consideration of the Amendments' fate has long and rightly focused on the plight of Freedmen, the judicial assault had other effects. For one, with the threat of federal interference in state affairs lessened, state and municipal lawmakers enjoyed greater leeway to police their citizens. As a result, though Chinese Californians had used equal protection in the 1870s and 1880s to challenge "queue ordinances" and laundry regulations, they would never offer such a challenge to any local or state anti-opium law.

Second, and relatedly, the ambit of what the states could accomplish with their police power expanded in the late nineteenth and early twentieth centuries. Following a period of sharp constriction of the states' powers during the Civil War era, the states—emboldened by legal theorists' shifting view of what their police power allowed—enacted a proliferation of police measures in the decades on either side of the turn of the twentieth century.[10] Legislators in California capitalized on this more expansive view of their powers by passing ever-more restrictive anti-narcotics laws. When the California Supreme Court first considered a narcotics possession statute, in 1887, it saw public morality as an insufficient ground for such a police measure. By 1911, though, it had little trouble upholding a possession law with the same

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[9] For discussions of the transformative potential some officials saw in the Fourteenth Amendment, including "a degree of federal intervention in state affairs scarcely conceivable before 1860," see Eric Foner, *Reconstruction : America's Unfinished Revolution, 1867*-1877 (New York: Harper & Row, 1988), 251-61; and Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015), 92-108. For arguments that the Court deliberately eviscerated the Fourteenth Amendment to weaken the ability of racial minorities (as well as, in one formulation, women and disabled persons) to challenge state and private discriminatory action, see Barbara Y. Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York: Cambridge University Press, 2010), 141-57; and Lawrence Goldstone, *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903* (New York: Walker Publishing Co., 2011), 130.

[10] Gary Gerstle, *Liberty and Coercion: The Paradox of American Government* (Princeton: Princeton University Press, 2015), 77-82. Even William Novak, who has championed the view of the nineteenth-century U.S. as a "well-regulated society" awash in "bylaws, ordinances, statutes, and common law restrictions," sees state power shifting in important ways following the Civil War. The "local, regional, and sectional entities" that had governed Antebellum Americans increasingly lost power as "federal and state governments centralized and consolidated their authority." Invocations of the police power by the states "proliferated as never before," and judges increasingly spoke of an "inalienable police power" defined "in terms of sovereignty and command rather than consent and common law precedent." William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), 1-17, 241-43.

underlying purpose. The weakening of equal protection and the strengthening of the states' police power went hand-in-hand and, together, altered the kinds of regulations a state could impose on those who lived within its borders.

This chapter tells the story of how and why two generations of California lawmakers opted to police narcotics—how, in other words, the Board's bonfire came to be a permissible exercise of state power. As others have noted, anti-Chinese animus undergirded passage of anti-opium legislation. This chapter aims to augment that scholarship by highlighting how lawmakers, invoking racialized threats, reconfigured state power to criminalize narcotics. When the Board of Pharmacy supervised the bonfire at Washington and Dupont, the state's drug laws restricted a list of substances, the legislature had constituted a regulatory board, and that board wielded broad enforcement power. To facilitate their race-inflected agenda, in other words, policymakers assumed vast new authority. In service to the same end, the white public sacrificed personal liberties they had hitherto taken for granted. The lesson for legislators was clear: Californians would countenance encroachments on their freedoms and exercises of power unthinkable only decades earlier so long as the stated purpose for both moves remained the policing of foreign, non-white populations. On such calculations, local and state officials began erecting a penal state in California.

I. Defining Opium Use as a Problem and Anticipating its Political Dividends

That lawmakers began in the 1870s to pay any attention to opium would have surprised Californians only a few years earlier, most of whom paid little mind to the drug. The handful of medical professionals who examined the substance before the 1880s took a measured view of it. While they saw smoking opium as a habit rampant among the country's Chinese population, they

described it as just one of several ways in which Americans consumed the substance.[11] Early press accounts took a similar tack, treating Chinese opium smoking as one of many problems associated with the drug. Though the press routinely described Chinese opium consumption or commerce, it also highlighted physicians' and druggists' role in dispensing the drug and noted the prevalence of opium use among the white middle and upper classes.[12] Perhaps because physicians and the press had yet to emphasize smoking opium as a noteworthy problem, lawmakers rarely referenced it before the 1870s.

Though they paid little attention to opium, policymakers and the public engaged in numerous efforts to solve the state's so-called "Chinese Question."[13] Debates over that matter led the California Legislature to move early and often to make life more difficult for Chinese immigrants. In 1850, for instance, it enacted a Foreign Miners License Law that required Chinese miners to pay a fee of $20 per month to pan for gold. It followed that with an immigrant bonding law that obligated shipmasters to post a bond for every non-citizen passenger that came ashore and, in 1858, it enacted its first of several state exclusion laws.[14] The state legislature also prohibited Chinese fishermen from fishing in the state's waters unless they paid for and received a special license; taxed Chinese persons who earned their livelihoods in non-agricultural fields;

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[11] Medical professionals in and out of California paid little mind to smoking opium. When they did, it was often in response to data documenting an increase in opium imports into the country. See, e.g., "Use of Opium in this Country," *Medical And Surgical Reporter* 12, no. 27 (Apr. 15, 1865), 438; "Remarks on the Opium Habit," *Medical And Surgical Reporter* 37, no. 22 (Dec. 1, 1877), 436.

[12] For articles concerning Chinese Californians and opium, see, e.g., *Los Angeles Herald*, December 31, 1873; May 12, 1874; August 6, 1874; January 30, 1875; March 17, 1875; June 2, 1875; Aug. 14, 1875. For discussions of physicians, the white middle class, and opium, see, e.g., *Los Angeles Herald*, January 10, 1874; August 22, 1874; May 18, 1879; *Daily Alta California*, December 13, 1875, at 1. The latter two articles, in particular, called attention to the growing opium consumption among the "better classes of society" and noted that Californians blamed the easy availability of the drug on both the state's Chinese immigrants as well as on its physicians.

[13] For a discussion of the "Chinese Question," see note 7 to this study's Introduction.

[14] Cal. Stats. (1850) 221; Cal. Stats. (1852) 78; Cal. Stats. (1858) 295.

and made disinterment unlawful, ending Chinese Californians' custom of sending the exhumed bones of their loved ones to China.[15]

Well before they set their sights on anti-opium laws, local officials also aimed ordinances at Chinese immigrants. The San Francisco Board of Supervisors, for instance, passed a "Cubic-Air" law that penalized lodgers in the city's most densely populated, and predominantly Chinese, areas.[16] It also passed a "queue ordinance" that required county jail prisoners to have their hair cut closely—targeting the traditional way Chinese men wore their hair.[17] Municipal lawmakers in California, like their counterparts in the statehouse, thus searched widely for a legislative answer to the "Chinese Question."[18] They did not initially see it in opium restriction.

Given the breadth of their anti-Chinese efforts, it is unsurprising that when lawmakers turned their eyes toward opium in the middle 1870s, specific anxieties about Chinese immigrants, and not concerns over public health or safety, prompted them to do so.[19] They connected the habit to other supposed shortcomings of Chinese immigrant communities, especially the poor conditions of the state's Chinatowns. To argue for control legislation, they highlighted opium dens, along with prostitution, filth, and crowded living quarters in the state's Chinatowns, painting a picture of neighborhoods teeming with vice and disease. In April 1876,

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[15] Cal. Stats. (1860) 307; Cal. Stats. (1862) 462; Cal. Stats. (1877-78) 1050-51; Cal. Stats. (1880) 123.
[16] Board of Supervisors, *San Francisco Municipal Report for the Fiscal Year 1871-72, Ending June 30, 1872* (San Francisco: Cosmopolitan Printing Company, 1872), 592 (noting passage in July 1870).
[17] Board of Supervisors, *San Francisco Municipal Report For The Fiscal Year 1877-1878, Ending June 30, 1878* (San Francisco: W. M. Hinton & Co., 1878), 888-85 (noting passage in June 1876).
[18] The Board of Supervisors also enacted laundry ordinances designed to allow local officials to run Chinese-operated laundries out of business. *See Yick Wo v. Hopkins*, 118 U.S. 356, 366, 374 (1886) (striking down San Francisco ordinance that required proprietors of laundries in buildings made of wood to seek official approval to carry on their business when all 200 Chinese persons who sought such approval were denied while every non-Chinese applicant, save one, received authorization).
[19] Policymakers at the time had a language of public health available to use, if they so wished, to describe the dangers of opium use. Public health debates were in wide circulation in the late nineteenth century, including some that specifically targeted Chinese immigrants. For studies that consider public health measures taken in the last decades of the nineteenth century and the opening years of the twentieth, see, e.g., Charles E. Rosenberg, *The Cholera Years: The United States in 1832, 1849, and 1866*, 2d. ed. (Chicago: University of Chicago Press, 1987); Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco's Chinatown* (Berkeley: University of California Press, 2001); and Michael Willrich, *Pox: An American History* (New York: Penguin, 2011).

when a California Senate committee gathered to study the effect of Chinese immigration on "the social and political condition of the State," several witnesses pointed to opium use to explain the miseries of life in Chinatown. The Reverend Otis Gibson, for one, a former missionary to Fuzhou who was routinely counted among the most outspoken supporters of Chinese Californians, claimed Chinese laborers slept four or five men to a room. They crowded in such close quarters, he explained, "for they spend a great deal of money for opium, in gambling, and at brothels." E. J. Lewis, himself a member of the Committee, testified that in a recent visit to Chinatown, he had found it "so filthy" that he could not fathom how people lived there. Among the conditions that made Chinatown unbearable he listed "the fumes of opium, mingled with the odor arising from filth and dirt."[20] If many Californians might have shrugged off concerns over the private consumption of opium, policymakers' efforts to link opium smoking to the poor, and visible, conditions in Chinatown made the matter one of public importance.

Lawmakers raised concerns beyond urban blight. As others have suggested, they also bemoaned the spread of smoking opium among whites. Ample evidence supports the contention that opium only became an issue of political and public significance when whites started smoking it. In 1882, Harry Kane published a widely-discussed study of the drug, in which he identified "a sporting character" named "Clendenyn" as the first white man in the U.S. to smoke opium. Kane contended the practice had spread rapidly among gamblers and prostitutes until San Francisco authorities came to understand that girls, women, and young men from respectable

[20] Frank Shay, *Chinese Immigration: The Social, Moral, and Political Effect of Chinese Immigration, Testimony Taken Before a Committee of the Senate of the State of California* (Sacramento: State Printing Office, 1876), 29, 45. On Gibson, see, e.g., *Daily Alta California*, February 19, 1869 (describing Gibson as "among those most prominent" in the "truly missionary work" of helping to educate Chinese immigrants); and *Sacramento Daily Union*, August 26, 1874 (noting Gibson's efforts to aid 22 Chinese immigrant women suspected of coming to the U.S. for "immoral purposes"). In 1877, Gibson published a book in which he purported to give an objective account of Chinese life in the United States. Otis Gibson, *The Chinese in America* (Cincinnati: Hitchcock & Walden, 1877). He set out to avoid offering, on the one hand, "blind, fanatical" support for "the Chinese, unable or unwilling to see the evils and dangers of the Chinese immigration to these shores." He also promised, on the other, that the reader would not find inside his book "the almost universal and frantic cry of 'Down with the Chinese!'" Ibid., 4.

families had also started visiting dens and smoking opium.[21] Kane claimed this realization had prompted action.

Given policymaker concern with white drug use, it may be tempting to view anti-opium law as less directly about Chinese Californians than the foregoing discussion of opium in Chinatown suggests.[22] But to so conclude would be to miss exactly what about whites smoking opium so worried policymakers: their defilement at the hands of Chinese Californians. In discussing white opium smokers, lawmakers and the press regularly described them as suffering the effects of Chinese influence. Kane, for one, bemoaned how middle-class white visitors to opium dens were "ruined morally and otherwise" as a result of visiting Chinese dens. And press accounts of opium dens in the late nineteenth century routinely cast white smokers as victims of Chinese vice.[23]

An 1895 exposé of white opium use in the *San Francisco Call* reveals precisely what drove lawmaker concern. The full-page story included three sketches, two of which portrayed the Chinatown location and Chinese purveyors of the city's opium dens. The third depicted a white man and woman reclining to smoke opium, a Chinese smoker beside them on the same bed. If the story's artwork suggested one set of consequences of Chinese influence—intoxication and miscegenation—its text focused on the physical conditions of the dens and the personalities of

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[21] Harry Hubbell Kane, *Opium-Smoking in America and China: A Study of its Prevalence, and Effects, Immediate and Remote, on the Individual and the Nation* (1882; repr., New York: Arno Press, 1976), 1-2. Diana Ahmad and Jill Jonnes have each made the point that authorities remained unconcerned so long as they perceived opium smoking to be confined to Chinese Californians. Diana L. Ahmad, *The Opium Debate and Chinese Exclusion Laws in the Nineteenth-Century American West* (Reno: University of Nevada Press, 2007), 31, 41; Jill Jonnes, *Hep-Cats, Narcs, and Pipe Dreams: A History of America's Romance with Illegal Drugs* (Baltimore: Johns Hopkins University Press, 1999), 27-8.

[22] In a forthcoming book, George Fisher argues that anti-opium measures can best be understood, as he described it recently in *Stanford Lawyer*, as reflective of policymaker concern that "*their* children and those of their friends and constituents could lie stoned in a fetid den." George Fisher, "The Drug War at 100," *Stanford Lawyer*, December 19, 2014, available at https://stanfordlawyer.law.stanford.edu/2014/12/the-drug-war-at-100/.

[23] Press accounts often highlighted the presence of whites in opium dens, on occasion calling them "white wrecks." See *Daily Alta California*, March 19, 1876; November 20, 1878; *Los Angeles Herald*, December 23, 1894; *San Francisco Call*, January 22, 1895; August 4, 1895; August 5, 1895; August 6, 1895; March 17, 1898.

their Chinese proprietors.[24] It was, in short, white demoralization at the hands of Chinese Californians that propelled lawmakers to action. By casting whites as the unwitting victims of Chinese deviants, policymakers found in opium criminalization a way to contain Chinese Californians and simultaneously, in the words of Matthew Lassiter, "resolve the impossible public policy of criminalizing the social practices of" middle-class whites.[25]

Anxiety about the influence of Chinese Californians on whites no doubt fueled policymakers' early focus on opium dens.[26] Dens provided whites who wished to smoke opium with a space to do so. As the *Call*'s exposé made clear, Californians also imagined them as mixed-race spaces, where white men and women reclined—on dingy mats in small, unventilated rooms, often in basements and behind closed doors—alongside Chinese Californians.[27] Conditions like these, which appeared an obvious threat to the virtue of white women and where the contagion of Chinese vice lay on prominent display, lawmakers could not abide.

Invoking the threats of Chinese influence on whites in California, San Francisco authorities moved to make keeping or visiting a den unlawful. In November 1875, San Francisco Mayor George Hewston alerted the Board of Supervisors to the presence of dens in the city, noting both their Chinese ownership and that their patrons included "white males and females of various ages." He called on the Board to remove "this leprosy from this city." A week later, the Board's Committee on Health and Police echoed the mayor. It lamented that, within a few blocks

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[24] *San Francisco Call*, August 4, 1895.
[25] This language is from a recent article by Lassiter on drug law at mid-century in which he calls attention to the ways in which "state institutions and American political culture have repeatedly constructed the war on drugs through the framework of suburban crisis and positioned white middle-class youth as innocent victims who must be shielded from both the illegal drug markets and the criminal drug laws." Matthew D. Lassiter, "Impossible Criminals: The Suburban Imperatives of America's War on Drugs," *Journal of American History* 102, no. 2 (Sept. 2015), 127. Khalil Muhammad has offered a similar argument about how progressives in the early twentieth century used black criminality as evidence of African American inferiority while casting white criminals sympathetically, as the "victims of industrialization." Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern America* (Cambridge: Harvard University Press, 2010), 8.
[26] The San Francisco Board of Supervisors' first opium-related act addressed dens, in November 1875.
[27] *San Francisco Call*, August 4, 1895. For a discussion of the "perverse" cross-racial encounters many whites imagined as occurring in opium dens, see Shah, *Contagious Divides*, at 90-97.

of City Hall, could be found “eight opium smoking establishments kept by Chinese for the exclusive use of white men and women.”[28] The Committee recommended the Board prohibit keeping or visiting an opium den, which it did one week later.[29] When they called on images of white opium use, then, lawmakers in San Francisco cast white opium smokers as morally ruined by Chinese immigrants, who both caused and profited from white decline.

State and municipal lawmakers hoped that opium criminalization would both lead some Chinese Californians to repatriate and also discourage new immigrants from journeying to the U.S. An unusually direct statement of this goal emerged when the Board of Supervisors convened a special committee to assess the condition of the city’s Chinatown. Willard Farwell, then a member of the Board, took charge of the committee and co-authored a report that called attention to Chinese San Franciscans’ continuing traffic in opium. Farwell accused Chinese immigrants of introducing the habit into the U.S. and contended it had become “so general” that “no visitor to Chinatown, night or day, can enter many sleeping-rooms without finding men indulging in the habit.”[30] He identified a silver lining to Chinese opium use. By enforcing municipal ordinances designed to make Chinese Californians live “like our own race,” “fewer [Chinese immigrants] will come,” he predicted, “and fewer will remain.” Among the laws Farwell suggested to accomplish this end were: “prevent them from burrowing together and crowding like vermin,” “restrict the number of inhabitants in any given block in the city,” and

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[28] *Daily Alta California*, November 9, 1875; November 16, 1875;

[29] *Daily Alta California*, November 9, 1875; November 16, 1875; November 23, 1875. Even before they could act under the authority of this new local ordinance, San Francisco Police raided opium dens and used the threat of a vagrancy prosecution to disperse the patrons they found inside. See *Daily Alta California*, October 1, 1875. Other municipalities shared San Francisco’s concern with white patrons and Chinese den proprietors. In February 1877, Sacramento’s Board of Supervisors approved an opium smoking ordinance modeled after San Francisco’s. The following year, Stockton’s City Council announced its intention to move “against the practice of opium smoking” and also passed a den ordinance. See *Sacramento Daily Union*, January 9, 1877; February 27, 1877; August 21, 1878; November 23, 1878.

[30] Willard B. Farwell and San Francisco Board of Supervisors, *The Chinese at Home and Abroad, Together with the Report of the Special Committee of the Board of Supervisors of San Francisco on the Condition of the Chinese Quarter of that City* (San Francisco: A. L. Bancroft & Co., 1885), 27.

"break up opium dens."[31] Municipal policymakers, then, began the work of using opium criminalization to shrink the state's Chinese population. On that foundation, state-level legislation and even more aggressive municipal ordinances would soon follow.

II. Exceeding the Late-Nineteenth-Century Limits of the State's Police Power

Predictably, the anti-Chinese fervor that lay behind opium legislation led municipal and state lawmakers to devise ever-more aggressive responses to the drug. Following a half-dozen years of municipal action, state lawmakers began to formulate an official, statewide response to opium smoking in the closing decades of the century. In 1880, the California Legislature passed the state's first law regulating the sale of "poisonous substances." A weak law relative to those that would follow, it required that any party selling any of a list of substances—opium among them—identify the substance on its label and also include the word "poison." The legislature passed an opium den law in 1881 and delved into pharmacy regulation for the first time a decade later.[32]

Municipal authorities continued to push harder than those in the statehouse, though, and their efforts precipitated pitched legal challenges. When criminal defendants fought the charges against them, the legal battles that resulted made clear that lawmakers' work to criminalize opium ran up against widely shared views of the appropriate reach of government power. In the late nineteenth century, firmly-held beliefs about individual liberties constrained the state—and, by extension, municipalities—from criminalizing at least some vice. As the century drew to a close, it was far from certain that the courts would allow lawmakers to erode those liberties, even though their racialized purposes for doing so were clear.

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[31] Ibid., 67.
[32] Cal. Stats. (1880) 104; Cal. Stats. (1881) 34; Cal. Stats. (1891) 86-90.

Lawmakers in Stockton pushed their early response to opium furthest. In October 1883, they passed an anti-opium ordinance that, while aimed at dens, featured language broad enough to criminalize smoking opium much more generally.[33] The new ordinance declared opium smoking "injurious to the public health, contrary to public morals, and against the peace and good order of the city." Like the California law that preceded it, the ordinance proscribed maintaining or visiting a room or place for the purpose of smoking opium. It also prohibited remaining in a place or room while others smoked opium; remaining in the "vicinity of" any place "where two or more persons [had] assembled for the purposes of smoking opium;" and the assembling of two or more people in any place for the purpose of smoking opium. As the state supreme court aptly put it when it reviewed the law, the ordinance was "broad enough to prohibit opium-smoking under all circumstances, except when the person ke[pt] moving."[34]

Nearly four years later, in March 1887, police arrested two Chinese Californians, Sic and Sam Lee, for violating the Stockton anti-opium statute. According to police, the two men had met to smoke opium in a room at the intersection of El Dorado and Washington Streets, in the center of Stockton's then-thriving Chinatown. Convicted in the local police court, Sic appealed his conviction, first to the Superior Court of San Joaquin County and later to the California Supreme Court.[35]

San Francisco attorney Lyman Mowry represented Sic. Born in Rhode Island in 1848 to parents who moved to California six years later, Mowry received his law degree at Harvard and began practicing in San Francisco in 1871. By 1887, he had earned a reputation in California for

[33] Stockton's city leaders appear to have acted in the aftermath of a publicized effort by local police to break up opium dens within the city. See *Sacramento Daily Union*, June 2, 1883.
[34] *Charter and General Ordinances of the City of Stockton* (1885), 80-81; Cal. Stats. (1881) 34; *In re Sic*, 73 Cal. at 144 (internal punctuation omitted).
[35] Certification of Sheriff Thomas Cunningham at 1-2, *In re Sic*, 73 Cal. 142 (1887); *In re Sic*, 73 Cal. at 143. On Stockton's Chinatown, see Sylvia Sun Minnick, *The Chinese Community of Stockton* (Chicago: Arcadia Printing, 2002), 12.

representing Chinese clients on matters ranging from criminal appeals to contract actions to habeas proceedings. Beginning in the 1880s, Mowry's public profile increased as he represented Chinese immigrants threatened with deportation under the federal exclusion acts. He was increasingly accused of being a "crooked Chinese lawyer" whose "principal professional practice" was "the devising of schemes to evade the laws for the exclusion of the Chinese.[36]

Mowry honed in on Stockton's use of the state police power in Sic's appeal. He made two principal arguments. First, he argued that the city derived its authority from the state's police power, which he saw as too limited to pass the Stockton ordinance. Second, Mowry pointed to state-level opium legislation and argued that municipalities like Stockton could only legislate on matters already criminal under state law when granted express permission to do so by the state legislature.[37] To the latter argument, the city's attorney responded by claiming that only municipal laws that conflicted with state law were impermissible. To rebut Mowry's argument concerning the limits of state power, Stockton's attorney maintained that the state's police power was capacious enough to "prohibit all things hurtful to the comfort and welfare of society." He described opium smoking as having "evil effects," and posited that opium smoking constituted a sufficient menace to justify this exercise of the police power.[38]

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[36] For criminal appeals, see, e.g., *People v. Ah Lee, et al.*, 60 Cal. 85 (1882); *People v. Lee Chuck*, 74 Cal. 30 (1887); *People v. Tarm Poi*, 86 Cal. 225 (1890); *People v. Chun Heong*, 86 Cal. 329 (1890). For contract matters, see *Ah Jack v. Tide Land Reclamation Co.*, 61 Cal. 56 (1882); and *Quan Wye v. Chin Lin Hee*, 123 Cal. 185 (1898). For another habeus proceeding, see *Ex parte Young Ah Gow*, 73 Cal. 438 (1887). For challenges to exclusion findings, see, e.g., *In re Tung Yeong*, 19 F. 184 (N.D. Cal. 1884); *In re Tom Yum*, 64 F. 485 (N.D. Cal. 1894); *In re Gee Hop*, 71 F. 274 (N.D. Cal. 1895); *Lee Kan v. United States*, 62 F. 914 (9th Cir. 1894); *Ong Mey Yuk v. United States*, 113 F. 898 (9th Cir. 1902); *Ow Yang Dean v. United States*, 145 F. 801(9th Cir. 1906). For three statements of Mowry's reputation as an attorney for Chinese Californians, see *Daily Alta California*, July 28, 1888; October 19, 1888; November 26, 1889.

[37] Pet'r's Br. at 4, 6, *In re Sic*, 73 Cal. 142 (1887).

[38] Resp't's Br. at 1, 3, 6-8, *In re Sic*, 73 Cal. 142 (1887). "Upon the evil effects of smoking opium," he contended, "it seems hardly necessary to enlarge." He continued: "It is too well known to all that a [persistence] in the habit results in the complete moral, mental, and physical ruin of the smoker." As for Mowry's argument concerning what ordinances municipal governments might enact, Stockton's attorney appears to have accurately described the letter of the law. According to the California Supreme Court, the state constitution permits "any county, city, town, or

The court sided with Mowry. In so doing, it proclaimed the state's police power to be too limited to prohibit opium smoking.[39] In sweeping language, the court averred that prohibiting vice, absent some direct harm to the rights of another, "is not ordinarily considered within the police power of the state." "The object of the police power," it contended, "is to protect rights from the assaults of others, not to banish sin from the world or make men moral." Concern over personal freedoms drove the court's pronouncement. "There seems to be an instinctive and universal feeling," the court explained, "that this is a dangerous province to enter upon, and that through such laws individual liberty might be very much abridged." And, in a move from which later decisions would diverge, the court analogized the anti-opium law to proposed temperance statutes and claimed that both represented impermissible infringements on personal liberty.[40]

The question of the state's power to regulate the private use and possession of opium came before the court in an era when legal attention to the police power ran high. According to the *Sic* court, the state could only use its police power to address harms visited on the rights of others. It could not, in other words, dictate private behavior incapable of directly injuring another. In so maintaining, the *Sic* decision reflected one of the widely accepted boundaries of police action during the second half of the nineteenth century. In his influential 1886 treatise on the subject, Christopher Tiedeman concluded that the maxim *sic utero tuo, ut alienum non laedas*—the principle that one must use his her property so as not to injure others—defined the limits of the states' police power.[41] Thomas Cooley, another authority on the subject, also

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township" to "make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." *Ex parte Cheney*, 90 Cal. at 620.

[39] Importantly, the court rested its decision on its finding that Stockton's ordinance conflicted with the state's Poison Law. *In re Sic*, 73 Cal. at 148.

[40] *In re Sic*, 73 Cal. at 143-48.

[41] Christopher Tiedeman, *A Treatise on the Constitutional Limitations of the Police Power in the United States* (St. Louis: The F. H. Thomas Law Book Co., 1886), vi-viii.

described the states' power as bounded by this maxim.[42] Under such a conception of the police power, prohibitions on what one did privately, absent some injury to another, could not stand.

That principle, derived from nuisance law, guided many of the California Supreme Court's decisions during the second half of the nineteenth century. Thirty-one years before its decision in *Sic*, in striking down a California Sabbath law in *Ex parte Newman*, the court had defined the limits of the state's police power by turning to this nuisance principle. To distinguish between legitimate government acts and those that usurped "the reserved rights of the citizen," the court intoned, the "true rule of distinction would seem to be that which allows to the Legislature the right so as to restrain each one, in his freedom of conduct, as to secure perfect protection to all others from every species of danger to person, health, and property." That view of the state's power continued to have purchase in California as the nineteenth century drew to its close. In an 1896 decision on another so-called "Sunday Law," the court proclaimed that "every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows."[43]

That view of the state's authority, though, coexisted in the second half of the nineteenth century with another conception of the police power that might allow the legislature to act in the absence of specific, identifiable harms. Only three years after it had invalidated the Sabbath law in *Newman*, for instance, the California Supreme Court upheld a second Sabbath law as a valid exercise of the police power. In so doing, the court declared: "The general duty of legislation is

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[42] Thomas Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the Union*, 6th ed., (Boston: Little, Brown, and Company, 1890), 704-746. I cite the sixth edition to make clear that, as late as 1890, legal scholars continued to hold and teach this view of the police power. That limitations existed on state legislative action premised on its police power did not mean that it represented a nugatory power before the last decades of the nineteenth century. On the contrary, Cooley catalogs just some of the voluminous laws and regulations properly founded on the police power in earlier periods.

[43] *Ex parte Newman*, 9 Cal. 502, 507-08 (1858); *Ex parte Jentzsch*, 112 Cal. 468, 472-73 (1896). *Newman* involved a state law that, "for the better observance of the Sabbath," forbade merchants from conducting business on Sundays. *Jentzsch* involved a law that prohibited barbers from working or opening their shops on Sundays.

cast upon [the Legislature,] and that duty is to be exercised for the general welfare." As early as 1861, then, the court had described the state's police power as a basis for positivist legislation to enhance the general welfare, and not simply as the authority to address public harms.[44] This broader view of the police power underwrote a number of acts in California, including municipal gambling ordinances, as the nineteenth century neared its end.[45]

Tiedeman's treatise, in fact, reveals his recognition that state lawmakers had begun to forge this more expansive view of the police power. Tiedeman acknowledged a then-recent trend for parties complaining of one "social evil" or another to raise a call for legislation or, as Tiedeman called it, "governmental interference." Indeed, his treatise was intended to contain this trend and to persuade jurists, legislators, and the public that all state constitutions, the police power notwithstanding, contemplated limits on legislative powers.[46] His very effort at proscription betrayed the widening of the police power then under way.

Though the court offered no guidance concerning how the two conceptions of the police power fit together, *Sic* makes clear that, as late as the 1880s, California courts continued to hinder lawmaker attempts to use the police power to encroach on long-cherished personal freedoms. Even as the bounds of the police power began to expand, judges in California frequently refused to allow lawmakers to regulate beyond acts they could link to an affirmative public harm—even when lawmakers acted to make life more difficult for Chinese Californians and, they hoped, reduce their numbers. In fact, at least in the nineteenth century, the court often went to great lengths to describe a particular behavior as inflicting a public harm even after it had started to develop a view of the police power that would have permitted action untethered from

[44] *Ex parte Andrews*, 18 Cal. 678 (1861).
[45] See, for instance, the California Supreme Court's decisions upholding two different San Francisco gambling ordinances, in *Ex parte Tuttle,* 91 Cal. 589 (1891); and *Ex parte McClain*, 134 Cal. 110 (1901).
[46] Tiedeman, *A Treatise on the Constitutional Limitations*, vi-viii.

such harms.[47] When the court decided *Sic*, it was unable to see in opium possession such a public harm and was unwilling to set aside the nuisance-based view of the police power that still had considerable purchase in the state.

Nonetheless, the broader view of the police power that gained traction over the second half of the century presaged the greater restrictions the court would soon countenance. The court's resolve to protect Californians' individual liberties from state encroachment, in other words, would wane in the years ahead, As that resolve weakened, the Chinese Californians who bore the brunt of municipal and state anti-opium laws were left with one fewer place to turn to fight the narcotic legislation that targeted them. Within 25 years, the California Supreme Court would find that the state had the power to criminalize possession—the very act for which it found state authority lacking in *Sic*.

III. Evading a Federal Constitutional Challenge to Anti-Opium Law

If California lawmakers saw limits to their authority premised on a constrained police power as beginning to lose purchase, any concern that federal constitutional challenges would put an end to their anti-opium campaign also diminished by the 1880s. Laws criminalizing narcotics survived where other state and municipal anti-Chinese statutes failed, because officials found in opium restriction a device by which they could target Chinese Californians without opening the state to a federal constitutional challenge. Before the close of the nineteenth century, narcotic laws' formal race neutrality, coupled with evidence that use had spread among a number of different racial and ethnic groups, rendered the laws all but impervious to federal challenge

[47] Even as the California Legislature grew more confident in the breadth of its police authority, the principle that the state's police power must be aimed at addressing an identifiable threat persisted. In approving an ordinance regulating betting on horseraces, for instance, the court took pains to describe gambling as a threat to public safety and morality. The legislature had authority, it determined, to regulate or even suppress a practice it had found "to weaken or corrupt the morals of those who follow it" and "to encourage idleness instead of habits of industry." *Tuttle,* 91 Cal. at 591.

For a generation, local and state policymakers had passed measure after measure targeting California's Chinese population, only to see state and federal courts strike them down on federal constitutional grounds. Before 1868, when the states ratified the Fourteenth Amendment, many of these cases hinged on Congress's authority over interstate commerce.[48] As early as 1857, the California Supreme Court construed the state's imposition of a head tax on foreigners entering the state as impermissibly intruding on Congress's power over foreign commerce. Five years later, the state supreme court struck down on the same grounds a San Francisco ordinance that levied a special tax on Chinese residents.[49] By the middle of the nineteenth century, in other words, immigrants pressing their cases under federal law had already begun to obstruct state lawmakers in their anti-Chinese agenda.[50]

After 1868, litigants could rely on the equal protection clause of the Fourteenth Amendment, which allowed the federal government to intervene whenever any state denied to any person the "equal protection of the laws." The Civil War had vastly increased the size and power of the federal government. The Reconstruction Amendments that followed promised a new, national view of citizenship and appeared to commit the federal government to protecting those rights against state encroachment.[51] In the 1870s, the federal courts and the Fourteenth

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[48] U.S. Const. art. I, § 8, cl. 3. Courts continued to rely on the Commerce Clause to strike down anti-Chinese legislation even after litigants could rely on equal protection. *See, e.g., People v. S. S. Constitution*, 42 Cal. 578 (1872) (striking down a foreign-passenger bonding law as a regulation of foreign commerce).

[49] *People v. Downer*, 7 Cal. 169 (1856); *Lin Sing v. Washburn*, 20 Cal. 534 (1862). San Francisco cast the special tax as protecting "free white labor against competition from Coolie Chinese labor."

[50] This is not to suggest that Chinese litigants always succeeded in challenging laws that targeted them. A notable exception is the effort to overturn California's law banning Chinese testimony, which survived both indirect and direct challenges during the same period. See *People v. Jones*, 31 Cal. 565 (1867); *People v. Washington*, 36 Cal. 658 (1869); *People v. Brady*, 40 Cal. 198 (1870).

[51] "The Civil War and Reconstruction," summarizes legal historian William Forbath, "brought a national draft, a national income tax, national monetary controls, and a national welfare and educational agency for former slaves. They had brought national citizenship and a vast expansion of federal court jurisdiction." William E. Forbath, "Politics, State-Building, and the Courts, 1870-1920," *Cambridge History of Law in America, Vol. II*, Michael Grossberg and Christopher Tomlins, eds. (New York: Cambridge University Press, 2008): 643-696, 643-44.

Amendment thus represented a new and promising avenue to challenge baldly race-motivated acts.

And federal courts struck down both local and state anti-Chinese laws from California as violations of equal protection. The U.S. Supreme Court famously invalidated a San Francisco laundry ordinance in 1886 *Yick Wo v. Hopkins*, finding that city authorities had violated equal protection by forbidding all Chinese applicants from operating their laundries while allowing all others to proceed unmolested. Lower federal courts followed suit. In 1879 and 1880, the federal circuit court in California invalidated, for example, both San Francisco's 1876 "queue ordinance" and a state statute prohibiting commercial fishing by Chinese persons.[52] The former took aim at the braids Chinese men traditionally wore and mandated that male prisoners in the county jail have their hair cut "to an uniform length of one inch from the scalp." The court concluded that the ordinance "was intended only for" and worked a special hardship on "the Chinese in San Francisco," and it held that the Fourteenth Amendment forbade such "hostile and discriminating legislation." Of the fishing prohibition, the circuit court held that subjecting "the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances" remained free from punishment, amounted to a denial of equal protection.[53] By the time they weighed opium restriction in earnest, California lawmakers had more than sufficient cause to fear constitutional challenges to laws inspired by racism.

Augmenting lawmaker concern was evidence that federal courts might consider more than the wording of statutes when they decided equal protection challenges. In *Yick Wo*, the Supreme Court expressly noted that the challenged law was "fair on its face, and impartial in appearance." Nonetheless, it found the law had been "applied and administered by public

[52] *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546); *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880).
[53] *Ho Ah Kow*, 12 F. Cas. at 253, 255-56; *In re Ah Chong*, 2 F. at 737.

authority with an evil eye and an unequal hand."[54] In striking down San Francisco's "queue ordinance," the circuit court in *Ho Ah Kow* also evinced a readiness to look beyond the law's terms. It wrote that where a facially race-neutral ordinance operated only "upon a special race, sect or class," it "may justly conclude that it was the intention of the body adopting it that it should only have such operation."[55] To survive challenge under equal protection, these cases suggested, the motivation behind municipal and state anti-Chinese laws would have to be obfuscated by more than policymakers' use of general terms.[56] Such exacting review of state and municipal anti-Chinese measures no doubt frustrated California policymakers, even as they must have given many Chinese Californians hope that they could resort to federal challenges to fight laws passed with the bald intention to harm them.

Commentators, too, demonstrated an understanding of the federal constitutional limitations that litigants could use to invalidate baldly racist legislation. Popular awareness of the Fourteenth Amendment is suggested by a December 1878 *Sacramento Daily Union* editorial bemoaning the "futility" of anti-Chinese proposals before the constitutional convention then convened. The proposals included provisions prohibiting Chinese immigration and preventing firms from hiring Chinese employees.[57] Angered by what it saw as an obvious political ploy, the *Daily Union* editorialized:

> The State cannot . . . deprive [the Chinese] of the equal protection of its laws, and if the Convention thinks it possible to make the Chinese go by any such measures as it has adopted it will find that it has merely run its head against a wall. It is perfectly safe to say that in so far as the report of the Committee on Chinese adopted the other day contemplates the application of discriminating

[54] *Yick Wo*, 118 U.S. at 373-74.
[55] *Ho Ah Kow*, 12 F. Cas. at 255. The circuit court in *Ho Ah Kow* announced an unwillingness by judges to shut their "eyes to matters of public notoriety and general cognizance."
[56] Litigants' equal protection challenges to anti-Chinese laws also came up short of having laws invalidated. See, e.g., *Soon Hing v. Crowley,* 113 U.S. 703 (1885) (finding that an earlier version of San Francisco's laundry ordinance did not violate equal protection).
[57] *Sacramento Daily Union*, December 21, 1878.

> legislation of any kind to the Chinese, it is totally worthless and invalid. The first attempt made to carry out such provisions would expose their futility, and then the public would discover, too late, that nothing at all had been really done by the Convention.[58]

As the *Daily Union*'s coverage demonstrates, policymakers and the public in California certainly understood equal protection as an impediment to statutes targeting Chinese Californians.

Despite this history of federal and state courts invalidating anti-Chinese measures on federal constitutional grounds, Mowry did not raise a Fourteenth Amendment challenge in either *Sic* or in a second opium case six years later, *Ex parte Hong Shin*. He opted not to do so though courts had indicated their willingness to assess such statutes with an eye on lawmaker intent, and not just language, and despite open discussion by policymakers and the public of the likelihood of equal protection challenges to anti-Chinese laws. In fact, he never raised the possibility that these anti-opium statutes might have had discriminatory purpose or effect.[59] He failed to raise this challenge even though, with his history of representing Chinese clients, it could not have escaped his attention that Chinese Californians had successfully used equal protection to attack laws that directly targeted them. Nor could he have failed to appreciate the underlying racialized purpose behind anti-opium measures, so widely broadcast at the time. Why would Mowry have decided not to raise equal protection in *Sic* and *Hong Shin* and argue that the laws he challenged

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[58] Ibid. On a separate occasion, the *Daily Union* criticized the "barbarism" of the convention's anti-Chinese propositions, declaring them in "flagrant contravention of the supreme law of the land" and predicting "they would be declared unconstitutional by the Courts." Though the daily's focus remained on California's inability to circumvent the Burlingame Treaty, its editorials made clear the convention's proposals violated both the treaties and laws of the U.S. *Sacramento Daily Union*, December 17, 1878.

[59] See generally Pet'r's Br., *In re Sic,* 73 Cal. 142 (1887); Pet'r's Br., *Ex parte Hong Shin*, 98 Cal. 681 (1893). The published opinions of state courts from the late nineteenth century indicate that Mowry was not alone in opting not to raise an equal protection challenge to opium restrictions. I have found evidence of only one such claim, in an 1897 challenge to a Missouri opium den law. See *State v. Lee*, 38 S.W. 583 (Mo. 1897). Among the defendant's grounds for appeal in that case was a contention that the Missouri law ran afoul of the Fourteenth Amendment by denying the defendant "equal protection with other citizens under the law." Ibid., 583. The state supreme court dispensed with the argument without discussion. Ibid., 584. More often, Fourteenth Amendment challenges to opium restrictions focused on due process and argued that drug laws had unconstitutionally encroached on a property right. See, e.g., *Territory v. Ah Lim*, 24 P. 588 (Wash. 1890); *Luci v. Sears*, 44 P. 693 (Or. 1896).

in those cases either had racist intent or had been enforced with particular vehemence against Chinese Californians?

The narcotic laws' formal-race neutrality and the public's growing awareness of white opium use must have played a part in Mowry's decision. Addressed to a practice on the rise among whites and with their underlying purpose cloaked in race-neutral terms, the Stockton and San Francisco ordinances at issue in *Sic* and *Hong Shin* did not raise the sort of easy equal protection problem that might have resulted in quick invalidation.

Moreover, Mowry may have determined not to offer equal protection challenges because, by the 1880s, federal judges had eroded much of the Fourteenth Amendment's once-considerable potency. In a series of decisions beginning with Justice Miller's opinion in the *Slaughter-House Cases*, the Supreme Court limited the Fourteenth Amendment's reach and impeded the federal government's ability to guarantee equality of treatment for African Americans and others.[60] By reading the Amendment to apply only to "state action" and construing it to protect only the privileges of federal citizenship—a "narrow class" compared to those incident to state citizenship—the Court rendered the Amendment a feeble vestige of what it might have otherwise been.[61] By 1883, when the Supreme Court issued its decision in *The Civil Rights Cases*, reaffirming the "state action" requirement and the Court's earlier decision that the Fourteenth Amendment did not support laws reaching private violence or discrimination, equal protection had ceased to serve as an important limitation on state acts.[62] In the words of William Stuntz, for

[60] *Slaughter-House Cases*, 83 U.S. 36 (1872).
[61] See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham: Duke University Press, 1986), 174-96; Loren Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro* (New York: Pantheon Books, 1966), 109-117; Goldstone, *Inherently Unequal*, 130.
[62] *Civil Rights Cases*, 109 U.S. 3 (1883).

a fifty year period beginning in 1883, "judges saw equal protection arguments as unserious" and did little to address "discriminatory treatment under formally neutral laws."[63]

Before Congress began adding its own criminal statutes to police narcotics, then, federal jurists immunized local and state anti-narcotic laws—and, indeed, nearly all local and state laws, criminal or otherwise—from invalidation on federal constitutional grounds. With the threat of federal intervention into questions of state politics lower after the 1870s, lawmakers acted with increasing confidence that they had found in opium restriction a means to target Chinese Californians that would survive attack in the federal courts. They would soon begin expanding their anti-narcotic efforts, criminalizing additional practices and substances. Law enforcement officers would continue, through subsequent expansions to anti-narcotics law, to police Chinese Californians more than any other group in the population. Equal protection no longer worked to stop them.

IV. Expanding the State's Response to Opium to Reach New Groups and Drugs

Beginning in the opening years of the twentieth century, the California Legislature began to pass laws in earnest to expand dramatically the state's response to drugs. Within 30 years of the first den ordinance, California had narcotics laws covering a long list of substances and practices, and the legislature had constituted an agency to enforce the laws. Throughout this expansion, Chinese Californians remained firmly in lawmaker crosshairs.

Shortly after the turn of the century, the legislature, at the Board's request, passed both a pharmacy law and a poison law. The former expanded the authority of the Board of Pharmacy

[63] William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge: The Belknap Press, 2011), 118. For a different view of the Court's decisions in the 1870s and 1880s and an alternative telling of when and how it definitively abandoned Reconstruction, see Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (New York: Cambridge University Press, 2011).

and set out to ensure that only licensed pharmacists sold controlled drugs. The latter placed a number of restrictions on the selling and dispensing of drugs, including a prohibition on doling out narcotics to customers not in possession of a valid prescription. It also brought a number of new substances under state control, including morphine, codeine, heroin, and cocaine. Importantly, both focused in large part on commerce in drugs, placing restrictions on the individuals permitted to sell narcotics and the circumstances under which they could do so.[64] The Board promulgated an official interpretation of the statute in August, and two months later its Legal & Complaint Committee drafted a letter to explain the new Poison Law.[65]

California passed these, its first broad control statutes, at the same time that many other state legislatures also enacted similar laws. The first decade of the twentieth century proved something of a heyday for narcotics control, with more than 35 states passing legislation of this type during the ten-year period. Although they differed as to substances covered, with a fair number of states first addressing cocaine and then later adding opiates to their laws, they resembled each other in forbidding the sale of controlled drugs absent a valid prescription. Notably, relative to its immediate neighbors, California's Poison Law came late. Nevada prohibited the sale or dispensing of opium without a prescription thirty years before California, and Oregon did so twenty years earlier.[66]

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[64] Cal. Stats. (1907) 765-72. In that regard, they only called on the police power in the same way that the San Francisco Board of Supervisors had when it enacted the 1889 ordinance challenged in *Hong Shin*.

[65] Board of Pharmacy Minutes, January 16, 1907; Board of Pharmacy Minutes, August 3, 1907; Board of Pharmacy Minutes, October 19, 1907. The Board's self-described "interpretation" of the Poison Law was little more than a parsing out of the law's provisions into separate rules concerning when a patient must have a prescription to receive a drug.

[66] United States Public Health Service, *State Laws Relating to the Control of Narcotic Drugs and the Treatment of Drug Addiction* (Washington: Government Printing Office, 1931). Arkansas, Colorado, Illinois, Maine, Montana, Nevada, Ohio, and Oregon, plus the Territory of Arizona, were the only states to pass a control law prior to 1900.

The Board took charge of enforcing the new laws, and it hired a group of investigators for this purpose.[67] The Board's early enforcement record underscores one way that concern over narcotics use had shifted since lawmakers in San Francisco, Stockton, and Sacramento first considered the issue. As a function of the laws' focus on restricting the sale of drugs and also of the pharmacists who comprised the Board, a considerable share of its efforts focused on retail druggists and their clerks. To explain its interest in these professionals, the Board invoked its duty to ensure Californians a safe supply of drugs.[68]

The Board immediately brought its power to bear against retail druggists and their clerks. It brought a large number of cases against druggists who allowed an unlicensed clerk to serve customers. It also brought cases against pharmacists it accused of doling out morphine, cocaine, and laudanum without valid prescriptions.[69] Such cases required little in the way of investigative work: A Board envoy needed only to enter a pharmacy and either observe sales being made by unlicensed clerks or endeavor to buy a narcotic without a prescription.

Even as the Board turned its attention to drug store purveyors and their employees, its investigators continued to police Chinese Californians and smoking opium. When the Board's investigators turned their focus away from retail pharmacies during the early months of enforcing the new Poison Law, Chinese Californians operating opium dens were the only other group that drew their attention.[70] And, it is worth noting, state investigators' efforts augmented,

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[67] The Poison Law anticipated a build-up in the Board's inspection force. It required that sellers of controlled substances keep a detailed record of all such transactions, which record book must "always be open for inspection by the proper authorities." Cal. Stats. (1907), 771.

[68] *San Francisco Call*, July 11, 1907. Charles Whilden, then secretary of the Board, called its drive to identify and prosecute druggists violating the two laws a "matter of life and death:" Without the Board's intervention, the "customer has no means of knowing whether the clerk to whom he hands his prescription knows how to fill it."

[69] See generally Investigation and Violation Log Book 1906-1909, Department of Consumer Affairs - Board of Pharmacy Records, R126.F3888-110, California State Archives [hereinafter Log Book].

[70] During the first three months the Board enforced the new laws, the Board prosecuted four cases against Chinese Californians in Los Angeles for maintaining opium dens. These four were the only defendants who neither owned nor worked at a retail pharmacy. Ibid. See also Board of Pharmacy Minutes, Oct. 23, 1907 (indicating that the

but did not replace, other law enforcement efforts in California. Police officers continued to enforce municipal ordinances and state laws relating to opium against Chinese Californians with the same dedication they had before the state expanded its response to California's narcotic problem.[71] As early as the first decade of the twentieth century, in other words, the overlapping capacities of local and state officials had already become a fixture of California's emerging penal state.

The Pharmacy and Poison laws also made opium restriction a subject of interest to a new group of Chinese Californians—the merchants involved in the wholesale opium trade. Several meetings between the Board and representatives of the Chinese Six Companies, in October 1908, drove home the consequences of the two laws for Chinese merchants.[72] One of these meetings, at the Six Companies' headquarters, counted the Companies' presidents, representatives of the "various drug and mercantile interests of the Chinese quarter," as well as an interpreter and O.P. Stidger, an attorney, among its audience members. According to the Board, the meeting was intended to discuss "the restriction of the trade in opium," especially its wholesale sale "by Chinese in California."[73] If only licensed pharmacists could lawfully dispense opium, and only pursuant to a valid physician's prescription, Chinese merchants faced a difficult situation. Their customers—opium den keepers and unlicensed Chinese druggists, prominent among them—

Board's inspectors visited 177 drug stores and 170 general stores during the first quarter after the legislature passed the Poison and Pharmacy Laws); *San Francisco Call*, July 11, 1907.

[71] The California press continued to cover instances where local police officers arrested Chinese Californians for opium-related infractions. See, e.g., *Los Angeles Herald*, May 20, 1908; July 11, 1908; *San Francisco Call*, December 3, 1908. It also carried reports where police arrested non-Chinese suspects. See, e.g., *Los Angeles Herald*, March 15, 1907; *San Francisco Call*, May 26, 1908.

[72] See Board of Pharmacy Minutes, October 24, 1908; Board of Pharmacy Minutes, October 27, 1908. For a recent study of the Chinese Six Companies, see Yucheng Qin, *The Diplomacy of Nationalism: The Six Companies and China's Policy Toward Exclusion* (Honolulu: University of Hawai'i Press, 2009). The first part of the conference involved the Board describing the source of its authority to regulate opium in California. Tellingly, before the Chinese attendees asked a single question, a member of the Board had to explain to them who comprised the Board of Pharmacy and had to elaborate on its duties. Even as their invitation to the Board suggests they understood something had shifted in their former freedom to traffic in opium, these representatives of San Francisco's Chinese merchants still saw the basis and scope of the Board's authority as obscure.

[73] Board of Pharmacy Minutes, October 27, 1908.

could no longer lawfully sell opium. The Poison and Pharmacy laws thus raised the possibility that these wholesalers would be left without a licit customer base.

The Board's meeting demonstrated that a sense of confusion concerning the state's opium strictures could be counted as one byproduct of California's multi-jurisdictional approach to anti-narcotic legislation and enforcement. Neither of the state's 1907 laws attempted to reach private use or possession of opium but instead targeted parties who sold narcotics illicitly.[74] The distinction between commercial and non-commercial activities remained opaque to many Californians, though, including the merchants who met with the Board. Through an interpreter, one of the meeting attendees asked, in a possible reference to smoking opium without inhaling the fumes, whether it would be a violation of the Poison Law for "a Chinaman to smoke opium when he did not take it into his system." The question suggests that Chinese Californians believed it unlawful to smoke opium and sought a means of continuing to do so without running afoul of the law. Without clarifying the precise practices the law condemned, a Board member responded that the Board had "no jurisdiction over the smoking of opium, only over the sale of it."[75] The attendee's question indicates that the overlapping laws to which Californians were subjected may have had a chilling effect on still-lawful practices; the Board's response suggests policymakers' comfort with that consequence.

Policymaker concern with Chinese-caused white demoralization also crept into the Board's conversation with the leaders of the Six Companies. Board members asked only a small number of questions at the conference, but the few matters they raised revealed a continuing anxiety that Chinese Californians might yet be selling opium to whites. One member queried: "What percentage of the people who trade in Chinese drug stores are white people?" The Board

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[74] See Cal. Stats. (1907) 766-72.
[75] Board of Pharmacy Minutes, October 27, 1908.

sought to learn, that is, how many white Californians secured opium from Chinese druggists. When the Board's audience replied that but few customers of the Chinese drug stores were white, the Board responded that such "sales would be contrary to California law."[76] Despite the Board's correct pronouncement of the law, its answer suggested that the customer's race had relevance in determining whether a specific transaction ran afoul of the state's narcotic laws. Neither the Pharmacy Law nor the Poison Law contained any provision for such a consideration; all sales by unlicensed druggists violated the law. Nevertheless, the discussion reveals that the prospect of white users consuming Chinese-provided drugs continued to irk lawmakers.

The 1907 laws, then, reflected the state's broadening view of which persons and what practices comprised the core of its drug problem, even as Chinese Californians continued to bear special notice. Neither the initial impetus behind opium den ordinances nor lawmakers' original focus on Chinese Californians suggested the need for so wide or aggressive a regulatory apparatus. Drug laws' utility in policing vulnerable groups, a budding consensus that narcotics had primarily negative consequences, and a shifting of view of what the state was empowered to do, though, coalesced to make an expansion of the state's response to narcotics appear a foregone conclusion.

V. Justifying a Renewed Attack on Narcotics Possession

If a limited view of state power had, for two decades, kept California legislators from pursuing a more aggressive response to opium and Chinese Californians, they would endeavor to implement such a response shortly after the turn of the twentieth century. Urged on by federal officials, California began an attack on personal use and possession following fast on the heels of policymakers' first efforts to construct a statewide anti-narcotics regime. Though the national

[76] Ibid.

state likely lacked the constitutional authority to criminalize drug possession, its envoys believed that such laws were the only means by which the penal state could effectively address the country's narcotics problem. California's move to build a more robust anti-narcotics apparatus thus foreshadowed how the penal state that would emerge by the 1920s would gather strength through the collaboration of officials at all levels of government.

Urged by the Board, which was in turn prodded by national figures and developments on the federal level in the control of narcotics, the California Legislature expanded its anti-drug response once more in 1909. Even though recent case law from the state's supreme court provided that the state lacked the authority to prohibit the private possession of opium, the state's legislators nonetheless moved to do exactly that. In March, the legislature amended the Poison Law to make it unlawful for any person or persons "to sell, furnish or give away" or "*to have in their or his possession* any cocaine, opium, morphine, codeine, heroin, or chloral hydrate."[77] For the first time, the state's lawmakers moved to regulate the private possession of narcotics, infringing on the same individual liberty about which the Court in *Sic* had expressed such fear of eroding.[78] Armed with expanded power, the Board of Pharmacy used the possession clause almost exclusively against Chinese Californians.

Dr. Hamilton Wright, one of the federal government's emissaries to the first International Opium Commission in Shanghai, instigated the Board's expansion of the law. Wright traveled

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[77] Cal. Stats. (1909) 422-26. (emphasis added). The amendment also changed the title of the law in a crucial way. Section 1 provided that "the title of an act entitled 'An act to regulate the sale of poisons in the State of California and providing a penalty for the violation thereof,' approved March 6, 1907, is hereby amended so as to read as follows, viz: 'An act to regulate the sale *and use* of poisons in the State of California and providing a penalty for the violation thereof." (emphasis added).

[78] I am not the first to note the significance of a criminal regime's policing of possession. For a study of how possession clauses feature in the War on Crime of the late twentieth century and an argument that they amount to "threat detection," the punishment of which lay outside traditional understandings and limitations of the criminal law, *see* Markus Dubber, "Policing Possession: The War on Crime and the End of Criminal Law," *Journal of Criminal Law & Criminology* 91, no. 5 (Summer 2001): 829-996.

around the country in 1908 at the instruction of the U.S. Department of State.[79] He endeavored to determine "the best method of restricting the use of opium in the United States."[80] He met with the Board in October 1908 and spoke of "stamping out the opium traffic" in California, recommending to the Board an amendment to the Poison Law that would make it "a violation to have opium, its compounds or preparations in [one's] possession."[81] The Board paid close attention and weighed in as the legislature considered Poison Law amendments over the next several months.[82] A recommendation by a federal official thus proved the catalyst for an increase in state criminal law.

The Board wanted the state to add a possession clause to the Poison Law not so that it could go after drug users, but, it claimed, so that it might prosecute hitherto unreachable opium traffickers. In its annual report to the governor, the Board in September 1909 praised the amendment. It claimed the legal change had already enabled it to "reach parties who were carrying on a nefarious traffic in opiates, but against whom it was almost impossible to secure satisfactory evidence when sale of the drug had to be proven."[83] As the Board initially cast the law, it had not shifted the focus of narcotics control away from trafficking toward possession and use. Instead, it had merely lowered the evidentiary standard law enforcement officers had to meet to prosecute traffickers. Now, when a police officer or a Board inspector caught a person suspected of selling opium illicitly, he could arrest the suspect on finding opium in the person's

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[79] Hamilton Wright Curriculum Vitae, Records of the U.S. Delegations to the International Opium Commission and Conferences, Records of Delegate Hamilton Wright, Record Group 43.2.9, National Archives, College Park, Maryland [hereinafter IOC Records].
[80] Letter from Dr. Hamilton Wright to the U.S. Secretary of State, November 5, 1909, IOC Records.
[81] Board of Pharmacy Minutes, October 26, 1908.
[82] Board of Pharmacy Minutes, January 18, 1909; January 23, 1909; January 25, 1909; January 27, 1909; February. 2, 1909.
[83] *Report of the California State Board of Pharmacy for Fiscal Year Ending June 30th, 1909*, Governor's Office Records.

possession rather than wait to build a case based on evidence of an illegal sale.[84] With little public fanfare, the legislature handed the Board a new, powerful weapon to fight narcotics use.

While the Board never mentioned Chinese Californians in its discussion of the Poison Law amendment, it used its new powers almost exclusively to target this group. In the 12 months that ended June 30, 1908, the last full fiscal year in which no possession prosecutions occurred, the Board brought 77 cases under the Poison Law, 23 against persons with Chinese surnames.[85] Three years later, its prosecutions of Chinese Californians, especially for possession, skyrocketed. That year, it prosecuted 294 Poison Law cases, 179 against persons with Chinese surnames.[86] The Board's possession cases presented even starker numbers: It brought 112 such cases during this 12-month period, 103 of which named Chinese-descended persons as defendants.[87] If the Board indeed used the Poison Law amendment only to prosecute previously unreachable traffickers—its justification for the new law—it must have believed a fair number of Chinese-descended traffickers had evaded prosecution under the old Poison Law.

The Board's explanation for why enforcement focused so singularly on persons of Chinese descent had two parts. First, it noted that the Poison Law had raised the prices of many narcotics, giving "unscrupulous druggists and many Chinese" an incentive to participate in the trade. Second, it claimed, the Board's effort to prosecute all druggists violating the Poison Law had led many in that field to "discontinue[] the practice" of selling drugs indiscriminately. With

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[84] Ibid. This strategy—using a possession charge to prosecute a suspected trafficker—would prove successful against defendants Chinese and non-Chinese. In April 1912, for instance, an officer of the San Francisco Police Department, working in conjunction with one of the Board of Pharmacy's inspectors, arrested Frederick Meade. Meade had earned a reputation in San Francisco as the "king of the cocaine peddlers." Despite his infamy, he was charged not with selling drugs but with having morphine and cocaine in his possession. *San Francisco Call*, April 7, 1912.

[85] *Report of the California State Board of Pharmacy for Fiscal Year Ending June 30th, 1908*, Governor's Office Records.

[86] *Report of the California State Board of Pharmacy for Fiscal Year Ending June 30th, 1911*, Governor's Office Records.

[87] Ibid. In other words, more than 91% of the Board's possession cases in the last six months of 1910 and the first six months of 1911 had Chinese Californians as defendants.

these violators out of the picture, it claimed, the Chinese Californians who peddled drugs were all that remained to supply addicts and users.[88] According to the Board, then, strict enforcement elsewhere had left Chinese dealers with a corner on the narcotics market. Increased prosecution of Chinese Californians reflected that reality and not any race-inflected motivation behind, or enforcement of, the law.

While the Board contended the uptick in its arrest of Chinese Californians reflected only greater success in apprehending traffickers using the relaxed evidentiary requirement of the possession clause, municipal authorities openly used the new law against Chinese drug users. If San Francisco records are any guide, municipal officials ramped up their enforcement of the Poison Law against Chinese Californians after the 1909 law. There, police and Board of Pharmacy inspectors continued to prosecute cases against Chinese persons caught in the act of peddling.[89] They also put the amendment to use by bringing possession charges against known vendors and peddlers against whom they may have been unable to secure evidence of trafficking—the purpose the Board claimed to have envisioned for the 1909 change.[90] Strikingly, though, law enforcement officials used the amendment to bring charges against a large number of Chinese persons they described only as "opium smokers," "opium users," or "drug users." Reports from the city Police Court in the years following the 1909 amendment are rife with

[88] Ibid. It did not offer an explanation for why the now-more lucrative trade did not encourage non-Chinese Californians, other than those it counted among the "unscrupulous druggists," to participate in the narcotics commerce at greater rates.
[89] *San Francisco Call*, February 6, 1910; March 1, 1910. Of course, law enforcement officials also continued to prosecute cases against non-Chinese persons caught selling narcotics. See, e.g., *San Francisco Call*, December 3, 1909; November 5, 1912.
[90] See, e.g., *San Francisco Call*, December 23, 1911; January 13, 1912, at 25. This interpretation depends to some extent on the degree of precision it is fair to credit newspaper reporters as having. In the two reports cited at the end of the previous note, the *Call* expressly claimed the defendants were convicted for selling narcotics without a prescription. In the two reports cited in this note, the *Call* labeled the Chinese-descended defendants "peddlers" and "sellers" of opium and morphine but did not indicate the defendants had been caught in the act of selling.

Chinese San Franciscans convicted and fined only for possessing opium.[91] And at least one defendant faced a trial in the San Francisco Superior Court, charged as a persistent violator of the Poison Law.[92] The complexity and multi-jurisdictional nature of this work bears mention. Municipal enforcement of the state's possession law, a legal intervention federal officials had conceived, brought increasing numbers of Californians, non-Chinese but especially Chinese-descended, to the attention of police officers, including many never charged with peddling.

By 1909, then, the legislature had claimed new authority for the state, constraining the individual liberty the *Sic* court had 22 years earlier warned against. Policymakers' drive to claim new power owed much to the populations they believed would bear the burden of increased surveillance. It is worth noting, though, that lawmakers moved to punish opium possession at a time of considerable change in the U.S. The period between 1890 and 1910 saw large numbers of southern and eastern Europeans enter the country, proved a highpoint of white supremacist brutality against black southerners, and featured a great deal of labor activism that occasionally turned violent.[93] The problems that lawmakers associated with opium use and Chinese influence may have appeared, in other words, as one component of a larger crisis facing the country. Securing more expansive legislative powers may have come to seem wise to legislators in light of these conditions. Judges, too, may have been more willing to countenance these expansions of state power in such a climate.

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[91] See, e.g., *San Francisco Call*, December 21, 1911; January 25, 1912; January 27, 1912; February 22, 1912; December 25, 1912. Non-Chinese drug "users" and "smokers" also found themselves newly scrutinized by law enforcement personnel. See, e.g., *San Francisco Call*, December 30, 1911; April 19, 1912; July 23, 1912.

[92] *San Francisco Call*, April 27, 1912.

[93] On eastern and southern European immigration to the U.S. between 1890 and 1910, see Roger Daniels, *Coming to America: A History of Immigration*, 2nd ed. (New York: Harper Perennial, 2002), 185-234. For the classic argument that the nadir of race relations fell during this period, see Rayford W. Logan, *The Negro in American Life and Thought: The Nadir, 1877-1901* (New York: Dial Press, 1954). On labor unrest during the period, see Melvyn Dubofsky, *The State and Labor in Modern America* (Chapel Hill: University of North Carolina Press, 1994), 1-52.

VI. Securing Judicial Approval of a Stronger Police Power

Legislators' determination to criminalize drug possession handed law enforcement officers broad authority to investigate and arrest Chinese Californians, but it would have all come to naught if the California Supreme Court had persisted in its earlier view of state power. When the question of the state's authority to police drug possession came before the court a second time, though, it found the state's police power sufficiently capacious to support a possession law. Though the court's about-face reflected contemporary shifts in state power, it still had to find a pressing public concern to approve the legislature's abridgment of Californians' personal freedoms. In contending that drug trafficking and use represented such a concern, the supposed moral degradation caused by narcotics, along with their imagined Chinese source, proved key components of both the state's arguments and the court's decision.

By the time it criminalized the private possession of opium, the state wielded greater authority to do so than it had a decade or two before. By 1909, the common perception of the police power among jurists, legal theorists, and policymakers had changed, a development on which the legislature depended when it set its sights on restricting possession and use. In 1887, in *Sic*, the California Supreme Court had echoed one commonly-held view of the police power—as closely tied to nuisance doctrine. So limited, it supported only those acts that could arguably be cast as preventing one person or group from harming another. Even when the court described the police power in more capacious terms—as the authority to "promote the general welfare"—it often tied such acts to identifiable public harms. After the turn of the century, though, the state's prerogative to promote the general welfare no longer required such a close fit between public harm and police measure. Ernst Freund's 1904 treatise, the best known on the topic, described this change. Though he made a case in his treatise for the national government to exercise the police power, Freund nonetheless explained the then-current parameters of police measures in

the country. He defined the power as the authority to promote the "public welfare by restraining and regulating the use of liberty and property." Freund's conception of the police power permitted a much broader set of legal restrictions on individual liberties.[94]

While Freund described the conceptual framework that underlay the expansion of the states' police power, others quantified the results of that shift. Charles Warren, whose three-volume *The Supreme Court in United States History* would win the Pulitzer Price in 1923, penned an article for the *Columbia Law Review* in 1913 in which he considered then-recent claims that the Supreme Court had served as an obstacle to Progressive legislation. Warren found otherwise, noting that the Court had, since 1887, but rarely invalidated a state police action as overstepping legislative authority or for running afoul of the Fourteenth Amendment. He also noted the Court's approval of Freund's view of the police power. The Court's deference to state authorities, its weakening of the Fourteenth Amendment, and the states' gain in power all went hand-in-hand in Warren's formulation.[95] These forces resulted in states with newly broad authority to regulate within their borders.

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[94] Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan & Company, 1904), iii.

[95] Charles Warren, "The Progressiveness of the United States Supreme Court," *Columbia Law Review* 13, no. 4 (April 1913): 294-313, 310. The same question that animated Warren's study would prove foundational to a large body of scholarship that debates whether and why the Supreme Court during this period invalidated state police power legislation. For scholarship suggesting the Court invalidated much state-level legislation that would have otherwise impeded the interests of American business, *see* Robert McCloskey, *American Conservatism in the Age of Enterprise, 1865-1910: A Study of William Graham Sumner, Stephen J. Field, and Andrew Carnegie* (Cambridge: Harvard University Press, 1951); Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca: Cornell University Press, 1960); Frank R. Strong, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* (Durham: Carolina Academic Press, 1986); and Owen M. Fiss, *The Troubled Beginnings of the Modern State* (New York: Macmillan, 1993). For arguments that the Court's conservative justices acted not to support business but instead to promote earlier conceptions of liberty, *see* Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law & History Review* 3, no. 2 (Autumn 1985): 293-331; William E. Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review* (1985): 767-817; Cass R. Sunstein, "Lochner's Legacy," *Columbia Law Review* 87, no. 5 (June 1987): 873-919. For a study suggesting that the Court may not have invalidated state legislation to the degree scholars had previously argued, *see* Michael J. Phillips, *The* Lochner *Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Westport, Conn.: Praeger, 2001).

As with the earlier Stockton ordinance, a Chinese defendant eventually challenged the possession law's constitutionality. On July 16, 1910, authorities in Salinas arrested Yun Quong and charged him with having "in his possession a preparation of opium" without a written prescription.[96] Yun was arrested in conjunction with investigations in Monterey and Santa Cruz counties by Board inspectors, with Inspector Fred Brown leading the charge. Brown's investigations were two-pronged: They included raids on opium dens as well as activities designed to trap local druggists selling drugs illicitly. Brown reported back to the Board that his raids on opium joints had proven "quite successful," with several defendants having already pled guilty to the charges against them. Two weeks later, an attorney representing the Board in several of its prosecutions appeared and confirmed Brown's claim of successful raids and guilty pleas. The attorney also informed the Board of Yun's challenge, however, reporting that "one of the Chinamen arrested in Salinas for having opium in his possession appealed."[97]

The Board found itself enmeshed in a whirlwind of bad publicity surrounding its Monterey and Santa Cruz activities for reasons that had nothing to do with Yun. Local press soundly criticized its inspectors' methods in gathering evidence against druggists. According to the *Santa Cruz News*, one inspector in Santa Cruz, "finding that a druggist did not keep a certain drug containing a poisonous substance, pleaded with him to send away for it to relieve his suffering." Having done so, the druggist found himself "put under arrest by the man he had succored." Another inspector visited a druggist and "pleaded" with him to sell "a small quantity of morphine," claiming that he had "contracted disease while fighting for the flag in the Philippines, and was at that moment in terrible pain." The druggist refused, suspecting a trap, and "learned later that the same man had caused the arrest" of another doctor on "some such

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[96] Pet'r's Writ of Habeus Corpus, 1-2, *Ex parte Yun Quong*, 159 Cal. 508 (1911).
[97] Board of Pharmacy Minutes, July 26, 1910; August 8, 1910.

false claim." The *San Francisco Call* condemned these practices and suggested the Board "should have the decency to exercise some sort of supervision over its gumshoemen." It recommended termination for any inspector caught making such representations to trap druggists.[98] Tellingly, the paper raised no objection to the Board's activities in investigating opium dens.

Before the state appellate court as well as in front of the California Supreme Court, Yun challenged the possession statute as beyond the state's police power and an "encroachment upon individual rights or liberties … guaranteed by the organic law."[99] Yun's attorneys claimed the right to possess what one wished to be one of the "fundamental rights of our people" and located the basis of that right both in natural and positive law.[100] Guarantees in the state and national constitutions that protected against the deprivation of liberty and property guarded this right, they contended. Yun's counsel also insisted that even absent such specific provisions, these rights were "inherent in every natural person" and did "not depend on constitutional grant" or guarantee.[101] They described the possession law, in other words, as running up against long-held notions of individual liberty that predated the U.S. and state constitutions.

Acknowledging that, in appropriate circumstances, the legislature may pass a law that infringes even upon a fundamental right, Yun's attorneys described their client's case as not

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[98] *San Francisco Call*, July 31, 1910 (citing *Santa Cruz News*). The Board's president set off on a tour of Northern California cities to meet with newspaper editors and law enforcement officials to resolve questions about its inspectors' methods. *See* Board of Pharmacy Minutes, Aug. 1, 1910; Board of Pharmacy Minutes, Aug. 1, 1910.
[99] Pet'r's Op. Br, 3, *Ex parte Yun Quong*, 159 Cal. 508 (1911); Resp't's Br., 4, *Ex parte Yun Quong*, 159 Cal. 508 (1911). He also argued that the statute violated the California Constitution on two additional grounds: (1) that its title did not sufficiently indicate its contents, and (2) that it granted to "physicians, dentists and veterinarian, privileges and immunities withheld from other citizens." See Pet'r's Writ of Habeus Corpus, 2, *Ex parte Yun Quong*, 159 Cal. 508 (1911).
[100] Pet'r's Op. Br, 4, 12 *Ex parte Yun Quong*, 159 Cal. 508 (1911). In a sign of just how profound an expansion of state power the possession clause represented, Yun Quong's attorneys expressed confidence that the court would not approve this exercise of the police power once it understood all the consequences that might follow. They explained to the court that it could not uphold the Poison Law amendment unless it was "prepared also to hold that it is competent for the Legislature to make it a criminal offense for one in the privacy of his own apartments to use opium; for in order to use it he must have it in his possession."
[101] Ibid., 5-6.

involving such circumstances. Their brief opened with authority that both invoked nuisance doctrine as the continuing limit of the state's police power and also proclaimed "conservation"—not "promotion"—"of the public welfare" to be the upper limit of legislative authority.[102] They insisted that the opium statute was directed toward the individual possessor's welfare and not the general welfare. "It is elementary," they maintained, that the police power may only be invoked to preserve the "public welfare;" it "does not concern itself with the individual as a part of public society." Yun's attorneys then insisted that the mere possession of opium had "no relation whatever to the protection" of the public welfare and was thus "not within the legitimate exercise of the police power."[103] In short, in addition to their arguments derived from state and federal constitutional guarantees and their exposition of individual liberties supported by natural law, Yun's attorneys contended that the possession law impermissibly tried to advance individual, rather than the public's, welfare.

The state's attorneys also focused on California's police power and indirectly referenced Freund's more capacious view of that basis of authority. They argued that the court must answer two questions to resolve Yun's case. First, was opium consumption a proper subject for the legislature to regulate or prohibit? Second, did the legislature choose a reasonable means for the "suppression of this vice?" Taken together, the two questions reveal a take on the police power that would allow all reasonable legislative actions on subjects deserving of regulation. They suggest, in other words, a decided move toward a police power potent enough to support positivist legislation to promote the general welfare. To contend that the court must answer the

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[102] Pet'r's Cl. Br., ii, 9-10 *Ex parte Yun Quong*, 159 Cal. 508 (1911) (emphasis in original omitted) (citing *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. 1909)). In *Campbell*, the Kentucky Supreme Court held that "the police power—vague and wide and undefined as it is—has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim: "Sic utere tuo ut alienum non lædas." *Campbell*, 117 S.W. at 387.

[103] Pet'r's Cl. Br., 9-11, *Ex parte Yun Quong*, 159 Cal. 508 (1911) (emphasis in original omitted). On a continuum with a strict application of nuisance doctrine on one end and promotion of the general welfare on the other, it may be that Yun's attorney's formulation of the police power—the power to conserve the public welfare—would fall somewhere in the middle. His attorneys did not, however, elaborate any further on their view of the power.

former question in the affirmative, the attorneys described the vast scope of domestic and international efforts to combat opium use, alleged a connection between opium use and crime, and called attention to the "moral degradation, poverty, and physical decay" the drug caused. As to the latter question, because the Poison Law permitted "every beneficial use of the drug" and criminalized only its "vice," they maintained, the statute represented a "reasonable and appropriate measure for the suppression and control of the opium evil."[104]

Despite the protestations of the state's attorneys, who maintained that the statute should not be understood as directed against California's Chinese, the public and political association of opium with Chinese Californians proved the subtext of much of the appeal.[105] That subtext occasionally spilled over into text. In particular, two of the state's arguments relied on this association. First, in arguing that opium represented a vice dangerous enough to justify this exercise of power, the state tied the deteriorating effects of opium to its supposed Chinese source. They referenced, for example, the U.S.'s Philippine colony, where "the vice of opium smoking was rapidly spreading from the Chinese to the natives," leading to "whole communities" becoming "impoverished and rendered unfit for life in the islands." Subsequent descriptions of opium users' immorality, poverty, and feebleness, following discussions of efforts in China to end widespread use there, served to shore up the state's case: The danger of

[104] Resp't's Br., 5-10, *Ex parte Yun Quong*, 159 Cal. 508 (1911). The state's attorneys analogized the Poison Law's possession clause to a long list of possession regulation that courts had already approved. These included statutes forbidding the possession of lottery tickets, the possession of wild game out of season, and the possession of weapons, among others. Ibid., 27-44. Yun Quong's counsel distinguished these statutes on two grounds. First, his attorneys argued, most of the other possession statutes also included a showing that the defendant intended to commit a crime with the object of concern. Second, in the instance of wild game, such was public property and therefore subject to reasonable restrictions on possession. Pet'r's Cl. Br., 11-14, *Ex parte Yun Quong*, 159 Cal. 508 (1911).

[105] Ibid. They wrote: "It must not be understood that the crusade against the opium habit is a local affair; or that the legislation before us is directed particularly against the Chinese. The opium problem is world-wide."

unregulated opium use lay in the possibility that California would be unable to stave off the effects of this Chinese vice.[106]

Second, the state relied on authority that distinguished between alcohol and opium based on their relative familiarity among the white, native-born population. Citing a federal case from Oregon that explained why opium legislation lay within the state's police power but alcohol regulation did not, the state's attorneys focused attention on the "language of the court" in that case. The Oregon court described the possession of intoxicating liquors as outside the state's authority on the ground that "the people of this country have been accustomed to the manufacture and use of these for many generations." The same court found opium restriction acceptable because the substance "had no such place in the "experience or habits of the people of this country."[107] The state may have framed this argument with Yun's focus on personal freedoms in mind. By noting smoking opium's recent, Chinese introduction into the U.S., the state suggested no long-standing tradition of governmental non-intervention attached to the drug.

Only 24 years after *Sic*, the Court approved this new legislation.[108] In so doing, it credited the state's argument concerning the necessity of narcotics criminalization in terms that accepted its racial underpinnings. It also signaled its endorsement of the state's proffered view of the police power. Adopting in its entirety the decision of the District Court of Appeal that heard the case below, the California Supreme Court agreed that the "unrestricted use of poisonous drugs would be the source of ill health, pauperism, misery and insanity," and it called the prevention of such ends "among the objects of all enlightened government."[109] Promotion of the general welfare, under this view of the police power, came to sound more like an affirmative duty than a

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[106] Ibid., 6-9.
[107] Ibid., 16 (citing *Ex Parte Yung Jon*, 28 F. 308 (D. Oregon 1886)).
[108] *Ex Parte Yun Quong*, 159 Cal. at 508.
[109] Ibid., 513 (citing lower court opinion of Justice Kerrigan).

basis of action. If the Court's listing of fateful consequences of drug use arguably left ambiguous the particular group of narcotics users it had in mind, it continued: "Most of *our citizens* have no desire or occasion to use any of the prohibited narcotics." In approving the amplified power of the state to regulate an area of private life held unreachable only two decades earlier, the presumed fact that the drugs' users appeared not to be among "our citizens" proved determinative.[110]

VII. Conclusion

Only 37 years divided San Francisco's passage of its first municipal den ordinance from the California Supreme Court's decision in *In re Yun Quong*. When the Board of Supervisors first prohibited opium dens within city limits, it did so in the belief it could, among other things, address the blight of Chinatown and prevent Chinese immigrants from spreading a vice to white San Franciscans and profiting thereby. It also acted with related, though grander, motives—principally, a belief that opium restriction would make life in California uncomfortable for Chinese immigrants and undesirable to those considering immigration—which drove other cities and the state to follow suit and legislate against opium. Ideas about race proved nimble, offering multiple problems for solution through opium restriction and suggesting a number of ends the prohibitory laws might serve. The category's flexibility in this instance, though, should not distract from the central role anti-Chinese animus played in legitimating anti-opium law in California. Whether they acted to rid the state of Chinese immigrants or to keep whites and Chinese Californians safely apart, lawmakers' beliefs about Chinese inferiority fueled an expansion in their thinking about what states were permitted to do.

[110] Ibid. (emphasis added).

Against these baldly race-inflected motivations in the political arena, legal channels ultimately proved unresponsive. At least in 1878, Chinese Californians prosecuted under a municipal or state anti-opium ordinance might have turned to one of two bodies of law to challenge the criminal statutes applied against them. First, like many of the Chinese Californians arrested for violating one of the many other municipal or state laws aimed directly at those of Chinese descent, they might have turned to the U.S. Constitution and argued that anti-opium laws ran afoul of equal protection. None of the Chinese Californians arrested under any anti-opium ordinance or state law in California appears to have offered a Fourteenth Amendment challenge, though, and for good reason. While it is beyond dispute that municipal and state officials passed anti-narcotics laws to serve racialized ends, they found in narcotics restriction a way to pass facially race-neutral legislation that could be enforced in racially-specific ways, cutting off defendants' ability to raise equal protection challenges. Their success in drafting anti-opium laws without referring to Chinese Californians, coupled with open acknowledgement of white opium use and a general waning of equal protection's power all but guaranteed an equal protection challenge, if offered, would fail.

Second, as a number of challengers did, they might have invoked constitutional and natural law protections for individual liberties and argued that the state's police power remained too weak to infringe on these guarantees. In the 1880s, the California Supreme Court had invalidated one broad anti-opium measure on this ground, despite the statute's baldly racialized purpose. Challenges premised on a weak police power and capacious individual liberties, though, lost purchase during this period. Instead, California policymakers capitalized on a broader shift in jurists' conception of the police power and expanded state authority, working a transformation in Californians' conception of which personal freedoms the state could not erode. They used this

expanded power to enact laws that allowed greater infringements on Californians' individual liberties, though the record of enforcement of these laws makes clear they were passed, again, to target Chinese Californians.

Municipal lawmakers in California, then, began the work of constructing a penal state, passing ordinances designed to target Chinese opium commerce and use. State lawmakers quickly followed suit. When the California Supreme Court decided *Yun Quong*, California's statewide drug laws restricted a list of substances, the legislature had constituted a regulatory board, and that board wielded broad enforcement authorities. Federal jurists and policymakers also played a supporting role in Californians' anti-narcotic efforts, with federal judges weakening the Fourteenth Amendment claims Chinese Californians might have brought against local and state anti-narcotic laws and with federal officials first suggesting the importance of possession statutes. In tandem, lawmakers' successful reworking of the police power and their experiment in fashioning anti-narcotics law meant a more powerful state emerged by the second decade of the twentieth century. That more potent state came armed with a new set of tools to make life difficult for Chinese Californians and, lawmakers hoped, to encourage their flight from the state. If greater numbers of whites found themselves ensnared in the legislature's and Board's statutory and regulatory web, they represented the collateral damage in municipal, state, and federal lawmakers' campaign to use anti-narcotics law against Chinese Californians.

CHAPTER 2

"STRIPES FOR COCAINE SELLERS:" IMPROVISING A RESPONSE TO ANXIETIES OVER BLACK CRIMINALITY IN TURN-OF-THE-CENTURY GEORGIA

For a single day in July 1909, onlookers in Judge William Eve's courtroom in Augusta, Georgia, watched as a parade of African Americans took the stand to testify against Clarence "Boisy" Holmes. The witnesses against Holmes included Henry Paine, a laborer at a nearby cotton compress, and George Williams, who lived near Holmes and whom police had charged with peddling cocaine. Police accused Holmes of selling cocaine to Paine and Williams, as well as others, in violation of a 1907 state law that forbade dispensing cocaine to anyone who lacked a prescription. According to the witnesses, Holmes, an African American, had earned a reputation as an easy source of cocaine. He transacted business throughout Augusta, including occasionally at his home, but he did much of his trafficking at the end of a nearby alley. If the jury believed the testimony against him, Holmes faced a fine or a term on the county chain gang.[1]

Like other peddlers, druggists, and physicians brought to trial on narcotic charges at the time, Holmes came to police attention after they apprehended peddlers, like Williams, and casual users, like Paine, in possession of cocaine they had purchased from him. And, like others charged in such cases, Holmes found himself under fire as much for the population he served—which consisted largely of black Augustans—as for his actual conduct. At trial, the prosecutor argued that Holmes's crime represented precisely the behavior Georgia's legislature had wished to end when it passed its 1907 statute. Though the law said nothing of what impelled its passage, the prosecutor claimed that the legislature had enacted it to break "up the use of cocaine,

[1] Brief of Evidence, 1-17, Case File, *State v. Holmes*, 7 Ga. App. 570 (Ct. App. Ga. 1910).

especially among the negroes." He thus linked a statute that regulated drug sales—a booming, if illicit, business for the state's predominantly white physicians and druggists—to the legislative intent behind the statute, which had everything to do with cocaine use by black Georgians.[2]

The prosecutor's description of Georgia's law as aimed at black cocaine use followed on a decade of public discussion of the drug in such terms. From the outset of popular attention to cocaine, Georgians described it as principally abused by African Americans.[3] While this view might have sufficed to support criminalization, lawmakers and the public connected the drug to black crime and urban decay. Continuing black use of cocaine, they claimed, would increase the population of ne'er-do-wells aggregating in Georgia's cities and lead to a surge in violent crime. Warnings by policymakers and academics of the consequences of black migration to the South's cities buttressed these anxieties, prompting Atlanta's City Council and the state legislature to pass cocaine statutes in 1901 and 1902, respectively. Lawmakers intended their earliest anti-cocaine measures to control black Georgians, and that motivation persisted when the legislature, acting in the wake of a race riot in Atlanta, expanded the state's anti-narcotic law in 1907.[4]

Though black cocaine use remained the drug-related behavior most troubling to Georgia's legislators, they settled on a control apparatus aimed at druggists, physicians, and

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[2] Ibid.

[3] For other studies that document the role of black cocaine use in the drug's criminalization, see David F. Musto, *The American Disease: Origins of Narcotic Control* (New Haven: Yale University Press, 1973), 7; Richard J. Bonnie and Charles H. Whitebread, II, *The Marihuana Conviction: A History of Marihuana Prohibition in the United States* (Charlottesville: University of Virginia Press, 1974), 14-5; David Courtwright, "The Hidden Epidemic: Opiate Addiction and Cocaine Use in the South, 1860-1920," *Journal of Southern History* 49, no. 1 (Feb. 1983): 57-72; Joseph Spillane, *Cocaine: From Medical Marvel to Modern Menace in the United States, 1884-1920* (Baltimore: Johns Hopkins University Press, 2000), 94; Doris Marie Provine, *Unequal Under Law: Race in the War on Drugs* (Chicago: University of Chicago Press, 2007); and Jeffrey Clayton Foster, "The Rocky Road to a 'Drug Free Tennessee': A History of the Early Regulation of Cocaine and the Opiates, 1897-1913, *Journal of Social History* 29, no. 3 (Spring 1996): 547-64.

[4] For the 1907 law, see *Acts and Resolutions of the General Assembly of the State of Georgia, 1907*, 1907 Vol. 1 121. On the riot, see Mark Bauerlein, *Negrophobia: A Race Riot in Atlanta, 1906* (San Francisco: Encounter Books, 2001); Rebecca Burns, *Rage in the Gate City: The Story of the 1906 Atlanta Race Riot*, Rev. Ed. (Athens: University of Georgia Press, 2009); David Fort Godshalk, *Veiled Visions: The 1906 Atlanta Race Riot and the Reshaping of American Race Relations* (Chapel Hill: University of North Carolina Press, 2005); and Gregory Mixon, *The Atlanta Riot: Race, Class, and Violence in a New South City* (Gainesville: University Press of Florida, 2005).

peddlers. They did so, though they had a model for how to pursue users more directly. By 1907, other states and municipalities had already added possession clauses to their anti-narcotics laws to facilitate the prosecution of drug users. Despite the public's continuing focus on black use as the crux of the state's cocaine problem, though, Georgia legislators refrained from revisiting their anti-narcotics laws again until 1935.[5]

Why did lawmakers in Georgia pass anti-narcotics statutes that, relative to laws elsewhere, could only be described as anemic? Why did they, unlike their counterparts in other states, opt not to extend their police power to pass a law making cocaine possession unlawful until 1935? While these questions suggest the importance of studying statebuilding at the state level, by subnational actors, the available record offers precious little evidence of what drove Georgia legislators' thin approach to regulating cocaine. Nevertheless, in reconstructing the story of early cocaine criminalization in Georgia, this chapter explores some of the factors that may have led lawmakers to shy away from embracing the full scope of their available power.

It suggests, first, that municipal and state lawmakers in Georgia took a different view of state power than lawmakers elsewhere, and that they may have been reluctant to embrace the capacious view of state authority that a possession clause required. Though their anti-narcotics laws did not face a single police power challenge in the early decades of the twentieth century, the many lawsuits in which the state became embroiled as a result of its temperance law may have made lawmakers reluctant to act more aggressively against drug use.[6] Moreover, once the federal government passed its first comprehensive anti-narcotics statute, lawmakers in Georgia

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[5] For the 1935 statute, see the "Narcotic-Drug Act," *Acts and Resolutions of the General Assembly of the State of Georgia, 1935*, 1935 Vol. 1 418, which made it "unlawful to manufacture, possess, have under control, sell, prescribe, administer, dispense or compound any narcotic drug," including cocaine.

[6] Though no plaintiff appears to have contended that the state legislature lacked the authority to pass its 1907 anti-narcotics statute, the Georgia Supreme Court still found an opportunity to describe that law as entirely within the General Assembly's authority to enact. *Stanley v. State*, 135 Ga. 859 (1911).

who harbored suspicions of federal power may have been reluctant to advance arguments in support of state building at any level.

Lawmakers may also have been dissuaded from more direct action because Georgians were satisfied with the patchwork system that police action and formal law together had yielded. Police action against cocaine began in Georgia before state or municipal legislators passed their first anti-drug statutes, when officers used misdemeanor charges, including vagrancy and disturbing the peace, to arrest drug users. Officers in Georgia continued to use the same laws to arrest users after the General Assembly passed its 1907 law. And, armed with that law, they also arrested physicians who wrote illegitimate prescriptions and pharmacists and peddlers who dispensed cocaine illicitly. After 1907, in other words, Georgians had improvised a system that allowed them to punish the drug-related behavior that concerned them without asking the legislature to embrace a more capacious view of state power.

By the end of the century's first decade, finally, Georgians' success in erecting other laws may have led them to view more aggressive cocaine regulation as unnecessary. Georgians argued in support of anti-cocaine laws in the same years that policymakers worked to spread Jim Crow laws throughout the state. While, through the 1880s, black and white Georgians had traveled alongside each other "on streetcars and trains, shared the same public recreational facilities, and shopped in integrated business districts," state and municipal authorities began, in the 1890s, to pass numerous Jim Crow regulations that ultimately transformed "the color line" in Georgia "to a color wall, thick, high, almost impenetrable."[7] This proliferation of Jim Crow laws may have

[7] John Dittmer, *Black Georgia in the Progressive Era, 1900-1920* (Urbana: University of Illinois Press, 1977), 8, 13, 16-9, 21; Donald L. Grant, *The Way it was in the South: The Black Experience in Georgia* (New York: Birch Lane Press, 1993), 213; Ronald H. Bayor, *Race and the Shaping of Twentieth-Century Atlanta* (Chapel Hill: University of North Carolina Press, 1996), 16. For more on the protest of Savannah's streetcar segregation ordinance lodged by African Americans in that city, see Blair L. M. Kelley, *Right to Ride: Streetcar Boycotts and African American Citizenship in the Era of* Plessy v. Ferguson (Chapel Hill: University of North Carolina Press, 2010).

reduced the symbolic power of cocaine restriction. That is, if policymakers and the white public pressed for cocaine laws to mark as illicit a practice they associated with African Americans—to use law to strengthen white supremacy—the state's Jim Crow laws already accomplished that end. Moreover, white Georgians may have believed their statewide prohibition law, which took effect in January 1908, had already achieved whatever reduction in crime lawmaker action might facilitate. In light of these laws, giving additional powers to the state legislature and subjecting Georgians to additional police scrutiny may have come to seem less necessary than in the first years of the new century.

What ultimately emerges from this account of anti-cocaine law in Georgia is a state government expanding its reach while still reticent to exercise all of its available power. A possession clause would have given police officers a powerful tool to use against African American drug users; were possession unlawful, they could detain users without even a cursory effort to secure evidence that the possessor had violated another law. That move, though, would have inserted the government into Georgians' private lives as never before. The General Assembly may have been willing to take that step if police officers had not already successfully improvised a means to pursue users, if the federal government had not entered the regulatory field, and if there did not exist other means of addressing crime through, and inscribing black inferiority into, the law.[8] Under these circumstances, though, what remained of Georgians' commitment to limited government led the legislature not to extend state power any further. The penal state that took shape in Georgia was both coercive and multi-jurisdictional, on the one hand, but it was also less visible than elsewhere, on the other.

[8] Municipal and state lawmakers improvised a response to cocaine by capitalizing on the coexistence of city and state laws as well as the availability of statutory and common law crimes. For an argument that the federal government engaged in similar improvisation with its circumscribed powers, see Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton: Princeton University Press, 2015), 89-123.

I. Defining the Consequences and Geography of a Nascent Cocaine Problem

The Georgia public turned its attention to cocaine soon after the twentieth century dawned. Once alert to the drug's presence in Atlanta, the city's press carried regular coverage of cocaine use within and outside the state, chronicling what many Georgians came to see as a troubling spread in trafficking and consumption. Public discussion of cocaine almost invariably focused on African American use, which white Georgians believed far outstripped white consumption of the drug.[9] The white public highlighted two supposed consequences of African American consumption. First, they claimed that cocaine use led African Americans to commit crimes while under the influence of the drug. Second, they claimed cocaine use and trafficking exacerbated the already-deplorable conditions of the state's most densely-populated black neighborhoods. As these two arguments circulated widely, municipal and state officials in Atlanta began to devise a response to the drug.

Cocaine first entered the public consciousness in the United States in the closing decades of the nineteenth century. Scientists in Peru and Europe successfully isolated cocaine, the coca plant's principal psychoactive alkaloid, in the second half of the nineteenth century. The German firm Merck began producing small amounts of the drug for sale to researchers as early as 1862, and cocaine first enjoyed wide commercial success as an ingredient of Vin Mariani, a mix of the drug and Bordeaux wine. It also made its way into a number of tonics, of which Coca-Cola became the best known. Discovery of its anesthetic properties in 1884 increased demand for the

[9] This is not to suggest a complete absence of discussions of white cocaine use. Indeed, two early reports of cocaine use in Georgia centered on white male defendants. In January 1900, the *Constitution* reported that a man in Macon had received a life sentence for throwing acid on a woman while he was under the influence of cocaine. The following month, a white man in Atlanta pled guilty to stealing a box of candy, which he believed to be a "box of instruments" that he could sell to make money and, the *Constitution* suggested, thereby purchase either cocaine or morphine. *Atlanta Constitution*, January 30, 1900; February 14, 1900.

drug for clinical uses. Initially not limited to those in possession of a physician's prescription, the drug grew in popularity as the nineteenth century drew to its close.[10]

As late as the new century's first year, Georgians did not yet connect cocaine with any particular group. A November 1900 proceeding before Judge Nash Broyles, who presided over Atlanta's Police Court from 1899 to 1914, indicates how little Georgians had discussed the drug at the time. Atlanta's press regularly covered Broyles' courtroom, describing the accused and Broyles' remarks from the bench in dramatic terms. His wit on the bench and his reputation for doling out swift justice made Broyles a local celebrity. During the proceeding, a "tall negro woman" named Mary Chapman, accused of swearing and spitting aboard a streetcar and forcing the car's passengers to alight, appeared before Broyles. Believing Chapman's behavior the result of intoxication, Broyles responded incredulously to her claim that she had not had anything to drink when the incident occurred. How, he asked, had she gotten "drunk without drinking anything?" Chapman registered surprise that Broyles did not yet know that many black Atlantans got "doped wi[th] coke." It took a policeman to explain her meaning; Broyles evidently was not yet accustomed to hearing talk of cocaine use from defendants in his courtroom. In a sign of things to come, Broyles declared a "coke sniffled drunk" worse than a "straight liquor drunk."[11]

Physicians in Georgia, too, initially saw little worth noting about cocaine. When doctors across the state gathered in April 1900 for the annual meeting of the Medical Association of Georgia, Dr. Cecil Stockard delivered a paper concerning drug addiction in the state. A well-known Atlanta physician who handled both "general medicine" and "drug habits" at a sanitarium

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[10] Spillane, *Cocaine: From Medical Marvel to Modern Menace*, 7-8, 25-6, 90-9; David Courtwright, *Forces of Habit: Drugs and the Making of the Modern World* (Cambridge: Harvard University Press, 2002), 46-52.

[11] Lucian Lamar Knight, *A Standard History of Georgia and Georgians, Volume II* (Chicago: Lewis Publishing, 1917), 1129; *Atlanta Constitution,* November 9, 1900. Rebecca Burns has noted that Broyles "prosecuted blacks at a much higher rate than whites," describing how in 1900 alone he sentenced nearly half of the black male population of Atlanta to a fine or to time on the city chain gang. Burns, *Rage in the Gate City*, 85-6. For a discussion of how the local press turned Broyles into a celebrity, see Bryan Wagner, *Disturbing the Peace: Black Culture and the Police Power After Slavery* (Cambridge: Harvard University Press, 2009), 135-9.

in the city, Stockard's only discussion of cocaine described it as derivative of other forms of addiction. "The cocain[e] habit alone," he wrote, "is rare, nearly all of them being morphinist, too, and I find a good many morphinists who take cocain[e] by sprees." Cocaine remained a marginal concern in Georgia in the first months of 1900.[12]

Then, according to lawmakers, cocaine use among African Americans exploded. Local officials described a "frightful spread" of the "habit among the negroes" of Atlanta. In a report rife with foreboding, Atlanta press reported that city police began 1901 "by ushering into the barracks" a "negro woman who was out late trying to find a drugstore" from which to buy cocaine. Other accounts stressed that cocaine use, especially among African Americans, had "rapidly spread until the trade in the city…[had] reached enormous proportions."[13]

White Georgians believed that cocaine use increased criminality among black Georgians. On December 15, 1900, for example, the *Constitution* reported that two black women had engaged in a fight at a so-called "cocaine dive." The fight ended when one of the women stabbed the other. In May of the following year, another report described how Oscar Fortson, an African American employee of the Atlanta National Bank, "administered a terrible beating to his wife" while "under the influence of some intoxicant, supposed to be cocaine."[14] Reports of crimes committed by "cocaine-crazed" African Americans outside the state amplified public concern over cocaine use among black Georgians. Dailies throughout Georgia, for one example, carried

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[12] C. C. Stockard, "Some Points of General Interest in Regard to Drug Addictions," in *Transactions of the Medical Association of Georgia, Fifty-first Annual Session* (Atlanta: Franklin Printing and Publishing Co., 1900): 373-76; *Atlanta Constitution*, December 14, 1901; January 2, 1909. Stockard's work with drug habitués did not lead him to take a more compassionate view of them. He argued "that no habitué should hold any office of trust, or one requiring discretion and judgment; and, particularly, that he is unfitted for a juror."

[13] *Atlanta Constitution*, December 3, 1900; January 1, 1901; November 4, 1902. And the trend would continue. By August 1904, the *Constitution* declared in bold terms that cocaine had gotten a "hold on blacks," despite law enforcement efforts. *Atlanta Constitution*, August 28, 1904.

[14] *Atlanta Constitution*, December 15, 1900; May 12, 1901. The *Constitution* did not shy away from describing horrific crimes committed by white Georgians while under the influence of the drug. In January 1900, for just one example, it told of a cocaine user in Macon, Georgia, who received a life sentence for throwing acid on a woman while he suffered the effects of cocaine use. *Atlanta Constitution*, January 30, 1900.

reports in July and August 1900, of a rampage by Robert Charles through New Orleans. Charles killed 11, including a police officer, the keeper of the city jail, and a young boy, before he was shot and killed. Several reports explained that Charles had been a "victim of the cocaine habit."[15] Accounts two years later of a murder in Terre Haute, Indiana, for another example, included similarly frightful details. When Michael Alexander killed the married couple who had employed him for the preceding five years, reports labeled him a "negro crazed by cocaine" and emphasized that he had entered the couple's bedroom to kill the "sleeping man and wife."[16] The Georgia press's coverage of such crimes helped stoke public concern over the drug.

Officials in Atlanta also drew a link between black cocaine use and crime. Where the press emphasized the sensationalistic crimes committed by those under the influence of the drug, law enforcement officers called attention to the more mundane crimes that users committed to support their habits. When two detectives arrested eight black Atlantans for theft in December 1900, for instance, they reported that the suspects had committed the crime to pay for cocaine. They also identified the preceding six months as a time of vast growth in black cocaine use.[17]

White Georgians—and white Atlantans in particular—described the drug as a problem endemic to the centers of black life in the South's increasingly populous cities. New Orleans

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[15] *Columbus Daily Enquirer,* July 27, 1900; July 28, 1900; July 29, 1900; *Savannah Tribune,* August 4, 1900; *Macon Telegraph*, July 27, 1900; July 28, 1900; *Atlanta Constitution*, July 25, 1900; July 26, 1900; July 27, 1900; July 28, 1900. While news of Charles' activities in New Orleans raised fears of the effects cocaine might have on black Georgians, it also demonstrated the violence with which white southerners met reports of black crime. In his study of lynching in Virginia and Georgia between 1880 and 1930, W. Fitzhugh Brundage has called this fifty-year period "the most southern and virulently racist phase" in the "history of mob violence in the United States." W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880-1930* (Urbana: University of Illinois Press, 1993), 14. The activities of white New Orleans between July 26 and July 28, 1900, bear this out. While Charles remained at large, white Louisianans wreaked havoc on African Americans in New Orleans, convinced that they were helping Charles avoid capture. The evening that Charles escaped, a mob of whites shot four black men and killed another. Two days later, when Charles was located, the mob fired their "Winchesters and revolvers" at him such that he was "literally shot to pieces." Then, the crowd split to allow a son of one of the victims to approach Charles' lifeless body and "stamp[] the face beyond recognition." *Atlanta Constitution*, July 26, 1900; July 28, 1900.
[16] *Augusta Chronicle*, September 8, 1902; *Atlanta Constitution*, September 8, 1902.
[17] *Atlanta Constitution*, December 3, 1900.

proved central in their early imaginings of urban cocaine use.[18] According to some reports, black cocaine use first emerged there, when employers of dock laborers doled out the drug to increase productivity. From these beginnings, news of widespread use in New Orleans began to make headlines in Georgia even before whites there first considered the specter of African American consumption in the state. As early as October 1896, the local press carried a story from a New Orleans newspaper that described the "abuses of cocaine" in that city. The article remarked on the "proportion to which the cocaine trade [had] grown in" New Orleans and repeated the claim of a local druggist that the use of the drug remained "confined almost exclusively to the colored folk." In a description that foretold the commerce of which Atlantans would soon complain, the druggist insisted that the "trade" had become "so well established" that druggists often dispensed cocaine to a patron without first being asked for the drug.[19] Georgians thus saw in the spread of cocaine use in New Orleans and the appearance of drug stores catering to black users there a potent example of what might befall a city with a densely-populated black quarter.

While white Georgians looked with wary eyes at a purported explosion of cocaine use in New Orleans, they debated whether the habit had taken hold in the state. Few in the state doubted that black Atlantans had become taken with the drug. The *Marietta Journal*, for instance, identified cocaine use among African Americans as rampant in cities, and it singled out Atlanta as a hotbed of cocaine use, noting that a "very large percentage of the colored chaingang convicts of Atlanta were cocaine fiends." Press coverage in 1903 of statements made by a pharmacist in Spartanburg, South Carolina, in which he attributed cocaine use among African

[18] On the growth of Atlanta's population in the late nineteenth and early twentieth centuries, Rebecca Burns writes: "The city's population had exploded, almost tripling over a quarter century, increasing from just fewer than 37,000 in 1880 to 115,000 in 1906. Some of these newcomers were Yankee opportunists but most were Southerners … drawn by the commercial promise of Atlanta's transportation and manufacturing centers. Black and white, from rural farms and plantations, or from smaller towns left impoverished by war, southerners crowded into Atlanta." Burns, *Rage in the Gate City*, 27.

[19] Spillane, *Cocaine: From Medical Marvel to Modern Menace*, 90-3; *Atlanta Constitution*, October 11, 1896; July 28, 1900.

Americans in that city to lessons "six negro girls" from Atlanta had taught the local population three years earlier, also suggests the reputation that black Atlantans had developed for their cocaine use.[20] Whether wishful thinking or a statement of fact, the papers' descriptions of black cocaine use in the state reveal an early view of the problem as primarily one that plagued urban areas with large black populations.

They were less certain of its popularity in the state's rural areas and smaller cities. The daily paper in Columbus, a small town on Georgia's border with Alabama, for instance, reported in January 1901 that the town remained "comparatively free" of cocaine. A December 1900 report in the *Augusta Chronicle* claimed that, like in Atlanta, the habit among Augusta's African Americans had increased at a "fearful rate." The article inspired several letters from a druggist in town, though, who asserted that "Augusta negroes [were] not addicted to the cocaine habit." He put the number of habitués in the city, black and white, at "not over one dozen." The druggist contacted 19 other pharmacists, all but one of whom claimed never to have sold cocaine to an African American; two physicians, who professed never to have seen a black addict; and the local jailer, who claimed he had "never known a negro at the jail who was a cocaine victim."[21]

While Georgians outside Atlanta cast cocaine as a problem tied to urban life, white Atlantans identified the saloons, dives, clubs, and gambling houses along Decatur Street, a bustling road in one of Atlanta's largest working-class black enclaves, as the heart of Atlanta's emerging cocaine problem. In the popular imagination of the city, cocaine use by black Atlantans first emerged in this already-troubled area, often called "Rusty Row."[22] In November of 1900,

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[20] *Marietta Journal*, April 11, 1901; *Atlanta Constitution*, May 21, 1903; *Columbus Ledger*, May 24, 1903.
[21] *Columbus Daily Enquirer*, January 6, 1901; *Augusta Chronicle*, December 31, 1900; January 1, 1901; January 3, 1903; January 7, 1903.
[22] Steve Goodson writes that Decatur Street at the turn of the twentieth century was "the center of black working-class culture in the city," with its "restaurants, dance halls, theaters, clubs, gambling houses, pawnshops, cheap hotels, and brothels." He also makes clear that many middle-class African Americans in Atlanta described Decatur Street, as well as its residents and commerce, in unflattering terms. Mara Keire reminds us that, while the area may

city police had arrested an African American man for openly selling cocaine on Decatur Street. That same month, a committee of ten state senators visited Decatur Street on what the press called a "slumming tour." Concerned about "the wicked ways of life in a great city," the group stopped at "Sarah Brown's sniffing parlor," where cocaine addicts paid "for the privilege of sniffing the drug up their noses." Law enforcement officers in Atlanta echoed these press reports and identified Decatur Street as a key site of black cocaine use in the city.[23]

It would be several years, however, before Atlantans articulated what made such practices in a populous urban area especially troubling. By 1905, though, they began to assert that cocaine use led to idleness and gave rise to entire districts "congested" with "loafing, semi-criminal" African Americans. Though they lacked a visible means of support, press reports claimed, black cocaine users in Atlanta refused offers of gainful employment, to the detriment of the areas where they congregated as well as the "commercial and industrial development" of the city. According to the *Constitution*, the presence of large numbers of idle, "cocaine[-]crazed" African Americans in one district proved a draw for others. The promise of cocaine, it claimed, "account[ed] somewhat for the growing tendency of the negro to desert his rural cabin and flock to the slums of southern cities."[24] Cocaine use by black city dwellers, in other words, threatened

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have been best know for its amusements, "Atlanta's tenderloin, like most Southern vice districts, was located in a predominantly black neighborhood." Mark Baurlein argues that to many whites, "the back rooms and alleyways of Decatur Street" were a "racial-moral-criminal blight not easily distinguishable from negritude itself." Steve Goodson, *Highbrows, Hillbillies, and Hellfire: Public Entertainment in Atlanta, 1880-1930* (Athens: University of Georgia Press, 2002), 154, 167; Mara Laura Keire, *For Business and Pleasure: Red-Light Districts and the Regulation of Vice in the United States, 1890-1933* (Baltimore: The Johns Hopkins University Press, 2010), 57-8; Bauerlein, *Negrophobia*, 141. For only a handful of examples of the many articles that described the thoroughfare as a site of crime and vice, see *Atlanta Constitution*, May 27, 1900; August 4, 1901; April 8, 1902; July 13, 1902.

[23] *Atlanta Constitution*, February 7, 1900; November 12, 1900; November 28, 1900; December 3, 1900; December 15, 1900; February 5, 1901. Importantly, no city or state law yet directly addressed cocaine sales, so police arrested this peddler on another charge. In a decade's time, some in Atlanta would begin referring to one neighborhood in the area as "Coke Alley." *Atlanta Constitution*, March 2, 1911; June 11, 1911; June 26, 1911. *Atlanta Constitution*, February 7, 1900; November 28, 1900; December 3, 1900; December 15, 1900; February 5, 1901.

[24] *Atlanta Constitution*, February 5, 1905; July 13, 1905; July 23, 1905.

the menace of entire neighborhoods overrun by idle vagrants and also offered an incentive for more rural migrants to flood the South's urban areas in search of just such an environment.

Georgians considered the relationship between urbanization and crime at the same time figures of national prominence entertained similar questions. Individuals offering views of black crime and urbanity included policymakers and academics from James Vardaman, who became Mississippi's governor in 1904; to Walter Willcox, a Cornell statistics professor; to participants in the Atlanta Conference on Negro Problems. While Vardaman contended that "the Negro element [was] the most criminal" in the U.S. and blamed emancipation for a purported recent increase in black crime, Willcox searched for different explanations for the black crime rate. He settled on labor competition, arguing that it had pushed rural black laborers into cities, where they joined "the potentially criminal class" aggregating in the South's urban areas. For their part, the conveners of the Atlanta Conference on Negro Problems, which first met in 1896, turned their attention to "the important matter of Negro crime" in 1908. One speaker took issue with statistics suggesting a high black crime rate and argued that racial biases had taken their toll on how American courts doled out criminal justice.[25] Despite advancing different ideas on the subject, then, a broad range of policymakers and social scientists worked at the turn of the century to formulate a view of the relationship between urbanization and crime among African Americans.

As a number of scholars have demonstrated, claims of African Americans' inherent inferiority often relied for support on their supposed propensity to commit crime. Khalil Gibran Muhammad, for one, has uncovered how, beginning in the late nineteenth century, statistics of

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[25] W. E. Burghardt DuBois, ed. *Some Notes on Negro Crime Particularly in Georgia* (Atlanta: Atlanta University Press, 1904), v-vi, 1-5, 9; Walter F. Willcox, *Negro Criminality* (Boston: Geo. H. Ellis, 1899), 5-7, 9, 14; "Mortality Among Negroes in Cities," Proceedings of the Conference for the Investigations of City Problems (Atlanta: Atlanta University Press, 1896), 4-5, 7-10.

black crime "became a proxy for a national discourse on black inferiority." In his study of the Progressive-era urban North, Muhammad argues that whites looked at black arrest and incarceration rates and concluded that black pathology had rendered African Americans unable to thrive in the "modern meccas of opportunity" in the North. In the South, evidence of black criminality proved a key ground on which advocates of Jim Crow legislation consolidated support. Moreover, reports of specific crimes, especially claims of sexual assault by black men against white women, provided the justification for a great many lynchings during the period.[26] In short, popular views of African Americans as prone to crime served to support a number of legal and extralegal moves, cocaine regulation among them.

That white Georgians so quickly came to consider cocaine use a public threat makes better sense in light of these conversations. Scholarly journals and the popular press both featured discussions of African American migration to cities as well as reports of a burgeoning crime rate among black city dwellers, priming Georgians to view with alarm any purported incentive to crime. And any discussion of black crime during this period called on wider-reaching, charged narratives of inherent depravity and sexual assault. While they appear to have known little about cocaine when the new century began, white Georgians, and especially white Atlantans, quickly absorbed the broadly-circulating claims of widespread cocaine use by African

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[26] Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge: Harvard University Press, 2010), 4-10. C. Vann Woodward, for one, has noted the connection between white views of black criminality and southern policymakers' support for Jim Crow laws. He writes of the "deeply pessimistic" view that many policymakers began to take of African Americans in the years just before and after the turn of the twentieth century. They "laid great stress on the alarming increase in Negro crime as the race flocked to the cities and packed into crowded, filthy slums." Such shifts helped erode what resistance remained to Jim Crow. C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1955), 93-6. Of the particular importance of claims of sex crimes to both lynchings and Jim Crow, Jane Dailey has recently explained that, though "racial segregation and lynching had broader social and political goals," the "rhetorical justification for Jim Crow laws and white-mob violence was the protection of white women from sexual assault by predatory black men." Jane Dailey, "Is Marriage a Civil Right?" in *The Folly of Jim Crow: Rethinking the Segregated South*, Stephanie Cole and Natalie J. Ring, eds. (College Station: Texas A&M Press, 2012): 176-208, 185-88. For more on the connections between lynching and claims of rape, see Brundage, *Lynching in the New South*; and Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven: Yale University Press, 1997), 176-208.

Americans that began at the dawn of the new century. They soon described cocaine as among the most pressing public threats facing the state, and they linked black cocaine use to sensational and violent crimes as well as to the deteriorating condition of Atlanta's city center. Within months, municipal lawmakers determined to press for an official response to this new problem.

II. Using Existing Law to Improvise a Response to Cocaine Use and Sales

Law enforcement officers in Atlanta did not wait for the Atlanta City Council or state General Assembly to act before they began arresting those involved with this new menace. They found means in existing laws to bring charges against users and traffickers alike. Their efforts against users, in particular, set a model for how police in Georgia would address this behavior in future years, as legislators' efforts would focus entirely on regulating physicians' and druggists' ability to dispense the drug lawfully. Only when they endeavored to marshal existing law against druggists, who raised forceful challenges to their arrests, did police come up wanting and turn to legislators for help.

In those instances when suspected cocaine users committed theft-related crimes to support their cocaine habits, of course, officers arrested them on charges related to those crimes. But officers also stepped up their enforcement of other violations in a deliberate attempt to target cocaine users. Several reports indicate that officers used curfew laws in just such a way. In December 1900, for example, police authorities in Atlanta directed officers to "arrest all the negro women who are found going after [cocaine] late at night" and to charge them with "being out after hours." The *Constitution* includes discussion of police accusing at least one black woman of searching for cocaine and formally charging her with a curfew violation.[27] What

[27] *Atlanta Constitution*, December 3, 1900; January 1, 1901. Whether the police had authority to enforce such a curfew remains rather opaque. At least as of the city's printing of its code in 1899—the first time the effort to do so

evidence exists suggests that police also used the city's law against loitering in a similar fashion.[28]

Police in Atlanta also discovered in existing laws avenues to attack those who trafficked in the drug and profited from its commerce. When an officer caught Tolbert Smith selling cocaine from a cigar box, the department concluded that it had apprehended at last the "unknown negro" who had been selling the drug on Decatur Street for weeks. Its officer collected testimony from several African Americans who had purchased the drug from Smith, and the department charged him with conducting business without a license. Although police considered charging Smith with violating the state's poison law, the department satisfied itself, at least for a time, with using its licensing violation claim.[29] Against both users and peddlers, then, police recorded some successes in marshaling existing law to target participants in the cocaine "evil."

Police wished to formulate a similar approach to use against druggists, whom they saw as the main source of cocaine supply in Atlanta. Police authorities met with city attorneys sometime in December 1900 or January 1901 to ascertain whether there existed "any law under which the druggists disposing of cocaine [could] be proceeded against." Police and local prosecutors resolved to dust off the state's poison law and put it to new use. In a matter of weeks a rumor

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had been made since 1874—its lengthy chapter governing "Peace, Good Order and Morals" included no general limitation on the hours when women were permitted to be on the streets. The Chief of Police's annual report for 1901, which purports to list the basis on which each and every arrest was made during the previous year, makes no mention of an arrest for a violation of any general curfew law. It does note, however, that police officers had arrested 16 "lewd women" for being on "the streets at night," a reference to section 1809 of the City Code that made it "unlawful for any prostitute or woman of notoriously lewd character to walk the streets, alleys or other public thoroughfares of the City of Atlanta, or ride around the same during the night season." It is possible that police officers used this provision as the basis for their campaign against female cocaine users caught out at night. *The Code of the City of Atlanta* (Atlanta: Byrd Press, 1899), 414, 415; *Twenty-First Annual Report of the Chief of Police of the City of Atlanta Georgia*, 20-3, Police Department Annual Reports, 1896-1952, Row 1, Section E, Shelf 2, City of Atlanta Records, Atlanta History Center [hereinafter AHC Police Department Reports].

[28] Though press accounts in the earliest years of the decade do not describe such police use of the loitering laws, press attention to African Americans "loafing" under the influence of cocaine, combined with the high number of loitering arrests the police made each year during the period, certainly suggest that police may have targeted cocaine-using black Atlantans by relying on loitering laws. *Atlanta Constitution*, February 5, 1905; October 16, 1911; *Twenty-First Annual Report of the Chief of Police*, 20-3.

[29] *Atlanta Constitution*, November 12, 1900.

spread among druggists in the city that police planned to use that law against "every dealer retailing cocaine in the city." Press accounts initially reported that the police would bring charges against as many as 30 or even 40 druggists.[30]

Officers and city attorneys would have to confront one problem before they could use the state's poison law so broadly: that law did not cover cocaine. Perhaps in recognition of this vulnerability, officers arrested only three druggists to test whether the poison law could be made to reach commerce in cocaine. The three druggists, Drs. W. W. McAfee, C. A. Moran, and W. J. Hodges, all owned and operated drug stores in one two-block area of Decatur Street. Police charged each with selling cocaine without wrapping the drug in scarlet paper, which police claimed a violation of the poison law. Police also charged the druggists with vending opiate preparations not permitted under state law. If the courts found the "scarlet paper" provision of the poison law too narrow to reach cocaine sales, the thinking may have gone, police could discourage commerce in cocaine through targeted enforcement of other provisions of that law. As in their use of curfew and loitering laws to target cocaine users in the absence of specific municipal or state legislation, in other words, police officers and prosecutors attempted to locate in existing law a means to go "after the druggists who [were] selling cocaine."[31]

The three druggists singled out for cocaine sales defended themselves on two grounds. First, they pointed out the weakness of the legal case against them. They maintained that a law about morphine could not "be made to apply to cocaine;" that it had become routine to sell even enumerated poisons without scarlet paper; and that "nearly every druggist" in the city sold cocaine. Second, they linked their arrests to the population they served. In comments to the press, they emphasized their anger that "cases [had] been made against only Decatur street

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[30] *Atlanta Constitution*, December 3, 1900; January 26, 1901.
[31] *Atlanta Constitution*, January 27, 1901; *Acts and Resolutions of the General Assembly of the State of Georgia, 1884-85*, 1884 Vol. 1 134.

dealers," daring officers to explain why the three druggists chosen for prosecution had stores in the same area and on the same street. In answer to that challenge, the *Constitution* explained that detectives had determined to act after hearing "reports about the use of cocaine spreading to an alarming extent among negroes."[32] To many Atlantans, in other words, police targeting of Decatur Street druggists represented not an injustice, but a reflection of their key role in the black cocaine use that made the substance a public menace.

When the local criminal court heard the druggists' cases two months later, Atlanta press opined that the actions stood as the "most important" the court would hear in its then-present term. At trial before Judge Andrew Calhoun, who served as Recorder in the city's police court for nine years before being named to the criminal court bench in 1898, Hodges pled guilty and received a $200 fine. Moran and McAfee took a different tack, it appears, and Calhoun adjourned the court for the term. Their cases would be heard, if at all, no sooner than May.[33]

Before the court turned back to the cases against Moran and McAfee, though, the Atlanta City Council considered two anti-cocaine bills and adopted one of them. Stopping the spread of cocaine in Atlanta, the proceedings against Moran and McAfee made clear, would require a formal response from municipal and state legislators. While the police's ad hoc efforts against users and peddlers had struck the first blow against cocaine in the city, such moves fell short against the city's druggists. Better-financed than users and peddlers and with a strong financial incentive to fight their arrests and the police's interpretation of the poison law, druggists forced both the City Council and the state legislature to devise new approaches to cocaine prohibition.

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[32] *Atlanta Constitution*, January 27, 1901.

[33] *Atlanta Constitution*, March 29, 1901; April 5, 1901; Knight, *A Standard History of Georgia and Georgians*, 3264. Neither press nor court records give any indication of the ultimate disposition of the first cases against Moran and McAfee. It seems probable, though, that local police and prosecutors pursued other avenues against the two in light of the ordinance the City Council soon passed to control behavior like involved in the cases.

III. Anti-Cocaine Law, Workarounds, and Concerns about Atlantans' Liberties

The first years of formal cocaine criminalization in Georgia found lawmakers, police, and private citizens in a pitched battle to determine whether and how the state and its political subdivisions might address the cocaine problem. The first anti-cocaine ordinance Atlanta's City Council considered focused on sales by druggists but contemplated a rather narrow restriction on their capacity to sell cocaine. The bill applied in its key provisions only to addicts and made it unlawful to sell or give cocaine, absent a prescription, to persons "addicted to the 'cocaine habit.'" It defined such persons as those who requested the drug more than once on the same day or for two days in succession or who had "a habit of constantly" using the drug. If enforced, poor users—and, in 1901, nearly all black users belonged in that category—would bear the brunt of the provision, while addicts and users who could buy enough cocaine to last several days might escape notice. If that provision failed to make clear which cocaine sales most worried the Council, the bill's only clause aimed at consumption, rather than sales, forbade running and visiting cocaine "joints," already widely associated with Decatur Street and black Atlantans.[34]

While the initial bill the Council considered would have allowed a fair amount of middle-class consumption to continue, the Council adopted a bill of broader application. The ordinance it enacted in April 1901 forbade selling or giving away cocaine to anyone not in receipt of a physician's prescription. If the white public and policymakers in Atlanta believed the cocaine habit to be a problem largely confined to the city's African American population, why the

[34] City Council Ordinance identified in City Council Minutes and Index, Volume 19, Page 79, Line 18, Atlanta City Council and Board of Alderman Records, Row 5, Section C, Shelf 5, City of Atlanta Records, Atlanta History Center [hereinafter Atlanta City Council 1901 Ordinance]. Councilmembers may have borrowed this approach to controlling drug use in Atlanta from state legislators, who passed a law in 1887 that forbade druggists and others from selling or giving away opium and its preparations "to any person habitually addicted to its use, after written notice from the near relative of such person that he or she is habitually addicted to its use, except upon the written prescription of a physician setting forth the necessity of its purchase and showing the good faith of the prescription." *Acts and Resolutions of the General Assembly of the State of Georgia, 1886-87*, 1886 Vol. 2 97.

change? The *Constitution*, describing the law's design, claimed the Council wished to ensure that drug stores only dispensed to persons "whom physicians say must have cocaine for their physical welfare." It explained the broader statute as reflecting a legislative determination that all cocaine use should be on the advice of a physician. As likely, though, is that the cases pending against Moran and McAfee had taught law enforcement officers and the City Council a lesson: They could not count on druggists to put their financial interests aside and refuse to serve customers. Only by forcing every cocaine purchaser to present a prescription could the Council hope to suppress the supply of cocaine; if whites and other casual users suffered under the increased burden, such was the cost of limiting African American access to the drug.[35]

Immediately following the law's enactment, the Atlanta Chief of Police issued a "special order" directing his force to "strictly enforce" the law "against the indiscriminate sale of cocaine." The next day, Moran, whose trial on the earlier charges remained pending, became the first person arrested under the statute. He claimed an intention to abide by the act's provisions but argued that he had not been made aware that the mayor had signed the law. Five days later, three African Americans appeared before Broyles, who fined each of them for peddling cocaine. All told, if the Council passed its cocaine ordinance to target those who sold drugs to black users, its members must have viewed the first weeks of the law's enforcement with satisfaction.[36]

Such would not be the case for long. Like Moran, McAfee quickly came under renewed police fire for continuing to sell cocaine despite the law. McAfee, though, had found a means around the new restrictions. At the end of June, two months into Atlanta's enforcement of the law, police accused McAfee and George Garner, his partner at the Eureka Drug Store, of selling large quantities of cocaine to black Atlantans. According to police, the two had opened a

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[35] Atlanta City Council 1901 Ordinance; *Atlanta Constitution*, April 2, 1901; April 9, 1901; April 10, 1901; April 17, 1901. The "cocaine joint" provision made it into the law as passed.
[36] *Atlanta Constitution*, April 21, 1901; April 22, 1901; April 27, 1901.

"branch" store in Reynoldstown, an area located "just outside the city limits," shortly after the new law took effect. They claimed that McAfee and Garner had opened the branch store to evade the Atlanta cocaine ordinance, because customers could simply "journey to Reynoldstown and there secure the drug without molestation from the city authorities." Because the city law had no application in Reynoldstown, the grand jury returned an indictment against the men only for selling adulterated cocaine under an 1888 statute that prohibited the sale of adulterated drugs.[37]

The emergence of such a workaround to Atlanta's law may have alerted policymakers to the wisdom of state legislation, but such evasions did not alone prompt deliberation of a statewide statute. At its annual meting in May 1902, the Georgia Pharmaceutical Association's president gave opening remarks that highlighted the importance of upholding both "the law of the land[] and the law of professional morality and of ethics." Ensuring pharmacists were held in high esteem required that they comply with an unimpeachable code of conduct, which included prohibitions on substituting "a cheap drug for a high priced one" and selling "pretended composition[s] as genuine." As importantly, the president claimed, "The indiscriminate sale of narcotic drugs, and especially that of cocaine, the free use of which is becoming a sad reality in the South, cannot be too severely condemned." He recommended the Association appoint a committee to "draft a new pharmacy law."[38] By the middle of 1901, for a variety of reasons, many had come to believe state legislators would, and should, enact a statewide anti-cocaine law.

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[37] *Atlanta Constitution*, June 27, 1901. Neither court records nor press coverage indicates what became of the indictment against the three persons connected with the Eureka Drug Store. For the 1888 statute, see *Acts and Resolutions of the General Assembly of the State of Georgia, 1888-9*, 1888-9 Vol. 2 89.

[38] *Proceedings of the Twenty-Seventh Annual Meeting of the Georgia Pharmaceutical Association* (Macon: Smith & Watson, 1902), 14-5. The importance of complying with state laws to the professional reputation of the state's druggists remained a subject of concern past 1902. In the Association's meeting the following year, its Special Legislative Committee offered a proposal for how the state's pharmacy laws might be amended. The Committee noted that George Payne, an Atlanta druggist, dean of the Atlanta College of Pharmacy, and then-current president of the American Pharmaceutical Association, had opposed most of the changes it suggested. Payne claimed to have been motivated in all his interactions with the Committee by a desire for a "higher and more perfect recognition of the pharmacist." *Proceedings of the Twenty-Eighth Annual Meeting of the Georgia Pharmaceutical Association*

In their annual session the following autumn, state legislators followed Atlanta's lead. The General Assembly enacted a law in its 1902 session that aimed squarely, and only, at cocaine. Like the Atlanta ordinance, the Assembly's law made it unlawful for anyone to sell or dispense cocaine absent a physician's prescription.[39] In the run-up to the Assembly's passage of the bill, Georgians and the Georgia press expressed their support for it. A "leading physician" of Atlanta, for one, bemoaned the cocaine habit's spread and reminded Georgians that "the worst habitués of the drug are the negroes." The *Constitution* reported, in a statement that reflected early beliefs about the persistence of drug use but also understated what the bill sought to do, that the proposed law would "do away with the indiscriminate sale of cocaine to habitual users."[40] Before the end of 1902, then, municipal and state authorities had approved a pair of laws that specifically targeted cocaine. As a result, police in Atlanta, where policymakers and the public viewed the state's cocaine problem as most serious, could rely on either the municipal or state law to arrest druggists and peddlers selling cocaine without a valid prescription.[41]

The statutes, both municipal and state, had little effect, however, on the day-to-day policing of cocaine in Georgia. Newspaper coverage of cocaine in areas outside Atlanta continued to focus on the alleged spread of black use of the drug and made little mention of an uptick in police actions against druggists or peddlers.[42] Within Atlanta, despite some reports to

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(Macon: Smith & Watson, 1903), 25-30; H. Douglas Johnson, "George Frederick Payne and the Atlanta College of Pharmacy," *Pharmacy in History* 27, no. 1 (1985): 22-31.

[39] *Acts and Resolutions of the General Assembly of the State of Georgia, 1902*, 1902 Vol. 1 100. Notably, the state law did not include a provision that prohibited keeping or visiting so-called "cocaine joints." Both chambers of the General Assembly appear to have passed a cocaine law in the fall of 1901. Though press accounts fail to explain what became of it, whether the governor allowed the bill to expire unsigned or affirmatively vetoed it, it is clear that the 1901 bill never gained force of law. *Journal of the Senate of the State of Georgia at the Regular Session of the General Assembly at Atlanta, Wednesday, October 23, 1901* (Atlanta: The Franklin Printing and Publishing Co., 1901), 178; *Journal of the House of Representatives of the State of Georgia at the Regular Session of the General Assembly at Atlanta, Wednesday, October 23, 1901* (Atlanta: The Franklin Printing and Publishing Co., 1901), 1115.

[40] *Atlanta Constitution*, November 4, 1902; November 22, 1902; December 14, 1902.

[41] Also, within Atlanta, the municipal law continued to prohibit running or visiting cocaine joints.

[42] *Augusta Chronicle*, July 27, 1903; *Columbus Ledger*, May 24, 1903. In one of the few references to the state law in Georgia newspapers outside Atlanta, the *Macon Telegraph* reported, a little more than a year after the General

the contrary, police made very little use of either statute in the years following their adoption.[43] In his report for 1901, for instance, Atlanta Police Chief J. W. Ball reported that the police had made only five arrests for violating the cocaine ordinance in the first eight months after its adoption. Police again made only five arrests for violation of the cocaine ordinance in all of 1902, and Ball's report in 1903 noted eight arrests under the municipal ordinance—and not a single arrest under the new state law.[44] Over the next several years that followed, Atlanta police never made an arrest under the state cocaine law, and the force's 1903 arrest figure proved the high point of its use of Atlanta's municipal ordinance.[45] In short, policymaker attention to cocaine did not translate in Georgia to a high number of arrests on the basis of the new laws.

While law enforcement officials in Atlanta rarely used the local cocaine ordinance and never used the state's first cocaine law, the drug continued to be a regular fixture of charges the police brought to the attention of Judge Broyles in the Recorder's Court. In the same month the General Assembly debated the state cocaine law, for one example, police in Atlanta announced the completion of a successful "raid" on "the negro women who were on the streets under the influence of cocaine." The police claimed to have arrested more than a dozen women. In April of

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Assembly had passed the cocaine statute, that the "law against [the] sale of cocaine" was frequently "violated in Macon" and "many negroes secure[d]" the drug. *Macon Telegraph*, December 27, 1903.

[43] In one case where the police arrested on the basis of the municipal ordinance, police presented evidence that Dr. O. H. Snyder had gone into a "negro dive" and given "away cocaine as an advertisement" of the Decatur Street drug store where he worked. Snyder ran into related troubles again the following year, when a court adjudged him a "lunatic" and ordered him sent to the state asylum on the basis of his morphine and cocaine addiction. A report of the proceeding explained that, since his arrest "on the charge of selling cocaine to negroes," Snyder had "become mentally deranged." *Atlanta Constitution*, February 25, 1903; July 3, 1904.

[44] *Twenty-First Annual Report of the Chief of Police of the City of Atlanta Georgia*, 23, AHC Police Department Reports; *Twenty-Second Annual Report of the Chief of Police of the City of Atlanta Georgia*, 26, AHC Police Department Reports; *Twenty-Third Annual Report of the Chief of Police of the City of Atlanta Georgia*, 20-3, AHC Police Department Reports. Ball's report conflicts with the *Constitution*'s claim that Recorder Broyles had used the state law to fine Snyder in February 1903, suggesting either that the newspaper's reporter misunderstood the charge against Snyder or that Broyles added a charge when Snyder appeared before him.

[45] *Twenty-Fourth Annual Report of the Chief of Police of the City of Atlanta Georgia*, 15-7, AHC Police Department Reports; *Twenty-Seventh Annual Report of the Chief of Police of the City of Atlanta Georgia*, 23-5, AHC Police Department Reports. While statistics for 1905 and 1906 are unavailable, the remarkable consistency of the records for 1903, 1904, and 1907 supports these inferences.

1904, three years after the municipal ordinance took effect and more than 15 months after the legislature passed the state law, Atlanta police arrested 38 "negro men and women" in a restaurant on Decatur Street, claiming the suspects' "drinking" and "sniffing cocaine" had occasioned the arrests. A few months later, police announced the arrest of "six negroes," only one of whom officers claimed had distributed the drug.[46] The surprisingly small number of arrests Atlanta police made under the local and state cocaine laws, in other words, did not correspond with the degree of attention they paid to cocaine users in the city.

What to make of the incongruity between the parade of cocaine users police brought before the Recorder's Court and the Police Department's evident failure to use city and state anti-cocaine laws? First, police only occasionally targeted druggists. The few cocaine violations the police did report may have reflected arrests of unlicensed peddlers rather than of druggists. Second, police continued to use other laws—loitering, drunkenness, curfews, and disorderly conduct among them—to arrest cocaine users.[47] The statutes the Atlanta City Council and Georgia General Assembly passed to curtail the activities of druggists, in other words, failed to address the cocaine users that most worried police. Police continued therefore to address the perceived problem of black cocaine use by arresting such users on other grounds. This they did frequently enough that the *Constitution* lamented in the summer of 1904 that cocaine use continued to spread among black Atlantans "in spite of police efforts" to the contrary.[48] Officers,

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[46] *Atlanta Constitution*, November 30, 1902; April 26, 1904; August 24, 1904. Police announced the arrest of nine black Atlantans on August 30, 1904, four of whom they caught near a Decatur Street "joint" and the other five of whom participated "in a rendezvous" in which they used "the vile drug." *Atlanta Constitution*, August 30, 1904.

[47] These petty crimes were the bread and butter of police work in Atlanta around the turn of the century. In 1904, for instance, the Atlanta Police Department arrested 9,404 Atlantans for disorderly conduct; 4,876 for intoxication; and 1,216 for "idling and loitering." In more than 80% of the 18,556 arrests the Department made during the calendar year, in other words, it charged the suspect with one of these three crimes. *Twenty-Fourth Annual Report of the Chief of Police of the City of Atlanta Georgia*, 15-7, AHC Police Department Reports.

[48] *Atlanta Constitution*, August 18, 1904.

rather than legislators, found a means to direct the state's attention to the black cocaine users who had fomented public support for anti-cocaine laws.

When it came to druggists, police rarely targeted them in part because those who had become accustomed to profits from selling cocaine to Atlantans had devised yet another means to evade both the city and state laws. While the statewide application of the General Assembly's 1902 law rendered the "branch store" workaround obsolete, a number of drug stores hired physicians to work in their shops and write prescriptions for cocaine. Local press lamented that these physicians "did nothing except furnish negroes with prescriptions for cocaine," and Chief Ball complained that the physicians' presence in stores allowed druggists to "comply with the letter of the law" while violating its spirit.[49] Both the police and local press saw this practice as having obstructed law enforcement efforts to end the sale of cocaine in Atlanta.

Another case involving W. W. McAfee made visible the workings of physicians employed by drug stores for this purpose. McAfee responded to the state law by hiring a physician, M. B. McAfee, perhaps of some relation.[50] The latter McAfee's prescription book, police charged and he admitted, showed that he had written 80 prescriptions for cocaine on a single day. One of the African American women to whom he had given a prescription explained what transpired when she walked into the store. Immediately after she entered, the doctor asked her if she had fallen ill. She stuck out her tongue for an examination, at which point the doctor logged her prescription in his record book, took her 15 cents, and handed her a box of cocaine. When charged, the doctor never denied that he dispensed cocaine after only the most perfunctory of examinations. Instead, he maintained that he wrote prescriptions only for the drug "fiends" who "suffer[ed]" without it. He also repeated his employer's earlier cry that police had unfairly

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[49] *Atlanta Constitution*, August 28, 1904.

[50] In one press account of the trial against Dr. M. B. McAfee, the physician is quoted as stating that he was not related to W. W. McAfee, a claim that seems somewhat dubious. *Atlanta Constitution*, August 24, 1904.

targeted his Decatur Street store, when "there [were] other druggists who [sold] cocaine to negroes, and nothing [was] done to them."[51] Despite city and state laws, druggists had found a means lawfully to continue to sell cocaine to whomever they wished.

Before the summer of 1904, Atlanta police would not have bothered to bring charges against M. B. McAfee. Two months earlier, though, frustrated with widespread violation of the city ordinance, Judge Calhoun, before whom McAfee had appeared on his earlier charge, announced a new interpretation of that law that gave police hope they might be able to proceed against McAfee and others like him. Dismissing a case against another druggist for selling cocaine "to a negro," Calhoun announced that, henceforth, he would not recognize as valid any prescription "given for cocaine by a physician who stays in the drug store for that purpose." He proclaimed "such a paper" to be "no prescription at all." When the city's police chief announced a new determination to "break up the cocaine trade in Atlanta," he cited Calhoun's opinion as inspiration and predicted the department would have "plainer sailing" proceeding against druggists in the future.[52] If officers' ingenuity in using existing law had provided a means to target cocaine users whose consumption of the drug violated no city or state law, judicial interpretation might provide police an avenue to pursue druggists who had developed a means around the city's anti-cocaine ordinance.

Police Department reports indicate that, despite officers' expressed hopes, Calhoun's interpretation of the city law had little impact on the sale of cocaine in Atlanta. Police arrested fewer people in 1907 for violation of the cocaine laws than they had before Calhoun announced

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[51] *Atlanta Constitution*, August 18, 1904; August 24, 1904. Interestingly, M. B. McAfee was only caught after several female prisoners at the city stockade snuck off to the drug store, purchased cocaine from McAfee, and dispensed it among a group of prisoners. W. W. McAfee, speaking at the proceeding, claimed that he "had always acted in accordance with the city ordinance regulating the sale of cocaine and never [sold] it without the proper label and prescription." He also claimed that "any Decatur street negro could take 15 cents and purchase cocaine at nearly any drug store in Atlanta without the proper prescription."

[52] Knight, *A Standard History of Georgia and Georgians*, 3264; *Atlanta Constitution*, June 24, 1904; August 28, 1904.

his new interpretation.[53] Either druggists in Atlanta had desisted in selling cocaine in response to Calhoun's statement, or even this more robust interpretation of the law failed to dissuade them from selling the drug—and police continued to experience problems enforcing existing law.

Atlantans believed the latter explanation true. Despite the efforts of Calhoun and Atlanta police, that is, Atlantans feared that the cocaine use that fomented public demand in favor of anti-cocaine legislation continued unabated. In January 1905, Gordon Noel Hurtel contributed a special report to the *Constitution*. Hurtel, one of the paper's best known reporters, often covered the goings-on in Broyles' courtroom. He began his report by claiming that cocaine had been "used by negroes in Atlanta" for five years, and he claimed it had taken that long "for the terrible drug to show its full work of mental and physical ruin." Hurtel declared cocaine worse than both "whisky" and the "dope pipe of the Chinese joint," and he noted the failure of legislation to "eradicate[]" the cocaine "evil." Directly referencing Calhoun's statement from the bench the previous summer, he intoned that, "although every possible effort has been made to save the wrecked and misguided negroes in spite of themselves," the work "of wrecking human minds has gone steadily and surely on."[54] A half-decade of work by police, lawmakers, and jurists, in other words, had failed to decrease cocaine consumption in Atlanta

If some Georgians wished to respond to the cocaine problem with additional legislation and enforcement, others resisted the move to subject Atlantans to more regulation. Evidence of the latter position is scarce, but Mayor James Woodward gave voice to it in his 1905 inaugural address. Woodward rebuked Atlanta's police and argued the Department's 17,000 arrests the

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[53] *Twenty-Seventh Annual Report of the Chief of Police of the City of Atlanta Georgia*, 23-5, AHC Police Department Reports (two arrests under the ordinance in 1907, no arrests under the state law); *Twenty-Third Annual Report of the Chief of Police of the City of Atlanta Georgia*, 21-4, AHC Police Department Reports (eight arrests under the ordinance in 1903, no arrests under the state law).

[54] *Atlanta Constitution*, January 15, 1905; Burns, *Rage in the Gate City*, 87; Wagner, *Disturbing the Peace*, 140-1. Hurtel gained some notoriety when he covered an infamous 1889 duel. Knight, *A Standard History of Georgia and Georgians*, 1358; Franklin M. Garrett, *Atlanta and Environs: A Chronicle of its People and Events, 1880s-1930s* (Athens: University of Georgia Press, 1969), 199.

previous year put Atlanta "at or near the top" of cities with high crime rates—an "unenviable distinction." He attributed the large number of arrests to officers' desire to enrich the city coffers and a misguided belief among police that the best officers were those who arrested the most criminals. Police overzealousness and not Atlantans' criminality lay at the root of the problem, which he beseeched the Department to address.

Woodward did more than chastise the police for their arrest rate. He also suggested that police activity had intruded upon Atlantans' liberty. He claimed it the police's duty to "protect the "lives, liberty, and property" of all Atlantans and explained that the "liberty of every human being is dear to them" and should not be denigrated without "just cause." Even at a time of much public discussion of cocaine and black crime, Woodward suggested that Atlantans had already been subject to too many restrictions on their liberties.[55] Four years after the City Council first placed restrictions on cocaine sales, public discussion of the drug continued to describe its use and sale as rampant. Police persisted in their use of other laws to target users, but they had been frustrated in their few attempts against druggists. Nonetheless, for a brief season, policymakers made no further moves against the drug.

IV. Responding to Atlanta's Race Riot with Additional Anti-Cocaine Legislation

The first half-decade of narcotics law in Georgia, then, had largely failed, at least insofar as the state's attempt to suppress sales by druggists was concerned. Despite that failure, as Woodward's fall 1905 address had suggested, it was far from clear that lawmakers would act again in response to the continuing cocaine problem. Developments in the summer and fall of 1906, though, would cast the matter in a different light. A heated gubernatorial election and a

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[55] *Annual Reports of the Committees of Council, Officers, and Departments of the City of Atlanta for the Year 1904* (Atlanta: Constitution Publishing Co., 1904), 27-30.

race riot would exacerbate white public anxiety about black criminality in Atlanta. As white elites in Atlanta organized a response to the riot, they argued for more law and order. The state legislature would answer their call by, among other things, passing a statewide prohibition law and expanding the state's response to narcotics.

The Georgia gubernatorial election of 1906 fueled a summer of racial tension in the state, making prominent—in one historian's formulation—"all the hatred and distrust between the races." In particular, it brought the hotly contested issue of black disfranchisement to the fore. Hoke Smith, a local lawyer and one-time owner of the *Atlanta Journal*, ran on a platform that put black disfranchisement at its center. He also shared his views of black Georgians with audiences as he campaigned for governor. According to Smith, African Americans were "ignorant, illiterate, savage, vicious, inhuman, unendurable, venal, arrogant, brutish, [and] venomous." Though his chief opponent in the Democratic primary, *Atlanta Constitution* owner Clark Howell, opposed Smith's disfranchisement plan, he was no champion of African American rights. Instead, Howell insisted that Smith's plan to disfranchise black voters through literacy qualifications would undermine white supremacy by keeping many uneducated whites from voting. Smith and Howell competed to be seen, in other words, as the candidate most protective of white supremacy. Reports of sexual assaults by black men on white women gave Smith an opportunity to claim the upper hand in that battle. The *Journal* linked black-on-white rape with Howell and his resistance to Smith's disfranchisement measure. Smith and the *Journal* cast all black men as potential rapists and contended that the franchise encouraged African Americans to defy their prescribed place, directly leading to sexual assault.[56]

[56] Thomas Mashburn Deaton, *Atlanta During the Progressive Era*, Ph.D. Diss., History, University of Georgia, 1969, at 170, 186; Godshalk, *Veiled Visions*, 48-9. On the connection some whites drew between black voting rights and crimes, particularly sexual assaults, see Leon Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Knopf, 1998), 220-22.

After simmering all summer, these racial tensions boiled over in a white-on-black race riot that began on the third Saturday in September. Like the editorial in the *Journal* that had first connected the vote to sexual violence, allegations of attacks by black men on white women precipitated the unrest. As dusk gave way to evening, several of Atlanta's newspapers published extra editions, offering their readers vivid accounts of four alleged incidents of black male-white female violence. Rumors quickly began to spread among whites of a planned massacre of African Americans, which Mayor Woodward attempted in vain to prevent. By 9 p.m. that Saturday evening, white mobs had begun amassing on Decatur Street. Over the following days, white mobs—supported by the state militia—fanned out into many of the city's black quarters.[57]

Threatened with continuing violence by whites and all-too-aware that they could expect little help from the city's notoriously racist police, African Americans in Atlanta responded with force. Individuals and small groups battled white mobs as they attacked black Atlantans. They hurled rocks and bricks at streetcars, fired their guns at police officers as they tried to arrest African Americans, and chased whites out of their neighborhoods. Residents of Dark Town and Brownsville, two black neighborhoods, even succeeded in turning away white mobs for a time by firing bullets into the crowd. Four days of violence left dozens of Atlantans, white and black, injured or dead. White elites in Atlanta, aghast at the destruction wrought by the riot, saw in the unrest evidence that continued racial violence would prove costly.[58]

The threat of economic consequences ultimately pushed a group of elite whites to make overtures to leading black Atlantans. As laborers still refused to work and factories remained idle

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[57] Burns, *Rage in the Gate City*, 111-17; Godshalk, *Veiled Visions*, 1, 27-30, 36-8, 48, 85-111; Bauerlein, *Negrophobia*, 142-43; Mixon, *The Atlanta Riot*, 65.

[58] Burns, *Rage in the Gate City*, 131-44; Godshalk, *Veiled Visions*, 85-111. The riot left a scar on the city's national profile. Two years later, muckraking journalist Ray Stannard Baker penned an account of the riot, which he included in his study of American race relations. He described Atlanta at the time of the riot as a "veritable social tinder-box." Ray Stannard Baker, *Following the Color Line: An Account of Negro Citizenship* (New York: Doubleday, Page & Company, 1908), 3-5, 9.

on the riot's fourth day, these whites promised safety in black neighborhoods in exchange for the African Americans' denunciation of the "lawless element" that had stood against the white mob. They also sought black leaders' assistance in securing African Americans' compliance with new and existing laws designed to preserve order. These included, in the words of Rebecca Burns, the "restrictive and demeaning Jim Crow laws governing streetcars, restaurants, and other public settings." White elites also sought the closure of gambling halls and saloons that catered to African Americans, a move that eventually resulted in the temporary closure of all saloons in the city. Assured both their safety and a continuing role in shaping the city's response to the riot, African American leaders agreed to seek the cooperation of black Atlantans to these measures.[59]

With many whites continuing to blame the incident on the saloons in Downtown Atlanta that provided liquor to African Americans, temperance reformers capitalized on discussions about how best to respond to the riot by raising calls for a statewide ban on alcohol production and sales. Atlantans, and particularly religious Atlantans, flocked to join the ranks of the state chapters of the Anti-Saloon League and the Women's Christian Temperance Union. Though

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[59] Godshalk, *Veiled Visions*, 135-62; Burns, *Rage in the Gate City*, 145-52. While the riot may have led white elites to embrace a "law-and-order" campaign, whites' role in the violence notwithstanding, law enforcement in the state had long focused on black Georgians. Both before and after Atlantans took to the streets, the weight of criminal justice efforts in Georgia fell heaviest on the state's African Americans. In a June 1906 report, the Georgia Prison Commission published statistics concerning the state's misdemeanor convicts. Among those shepherded out to public and private employers under the convict-lease system, black Georgians vastly outnumbered whites. Thirty-nine of the 52 counties that hired convict labor employed no white workers. As for private employers, only one firm in Georgia leased more than five white convicts, while 28 companies leased more than five black convicts, including several that hired as many as 60 black prisoners. In its 1908 report, the Commission put the matter in stark numeric terms. It noted that the prisoners in the state penitentiary included 2,145 "negro males" but only 315 "white males." The state's chain gangs counted 2,145 "negro males" but only 146 "white males." Whatever reforms the riot may have led whites to champion, those new laws would not mark a sea change in police attention to black Georgians. *Ninth Annual Report of the Prison Commission of Georgia*, Georgia State Archives, Atlanta, Georgia, 20-1; *Eleventh Annual Report of the Prison Commission of Georgia*, Georgia State Archives, Atlanta, Georgia, 11; *Sixth Annual Report of the Prison Commission of Georgia*, Georgia State Archives, Atlanta, Georgia, 6. After the riot as before, a caution the Prison Commission once offered continued to ring true: "So great is the disproportion between the number of criminals furnished by each race," it "demands the serious consideration of every man who has at heart the future welfare of his State."

Smith, by then governor of Georgia, supported local option laws over a statewide ban, he signed the measure into law in the summer of 1907.[60]

Soon after, he signed into law a new anti-narcotics measure, which introduced two innovations into the state's drug statutes. First, the Assembly expanded the substances covered under the criminalization statute to include opiates. After August 1907, no Georgian could sell or dispense cocaine, opium, morphine, or heroin to any person not in possession of a valid prescription. In adding these drugs to the state's statute, the Assembly brought Georgia law in line with the laws of states across the country, which increasingly prohibited a similar list of drugs. Second, in a move connected to the efforts of druggists to evade the earlier law, the new statute forbade physicians from prescribing any of the enumerated drugs to two classes of people: "habitual user[s]" and persons "not under [] treatment in the regular practice" of the accused's profession. The new state law, then, both expanded police authority over vendors of other drugs and effectively outlawed the much-maligned workaround druggists had developed so they could continue to sell cocaine to habitual users.[61]

Several things became clear soon after the law's passage. Above all, it would not be enough to end the use of cocaine or opiates in Georgia. A series of press complaints in Atlanta in November 1907 provide one indication that users continued to secure narcotics. In testimony before the Recorder's Court on November 13, one witness testified that she had seen a man and woman using both cocaine and morphine, which the man claimed to have purchased from a druggist. The *Constitution* used the opportunity to lament that "quite frequently" in the

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[60] Godshalk, *Veiled Visions*, 164, 178-81; Bayor, *Race and the Shaping of Twentieth-Century Atlanta*, 16. For the text of the statewide law, see *Acts and Resolutions of the General Assembly of the State of Georgia, 1907*, 1907 Vol. 1 81.

[61] *Acts and Resolutions of the General Assembly of the State of Georgia, 1907*, 1907 Vol. 1 121. A 1931 study by the Public Health Service determined that "practically all narcotic control legislation in the United States" was enacted after 1895, and it concluded that, by 1912, "most of the States had laws designed to restrict the sale of cocaine and opium." United States Public Health Service, *State Laws Relating to the Control of Narcotic Drugs and the Treatment of Drug Addiction* (Washington: Government Printing Office, 1931), 9.

Recorder's Court one saw evidence that druggists continued to sell the substances as before. The newspaper repeated its complaint the next day, contending that "neither white [n]or negro habitués" had experienced "particular difficulty in procuring their drugs" in the months since the General Assembly acted.[62] No matter what successes the new law might register, Georgians quickly came to understand, an end to drug use would not be among them.

Moreover, Georgians identified a tension between their desire for strict enforcement of the law and a "humanitarian" question the new statute raised. Having complained about inadequate enforcement of the act, the Atlanta press urged "stripes for the cocaine seller" and claimed it the "plain duty of the police" to convict men who profited "at the expense of the lives and minds of their victims." They actively clamored for an expansion of Georgia's response to cocaine. At the same time, Georgians understood that the law would force a hardship on habitués. The *Constitution* criticized the statute for failing to provide for addicts who "would be subjected to unspeakable pangs" if unable to secure drugs. It called for palliative treatment and advocated for an increase in sanitarium capacity. Physicians in the state made similar calls. At the Medical Association of Georgia's 1908 meeting, one speaker argued that the state should establish homes for the treatment of addicts and pay for those Georgians who could not afford a stay.[63] Strict enforcement of the law, Georgians came to understand, would make life increasingly difficult for addicts, and they wished for strict enforcement against druggists to be tempered with mercy for habitués.

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[62] *Atlanta Constitution*, November 14, 1907; November 15, 1907. An October 2010 article, for example, reported that peddlers in Atlanta, supplied by "some unscrupulous druggist," were then doing a "rushing business." Press coverage of the continuing drug problem in Atlanta and the rest of the state is abundant.

[63] *Atlanta Constitution*, November 15, 1907; November 16, 1907; November 17, 1907; J. L. Frazer, M.D., "The State's Attitude toward the Drug Habitue," in *Transactions of the Medical Association of Georgia, Fifty-ninth Annual Session* (Atlanta: Medical Association of Georgia, 1908): 327-31, 329-30. He continued: "Gentlemen, let us help them, let's ask our State to relieve them. It is within our power and I am firmly persuaded that she should not prohibit the sale of such drugs and leave the child of its domain to die in consequence of such deprivation."

Finally, police had greater success against physicians under the new law than they had against druggists under the earlier ones. As early as the end of November 1907, police in Atlanta had arrested a physician, Dr. J. W. King, for violating the state law by prescribing cocaine "to a negro" not under his care. King claimed that he had written the prescriptions for "treatment of the cocaine habit" and argued that doing so did not run afoul of the state law. He paid a bond and awaited trial in the state criminal court.[64] A year later, another physician appeared before Judge Broyles on the same charge and suffered a similar fate.[65]

While these things became clear in the immediate aftermath of the new statute, what did policing of cocaine look like in Georgia several years down the road? A series of cases arising in 1909 and 1910 in Savannah, then Georgia's second most populous city, allows us to draw some conclusions about how Georgia police and prosecutors used—and did not use—the 1907 law in the years after its passage. They also give a gauge by which to consider whether lawmakers and law enforcement professionals succeeded in their efforts to stem cocaine sales and use.

If Savannah's experience in the aftermath of the 1907 statute is any indication, Georgians continued to use cocaine widely, and police persisted in directing their attention to black users and their suppliers. In August 1909, police in Savannah made public pronouncements about the "astonishing" amount of cocaine use then occurring in their city. They succeeded in bringing "eight or nine negroes" before the city's Recorder's Court on a single day, each charged either "with dealing in cocaine or with buying it in violation of the law." News of so many arrests made manifest that the state's narcotic law had not ended use of the drug; it also made clear that police continued to monitor not only black peddlers, but also users.

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[64] *Atlanta Constitution*, November 20, 1907; November 21, 1907; November 27, 1907. King's defense conflicted with the law's clause forbidding physicians from writing prescriptions for "habitual users."
[65] *Atlanta Constitution*, February 24, 1909. Available records do not make clear what befell these two men at trial.

This continuing police attention to peddlers and users paid dividends in the form of additional arrests against other participants in the cocaine traffic. Alarmed "at the wide range" the "unlawful traffic ha[d] taken in Savannah," police determined to begin a "crusade" against the substance to make its purchase more difficult.[66] These efforts quickly yielded the arrest of several Savannah physicians on charges of writing unlawful cocaine prescriptions. On August 11, police arrested Dr. H. B. Stanley and Dr. W. W. Lee after "fourteen men and women, mostly negroes," testified in the Recorder's Court to having received cocaine prescriptions from one of the two. Stanley, a former Coroner of Chatham County, and Lee, who had been acquitted of a similar charge on three previous occasions, both fought the charges against them at trial and appealed their convictions.[67]

The trial against Stanley and Lee revealed that some Savannah physicians were still conducting a vast commerce in cocaine. At the trial against Lee, County Health inspector W. F. Brunner claimed to have reviewed the doctor's prescription records. Lee, he testified, had written at least 318 prescriptions for cocaine between June 12 and August 8, 1909. While Brummer did not offer similar testimony at the trial against Stanley, the prosecution offered Dr. John Train, another Savannah physician, as a witness. Train claimed to have run into Stanley on the street a year earlier. The two had a friendly conversation, Train explained, during which Stanley asked him whether his practice was doing well. When Train claimed to have had little recent business, Stanley replied, "If I was not writing cocaine prescriptions I would not be doing anything either."

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[66] *Augusta Chronicle*, August 12, 1909; *Macon Telegraph*, August 12, 1909; *Columbus Daily Enquirer*, August 15, 1909. It is not clear on what theory police in Savannah brought charges for the unlawful purchase of cocaine, since state law only placed restrictions on the persons to whom physicians could prescribe, and druggists could dispense, cocaine and opiates.

[67] *Augusta Chronicle*, August 12, 1909; *Macon Telegraph*, August 12, 1909; August 15, 1909; Brief of Evidence, 19, Case File, *State v. Lee*, 8 Ga. App. 413 (Ct. App. Ga. 1910). In addition to Stanley and Lee, police also arrested an African American physician, Dr. E. M. Pinckney, though the press did not describe his fate in the courts and, if convicted, he does not appear to have appealed the decision.

The inference the prosecutor wished for the jury to make was clear: Stanley's practice had come to depend on the income he made from his regular prescribing of cocaine.[68]

Lee and Stanley adopted a similar routine to sell cocaine to their patients. Frances Townsend, a 26 year-old black woman from Augusta, testified at both doctors' trials. By the time of her arrest in August 1909 for selling cocaine, Townsend had lived in Savannah five years. Irregularly employed as a domestic, she served more than five months on the county chain gang for her crime. She claimed to have first visited Stanley and Lee in August 1909. Neither performed an examination of her, she claimed; instead, Stanley simply charged her 50 cents, and Lee 25 cents, before each handed her a prescription. She returned to Stanley on two or three occasions and to Lee on as many as four, all with the same results. Police also brought Tom Brown, an African American and the so-called "Cocaine King" of Savannah, from the "convict farm" to testify against both doctors. Like Townsend, Brown claimed to have secured drugs for resell from both Stanley and Lee, who asked no questions of Brown and never performed an examination.[69] Despite the 1907 law, the testimony against Stanley and Lee made clear, some doctors had taken the prescription requirement as an opportunity to make extra income. Repeat customers, whom they did not examine, because a mainstay of their practices. Prosecutors secured convictions against Lee and Stanley, and the court ordered them to pay a $1,000 fine or serve 12 months on the chain gang.[70]

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[68] Brief of Evidence, 19-9, Case File, *State v. Lee*, 8 Ga. App. 413 (Ct. App. Ga. 1910); Brief of Evidence, 8-9, Case File, *Stanley v. State*, 9 Ga. App. 141 (Ct. App. Ga. 1911).
[69] Brief of Evidence, 15-8, Case File, *State v. Lee*, 8 Ga. App. 413 (Ct. App. Ga. 1910); Brief of Evidence, 2-6, Case File, *Stanley v. State*, 9 Ga. App. 141 (Ct. App. Ga. 1911).
[70] Whether or not they felt compassion for addicts, Stanley and Lee relied in their defense on the same humanitarian question raised by the Atlanta press and the Georgia Medical Association. Stanley claimed that the legislature's 1907 act forced medical professionals to encounter relentless demand for cocaine from addicts. Lee called addicts "great sufferers" and opined that the legislature should have established a hospital for addicts when it criminalized cocaine. Brief of Evidence, 19-21, Case File, *State v. Lee*, 8 Ga. App. 413 (Ct. App. Ga. 1910); Brief of Evidence, 3, 9-10, Case File, *Stanley v. State*, 9 Ga. App. 141 (Ct. App. Ga. 1911); *Augusta Chronicle*, May 22, 1910.

Proceeding against druggists, though, proved more challenging, because a veritable cottage industry of physicians willing to write prescriptions for nearly any customer had emerged in the wake of the 1907 narcotic law. Even if a druggist had reason to suspect that a particular customer were a habitual user, in other words, he could claim some immunity from prosecution if the customer had presented him with a prescription. In the summer of 1909, police arrested druggist R. J. Dukes as part of the same campaign that netted Stanley and Lee. County Health Inspector Brunner testified at Dukes' trial, too, and explained that he had found in Dukes's office several hundred prescriptions for cocaine. One doctor, he noted, had written 139 prescriptions for the drug in only a six-week period. Convicted by a Savannah jury and given the same sentence as Stanley and Lee, Dukes appealed. He argued that, without more evidence of his wrongdoing, his dispensing of cocaine pursuant to valid prescriptions shielded him from criminal liability—even if he had reason to doubt that each prescription was written as part of a legitimate course of treatment. The appellate court agreed.[71]

Stanley and Lee, too, appealed their convictions. Lee focused his appeal on evidentiary determinations made by the trial court, including its admission of information from his previous trials. Stanley raised a constitutional challenge. He argued that the law impermissibly referred "to more than one subject matter" and that its title failed to reflect its substance. That title, he elaborated, defined the act's purpose: to provide "against the evils resulting from the traffic in certain narcotic drugs and to regulate the sale thereof." Stanley argued that combatting the "evil" of narcotics implied a need for prohibition, yet the act instead set out conditions under which physicians might prescribe narcotics for their patients. He buttressed that argument by noting that

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[71] Brief of Evidence, 1-2, Case File, *State v. Dukes*, 9 Ga. App. 537 (Ct. App. Ga. 1911); *Dukes v. State*, 9 Ga. App. 537, 71 S.E. 921, 922 (Ga. Ct. App. 1911). The appellate court found the indictment defective because it did not allege "that the cocaine was sold without a written prescription" or that the prescription had been insufficient for failing to abide by some other formal requirement of the law.

nothing in the title of the act indicated "a purpose to make penal the sale or prescription of the narcotic drugs named in said act."[72] As others had before him, Stanley identified a disconnect in what Georgia's narcotic law set out to do and how it proposed to accomplish that end.

Neither appeal succeeded, but Stanley's proved the more consequential. Though Stanley never questioned whether the narcotic law represented a permissible exercise of the state's police power, the Georgia Supreme Court took the opportunity to declare it so, impeding any future attempt to void the law on this ground. The court dismissed Stanley's claims by finding that criminal prohibitions on physicians bore a direct relationship to the act's purpose of regulating drug sales. Such regulation on drug sales would be impossible, it explained, "without providing for punishment of those violating the rules laid down for such regulation." It further opined that the "provisions relating to prohibition of prescribing" imposed only "reasonable restrictions on the manner of prescribing" and were "valid as a reasonable exercise of the police power."[73]

An episode of violent racial unrest, then, led the state legislature to revisit and expand its earlier narcotics law. Though the General Assembly's 1907 law included no new provisions by which police could proceed against cocaine users and addicts, it extended the anti-cocaine law to cover new substances and to prohibit additional practices. As Savannah's experience with the statute made clear, law enforcement officials in Georgia focused their anti-narcotic efforts on black users and street peddlers, the former of which they arrested for other misdemeanor crimes and the latter of which the General Assembly's two narcotic laws reached. Their attention to these Georgians led them to discover the physicians and druggists who profited from the cocaine

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[72] Amended Motion for New Trial, 6-14, Case File, *State v. Lee*, 8 Ga. App. 413 (Ct. App. Ga. 1910); Demurrer, 1-2, Case File, *Stanley v. State*, 9 Ga. App. 141 (Ct. App. Ga. 1911); *Stanley v. State*, 135 Ga. 859, 70 S.E. 591 (1911).
[73] *Lee v. State*, 8 Ga. App. 413 (Ct. App. Ga. 1910); *Stanley v. State*, 135 Ga. 859, 70 S.E. 591, 592-93 (1911); *Stanley v. State*, 9 Ga. App. 141 (Ct. App. Ga. 1911). Two years later, in *Silver v. State*, a Georgia appellate court likewise described the 1907 law as having been "[p]assed by the Legislature by virtue of the broad police powers of the state." *Silver v. State*, 13 Ga. App. 722, 79 S.E. 919, 920 (Ct. App. Ga. 1913).

traffic. Police succeeded in bringing charges against physicians who violated the expanded law, but they faced rather less certain odds when they focused their energies on druggists. And, each user, peddler, or medical professional they arrested made manifest that large numbers of Georgians continued to use cocaine and seek out a supply of the drug in spite of the legislature's efforts to make that enterprise more difficult.

V. Conclusion: On Georgia's Decision not to Expand its Anti-Narcotic Law

When the Georgia Supreme Court declared the legislature's 1907 law a valid exercise of the police power, it had been only a little more than a decade since Georgians had first learned of the presence of cocaine within the state and had worked to determine what kind of problem the drug represented. In those early years of attention to the drug, Georgians had quickly come to see cocaine in racial terms, as a substance widely and increasingly used by the state's African Americans, many of whom committed crimes while under its influence. They also believed that wide use of cocaine by black Georgians, especially black Atlantans, would increase the size of Atlanta's already-considerable population of "loafing" vagrants, who would eschew gainful employment in favor of lazy, cocaine-filled days. As Georgians saw it, cocaine use by African Americans represented a serious danger that imperiled public welfare.

The penal state that Georgians began constructing as they responded to cocaine use had different origins than that in California. Before municipal or state lawmakers in Atlanta attempted a formal, political response to cocaine, Atlanta police worked to use existing law to save the public from this newly-identified threat. They recorded some successes against users and peddlers, using curfew laws as well as statutes against vagrancy, lewd behavior, disturbing the peace, and doing business without a license as the bases on which to arrest such suspects. The paucity of law concerning cocaine, though, gave them trouble when they attempted to target

the druggists who sold the majority of the drug in the city. The Atlanta City Council and the Georgia General Assembly responded within 18 months of each other, and each passed new restrictions on when druggists might dispense cocaine to customers.

So began Georgia lawmakers' efforts to use the law to curb cocaine consumption and sales in the state. The legislature expanded its law in 1907 in the wake of the violent Atlanta race riot of 1906, putting restrictions on physicians' prescription practices. This proved more useful to police, who successfully moved against a number of physicians. Still, they remained largely unable to use the expanded law against druggists and, Georgians agreed, cocaine use continued despite the increase in convictions of doctors.

Georgia's General Assembly would not pass new narcotic legislation again until 1935, though public discussion of cocaine's threat persisted in the second decade of the new century.[74] Outside the state, during this same period other southern legislatures devised new ways to target users for criminal sanction. In 1908, for instance, Virginia's legislature made it unlawful to possess narcotics "with intent to sell, give away," or otherwise dispense of the drugs, a statute that, at a minimum, made some possession actionable without evidence of an actual sale or transfer. South Carolina's legislature went further. It made possession of cocaine—and only cocaine—unlawful unless in packaging that bore the names of the prescribing physician and the dispensing druggist. The members of Georgia's General Assembly could hardly have avoided news of these devices conceived to bring casual users and addicts to justice, yet it did not add a similar clause to its narcotic control statute until 1935.[75]

[74] See, for but one example, a 1912 feature in the *Constitution* calling cocaine use the city's "greatest curse" and referencing the recently-convicted Ben Green, "King of the Cocaine Fiends," and his cocaine-induced crime sprees. *Atlanta Constitution*, June 30, 1912. For more on Green, see *Atlanta Constitution*, March 24, 1912; May 4, 1912.
[75] Virginia Acts 1908, p. 375, c. 255; *Taylor v. Commonwealth*, 109 Va. 825 (1909); *State v. Freeland*, 106 S.C. 220 (1916) (reciting text of South Carolina statute).

The General Assembly's 1917 addition of a possession clause to its alcohol prohibition statute makes its silence on narcotics possession all the more befuddling. In March 1917, Governor Nat Harris submitted, and the General Assembly approved, what Georgians came to know as the state's "bone dry" law. According to the *Constitution*, the governor's bill was the result of a "contest between all the antagonists of the festive cup to see who could suggest the utmost in 'dryness.'" The law prohibited carrying liquor into the state, subject to exceptions for medical and religious purposes. It also prohibited possession of alcohol by individuals or groups for any purpose.[76] Given continuing public and policymaker attention to cocaine and the General Assembly's embrace of a possession clause to constrain liquor consumption, its inertia concerning narcotics law demands explanation.

In part, the legislature may have believed itself on weaker constitutional footing in regulating cocaine. Its moves against liquor possession raised vociferous opposition from Georgians arrested on these grounds, and state courts heard a series of cases questioning the legislature's authority to pass such a law. Litigants in these suits raised a number of constitutional concerns: that the laws deprived Georgians of property without due process; that they circumscribed an "inherent right" of citizenship; and that the legislature lacked the authority to outlaw possession. Though the courts dismissed these objections and found the state's police power sufficient to prohibit liquor possession, their reasoning may have given pause to legislators pondering a similar approach to narcotics control. Time and again, Georgia courts upheld legislative action regulating alcohol, and alcohol possession, on the ground that the "sale of spirituous and malt liquors ha[d] from early times been considered as falling peculiarly within the cognizance of the police power of the state." In support of this proposition, courts recited a

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[76] *Acts and Resolutions of the General Assembly of the State of Georgia, 1917*, 1917 Vol. 1 7; *Atlanta Constitution*, March 20, 1917; March 27, 1917.

long line of cases stretching well back into the nineteenth century.[77] The possibility of numerous legal battles, then, as well as the relative absence of a similarly long and judicially-approved tradition of regulating narcotics, may have led some legislators to shy away from deepening the state's control law.[78]

Federal entry into the narcotics field, too, may have discouraged Georgia lawmakers from passing additional drug legislation. Congress's Harrison Narcotic Act, passed in December 1914 and effective the following March, included language that made it unlawful under federal law for Americans to possess any narcotic that had not been prescribed and dispensed through proper channels. Federal officials in Atlanta, including the local United States Attorney, Hooper Alexander, emphasized that "any unregistered person having narcotic drugs in his possession" was "guilty under the Harrison Act, unless he got them on a prescription given in good faith by a practicing physician." A stronger federal role in narcotics control may have discouraged Georgians from passing additional narcotic laws in two ways. First, Georgia lawmakers may have harbored concerns that, by broadening the states' police power, state legislatures and courts had given the federal government a basis to argue that governing required a baseline level of centralized authority. Christopher Tomlins, for one, has argued that such a concern drove Justice Peckham's decision in *Lochner*. Tomlins contends that Peckham's "antagonism to state police powers appears to have been heightened by the 'leakage' to the federal state of capacities to compel broadly."[79] To the extent that Georgians maintained a preference for state over national

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[77] *Whitley v. State*, 134 Ga. 758, 68 S.E. 716, 723-24 (1910); *Delaney v. Plunkett*, 146 Ga. 547, 91 S.E. 561, 565-66 (1917); *Barbour v. State*, 146 Ga. 667, 92 S.E. 70, 71(1917); *Saddler v. State*, 148 Ga. 462 (1918).
[78] As I suggested in the opening pages of this chapter, though, the General Assembly also had reason to believe the courts would ultimately uphold their right to act more aggressively in this field. See notes five and six and accompanying text. That likelihood suggests that a concern over the scope of their power fails to account fully for legislative inaction between 1907 and 1935.
[79] Christopher Tomlins, "The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to *Lochner*," in *Police and the Liberal State*, Markus D. Dubber and Mariana Valverde, eds. (Stanford: Stanford University Press, 2008): 33-53, 49.

power, they may have feared that concentrating additional powers in the statehouse offered the central state another justification for growing its power.

Second, the federal law's breadth may have led Georgia lawmakers to believe additional state-level legislation unnecessary. Harry Anslinger, who became head of the Bureau of Narcotics in 1930, certainly believed the states had taken a backseat in the fight against drugs once the federal government entered the fray. After Congress passed the Harrison Act, he lamented, "State officers immediately became imbued with the erroneous impression that the problem of preventing abuse of narcotic drugs was one exclusively cognizable by the National Government."[80] Anslinger advocated for robust anti-narcotics laws and enforcement from every level of government, so he viewed state forbearance as detrimental to national narcotics control.

More than concern over their authority to police possession or a belief that the federal government would do so for them, though, likely animated lawmaker inaction. The General Assembly, as well as the Georgia public, may have been satisfied with the results of municipal and state efforts to decrease cocaine use and sales within the state. In Atlanta, where concern with cocaine rang the loudest, the City Council's ordinance and the General Assembly's narcotic law allowed police to arrest any druggist or physician who helped users or addicts secure cocaine; permitted the detainment of any peddler not licensed as a physician or druggist; and gave the police discretion to raid any suspected "cocaine joint" and arrest those keeping and patronizing such places. The two laws, in other words, gave the police leave to arrest all of the participants in the cocaine traffic whose actions, absent the new restrictions, would not have run afoul of any legal strictures. Against the casual users and addicts, police remained free to, and did, use the laundry list of other laws upon which they had relied from the start of public

[80] Harry J. Anslinger, "The Reason for Uniform State Narcotic Legislation," *Georgetown Law Journal* 21 (1932-1933): 52-61, 53.

attention to the drug.[81] And it was, after all, their use of these statutes against users that often led police to the physicians and druggists they charged with violating the General Assembly's anti-narcotic statutes. By the time South Carolina's legislature added possession to its control law, in other words, Georgia's police and lawmakers may already have been satisfied with the flexible patchwork of local and state laws they had developed through a decade of public discussion, lawmaker action, and police improvisation.

Finally, by the second decade of the twentieth century, many Georgians may have come to believe that other laws already accomplished much of what an expanded narcotics law might have promised. In 1917, after all, when the state legislature added a possession clause to its prohibition statute, the number of Jim Crow statutes in effect in the state and its localities had multiplied precipitously.[82] Purporting to separate the races and mark the inferiority of African Americans to whites, these laws may have blunted whatever symbolic value cocaine restriction might once have offered. Moreover, to the extent that early calls for cocaine proscription had as their goal a reduction in black crime, white Georgians may have believed their statewide prohibition law had already achieved whatever reduction in crime lawmaker action might make possible.

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[81] For only a handful of press accounts of the Atlanta Police Department using vagrancy and disturbing the peace ordinances against cocaine users, see *Atlanta Constitution*, October 16, 1911; August 23, 1912; November 1, 1912; October 27, 1913; and December 27, 1914.
[82] Dittmer, *Black Georgia in the Progressive Era*, 21.

<u>CHAPTER 3</u>

"NOT FAR FROM BEING AN 'OPIUM EATING' COUNTRY:" THE LEGAL AND POLITICAL DEBATE OVER FEDERAL DRUG CONTROL LAW

" I realize that the purpose of this bill is to do that which perhaps the States have not already done; I realize that Congress is reaching out for power it was never dreamed Congress should exercise; . . . I realize fully that the necessity for the legislation is pressing perhaps upon the hearts and consciences of many people; I realize fully the other horn of the dilemma, that when these conditions prevail the Constitution never has within the last 50 years and never will stand in the way."[1]

In the first years Congress contemplated criminalizing narcotics, incredulity met the suggestion that the national legislature should, or had the authority to, do so. After enacting in 1909 a law that prohibited the importation of smoking opium, Congress began debate on three additional measures in the closing months of 1910. Referred to the powerful House Committee on Ways and Means, the bills sought to expand the earlier law's coverage and include cocaine in some of its provisions. They also required dealers in opium, cocaine, and their derivatives to register with the federal government, pay a tax on their wares, and affix a stamp demonstrating payment onto the drugs' packaging. The bills made receipt of unstamped packages a crime, punishable by a fine of up to $5,000, a prison sentence of up to five years, or both.[2]

In hearings before Ways and Means, the laws' targeting of the purchase and private possession of opium alarmed Champ Clark—a Democrat from Missouri who would soon become Speaker of the House—who challenged the bills' reach. He pointedly asked Sereno Payne, the long-time New York Congressman and House Majority Leader: "You are not going to

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[1] Representative Thomas Sisson, on the Harrison Narcotic Tax Act, at 1913 Cong. Rec. – House 2203 (1913).
[2] 61 H.R. 25240; 61 H.R. 25241; 61 H.R. 25242. None of the bills became law.

try to make it a crime for a fellow to buy opium, are you?" When he came to understand that the bills proposed to do precisely that, he likened private transactions in narcotics to the private purchase of alcohol and directed another question to Payne: "Suppose a man came along with moonshine [whiskey] and you wanted a drink and you bought a drink from him. You would not be guilty of any wrong in that, would you?" Clark could not square what the bills undertook to accomplish with his sense of what the law ought to do. Correctly perceiving that the bills punished the possession of unstamped narcotics, the first federal law that would do so, Clark saw them as conflicting with long-held notions of the freedoms Americans enjoyed from government intervention. He interjected: "You can not punish a man for doing a thing in his own home."[3]

As Clark's questions suggest, Congress's determination to erect a narcotics control apparatus required that Americans—policymakers, jurists, and the public—reconceptualize their view of the central state's relationship with the people who lived within its borders. Federal action in this arena meant adapting to novel exercises of power that would shift, perhaps irrevocably, whether and when Congress had the authority to dictate what Americans might do in private. As Clark's queries demonstrate, lawmakers, too, saw in anti-drug legislation a new claim to power by the federal government, and some viewed the expansion with suspicion.

Their doubts reflected policymakers' consideration of the issue over the previous four decades. As the nineteenth century closed, it remained far from clear that the federal government would enter the anti-narcotics fray in any substantial way. Congress's concern with narcotics appeared to begin and end with smoking opium, which it viewed as chiefly a problem in China

[3] "Importation and Use of Opium," Hearings before the Committee on Ways and Means of the House of Representatives (Washington: Government Printing Office, 1910), 8. That Missouri did not add opium or its derivatives to its narcotic control law until 1915 may help reconcile Clark's confusion and the fact that many states and municipalities had already criminalized the private purchase and possession of opium. United States Public Health Service, *State Laws and Regulations Pertaining to Public Health* (Washington: Government Printing Office, 1916), 329-30.

and among Chinese subjects. Even as some policymakers raised an alarm about domestic use, Congress appeared content to let the states lead the charge against opium and other narcotics. It acted only on drug matters that occurred beyond the borders of the U.S., where it was secure in its power. When negotiating treaties with foreign powers, for instance, or in setting tariff rates at the insistence of congressmen from the Pacific Coast, Congress exercised its vast authority over foreign relations and imports to make smoking opium costlier and more difficult to obtain. Its earliest moves to address narcotics reflected Congress's initial estimation of the opium problem's scope and its then-limited conception of its powers.

From these humble beginnings, the federal government took more elaborate action to regulate traffic in, and possession of, narcotics between 1909 and 1919. In doing so, proponents of anti-narcotic legislation acted on a shared belief in statist responses to social ills. Three shifts in policymakers' views of narcotics and the central state propelled their determination to act. First, they came to perceive narcotics use as a domestic problem widespread enough to warrant federal legislation. Second, they began to see utility in action—hoping it would allow the U.S., among other things, to stake a claim to moral leadership, to police substances and populations that weakened the national body, and to tighten control over underworld figures who could evade prosecution by crossing state lines. Third, they believed that, in their power over taxation, they had found a means of legislating control while still abiding constitutional limitations on their power.

This chapter traces the federal government's growing interest in narcotics. It highlights the problem Congress came to see in opiates and cocaine, and it outlines the contests over government power involved in Congress's move to police drugs. The contours of federal authority stood as a subject of concern for turn-of-the-century lawmakers, many of whom

perceived the central government as expanding rapidly. Whether a more powerful state emerged in the U.S. during this period has proven a topic of scholarly interest, too. Some historians see the nineteenth-century American state as broad and its regulations vast.[4] Others argue that a qualitatively different national state emerged in the twentieth century, assuming responsibilities and growing to a size that would have made it unrecognizable to nineteenth-century Americans.[5] This chapter provides evidence to support the latter argument. Through its construction of a narcotics control apparatus, the federal government did claim new authority and grow. Looking at Congress's action in one policy area provides an opportunity to consider both the complex of concerns that led the federal government to act as well as the cacophony of voices raised against the central state's growth. This chapter indicates that a more powerful central state did indeed emerge, but it suggests state building occurred piecemeal, in fits and starts. Congress's interest in anti-narcotics law proved constitutive of that expanded state even as the debates that accompanied it demonstrated the tenuousness of its claim to power.

Though more submerged in federal debate over drugs than it had proven in statehouse deliberations, race played important and multiple roles in the government's increased attention to narcotics law. Initially, federal policymakers limited their consideration of narcotics to smoking opium, which they viewed as a Chinese problem. The residue of this early judgment remained long after it became clear that drugs represented a broader concern, appearing again as Congress

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[4] See, for examples, William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113, no. 3 (June 2008): 752-72; Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009). Importantly, some scholars who view the nineteenth-century state as broad, including Novak, focus their attention on state and local—rather than federal—action.

[5] In this camp are, for instance, Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982); Morton Keller, *Regulation a New Society: Public Policy and Social Change in America, 1900-1933* (Cambridge: Harvard University Press, 1994); Kimberley S. Johnson, *Governing the American State: Congress and the New Federalism, 1877-1929* (Princeton: Princeton University Press, 2007); Gary Gerstle, "A State Both Weak and Strong," *American Historical Review* 115, no. 3 (June 2010): 779-85; and Peter Zavodnyik, *The Rise of the Federal Colossus: The Growth of Federal Power from Lincoln to F.D.R.* (Santa Barbara: Praeger, 2011).

expanded its response. Notably, as they tried to reconcile the decline in Chinese immigration with what they acknowledged as an increase in opium imports and use, policymakers offered competing narratives to solve the puzzle, all of which blamed Chinese immigrant communities. Race also emerged in drug debates when Congress considered adding to the list of proscribed substances and increasing its controls, with policymakers sounding notes of immigrant contagion and black criminality—as well as degeneracy among poor whites—to consolidate support for their moves. In short, while federal lawmakers used race more nimbly and less consistently than did their peers in statehouses, they depended no less on racial animus in overcoming opposition to their assumption of new powers.

And Congress's exercise of new authority over narcotics did indeed engender debate, despite the racialized purposes for which the national legislature acted. Forceful disagreement emerged especially when congressional action came up against Americans' long-held views of the inviolability of personal freedoms. Like Representative Clark, policymakers who opposed federal action in this area decried what they saw as a tendency to answer troubling social phenomena with federal legislation, much of which they viewed as beyond Congress's authority. In the Supreme Court, Clark and his supporters found a powerful ally.

The Court's opposition emanated from its conservative justices, long notorious for their elevation of economic liberties over the public's welfare. Several generations of historians developed what Owen Fiss has called an "instrumental hypothesis" of these justices' jurisprudence.[6] According to that hypothesis, these justices decided cases and developed legal

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[6] Owen M. Fiss, *The Troubled Beginnings of the Modern State* (New York: Cambridge University Press, 1993), 12-17. While I use Fiss's formulation to describe scholars' treatment of the jurisprudence of the entire *Lochner* era, Fiss focuses on the Fuller Court's jurisprudence. I use the term "*Lochner*-era" to refer to the period before and after the turn of the twentieth century, from the 1890s until 1937, a periodization suggested by many, including David Bernstein. David E. Bernstein, "*Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism," *Georgetown Law Journal* 92, no. 1 (2003): 1-60, at 7.

doctrines to invalidate protective social legislation and serve the interests of capital.[7] Beginning in the 1980s, a group of revisionist scholars started taking this tale to task, arguing that the judges' positions were continuous with earlier intellectual commitments. Prominent among them were a belief that government efforts to intrude on the "laws" of economics were doomed to fail and a "concept of human liberty" that held as illegitimate any exercise of government power that benefitted "one person or group at the expense of others."[8] Far from the servants of capital and the unswerving devotees of liberty of contract, these revisionists argue, *Lochner*-era laissez-faire adherents endeavored to uphold and protect freedom as they understood it.

Debates over Congress's drug law provide a window to explore what drove these laissez-faire devotees' jurisprudence, and they bring into relief the contests that followed Congress's claim to power over drug trafficking and use. These legal disputes make clear that, for at least a decade, Congress's narcotics control regime had only tenuous support in the Court. Conservative justices, despite the negative views they shared of both narcotics and the racial minorities they assumed to be the most regular users of those substances, repeatedly lambasted portions or all of drug control law as beyond the scope of federal power. Taken together, the Court's decisions and dissents from the period demonstrate the strength of resistance to Congress's assumption of these powers. They also suggest that, in the debate as to whether the *Lochner*-era conservatives sought

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[7] See Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon American Constitutional Law* (Berkeley: University of California Press, 1954); and Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca: Cornell University Press,1960). For recent versions, see Frank R. Strong, S*ubstantive Due Process of Law: a Dichotomy of Sense and Nonsense* (Durham: Carolina Academic Press, 1986); and James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (New York: Penguin Press, 2009).
[8] Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3, no. 2 (Autumn 1985): 293-331, 298. See also William E. Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review* (1985): 767-817; Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993); Cass R. Sunstein, "Lochner's Legacy;" *Columbia Law Review* 87, no. 5 (1987): 873–919. A group of legal scholars has also detailed holes in the classic story. See Michael J. Phillips, *The* Lochner *Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Westport, Conn.: Praeger, 2001); and David E. Bernstein, *Rehabilitating* Lochner*: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011).

to support capital or to preserve traditional notions of American liberty, the revisionists may have the better argument. In this instance, concern over federal erosion of long-held freedoms, and not the interests of industrialists, instigated much of the conservatives' opposition.

Congress's passage of the Harrison Tax Act, in 1914, was a watershed moment for anti-narcotics law. Federal narcotics control would over time change the relationship of the U.S. state to its citizens and residents, and not only for the traffickers and users now subject to fines and prison sentences for running afoul of the law. Congress would soon build an enforcement apparatus that would make Americans susceptible to much greater oversight from the federal government. Yet little changed overnight. Indeed, lawmakers and jurists continued to argue strenuously that Congress was unauthorized to act in this arena. America's penal state thus grew slowly, unevenly, and with unexpected results.

I. Addressing Opium through Uncontroversial Exercises of Federal Power

Federal interest in narcotics began with policymakers' eyes turned toward China and focused on smoking opium.[9] The first federal officials to turn their attention to the drug, nearly half a century before Congress would debate comprehensive narcotic laws, described it as a Chinese problem that affected the U.S. only indirectly. As early as 1870, for instance, State Department officials contended that opium addiction rendered China a less profitable trading partner than would otherwise have been true. C.W. Le Gendre, a diplomat stationed in Amoy, catalogued the commerce occurring in many of the Empire's major cities. In Ningbo, for instance, he claimed that "nearly one-half of all that is paid for foreign products" went to

[9] Though evidence was mounting of a growing rate of opiate addiction among Civil War veterans and middle-class women at the time, federal policymakers focused their attention outward. See David Courtwright, *Dark Paradise: A History of Opiate Addiction in America* (Cambridge: Harvard University Press, 1982), 54-5; and William Butler Eldridge, *Narcotics and the Law: A Critique of the American Experiment in Narcotic Drug Control* (Chicago: University of Chicago Press, 1967), 4-5.

purchase opium. While he explained that the drug inflicted on its Chinese consumers "an amount of evil a hundredfold greater than the loss of the three millions of dollars with it annually costs them," his focus remained elsewhere. More important for U.S. interests, he claimed, opium smoking had "deleterious influence" on foreign trade: It led to poverty, which made for "bad customers." Another report echoed this concern, noting that the resources the Chinese expended to import and process opium represented commerce in which the U.S. could "have no share."[10]

While its subjects' drug use left China a less fit trading partner, diplomats also saw in it evidence of both a weak nation and an ineffective government. State Department officials opined that opium had weakened the "substance" of the Chinese people, producing "a vast deal" of "suffering, misery, and vice." By 1879, they noted, China imported more opium than it exported tea. Given this expansion, the Chinese government determined to act and issued edicts to prohibit opium use.[11] Diplomats in the area, though, reported that government control laws had only resulted in the growth of large smuggling operations. And, when officials in Szechuan tried a different approach, prohibiting cultivation of the poppy, imports of opium from British India surged. To the emissaries of the U.S. federal government, in short, Chinese authorities appeared "helpless" to fight the "wide-spread demand for this destructive drug."[12] They saw opium as cause and consequence of Chinese national and governmental weakness.

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[10] Department of State, *A Report on the Commercial Relations of the United States and Foreign Nations, for the Year Ending September 30, 1869* (Washington: Government Printing Office, 1870), 74-6; Department of State, *A Report on the Commercial Relations of the United States and Foreign Nations, for the Year Ending September 30, 1879* (Washington: Government Printing Office, 1880), 82-3; *New York Times*, July 14, 1866.

[11] The Chinese Imperial government first prohibited opium use by edict in 1729; Qing dynasty efforts to enforce the prohibition and suppress the traffic in opium led to the First and Second Opium Wars, from 1839-1842 and 1856-1858, respectively. The latter conflict resulted in the legalization of the trade, to the ire of Chinese Imperial officials. See David T. Courtwright, *Forces of Habit: Drugs and the Making of the Modern World* (Cambridge: Harvard University Press, 2001), 32-5; Richard Ashley, *Heroin: The Myths and the Facts* (New York: St. Martin's Press, 1972), 3-5; and Kathleen L. Lodwick, *Crusaders Against Opium: Protestant Missionaries in China, 1874-1917* (Lexington: University Press of Kentucky, 1996), 1-5.

[12] Department of State, *A Report on the Commercial Relations of the United States and Foreign Nations, for the Year Ending September 30, 1870* (Washington: Government Printing Office, 1871), 72; *Papers Relating to the Foreign Relations of the United States Transmitted to Congress with the Annual Message of the President*

In searching for the source of China's opium problem, State Department officials articulated a critique of British imperialism founded on its role in the opium traffic. Such critiques also buttressed a view of U.S. interests in the Orient as both exceptional and benign. One report summarized the "enormous revenue" earned in British India from the traffic in opium, positing that Chinese authorities found themselves unable to "contend against the pressure of foreign and commercial interests." Another identified Britain as the source of these interests: "It is a sad commentary upon the boasted civilization of England," it claimed, "that her merchantmen are daily enriching themselves by the misfortune of a people too weak to resent an insult and too depraved to abstain from vice."[13] The press, too, criticized Britain for its role in the opium traffic.[14] Importantly, in describing Britain as a malevolent commercial power, this diplomatic and press coverage distinguished U.S. interests in China and suggested the U.S. played a more benevolent role in the region.

Though opium's effect on U.S. interests remained indirect, policymakers used drug control measures to alter the country's relationship with China. And, convinced China had an opium problem it could not solve, federal officials cast its efforts as assistance to China, even as they moved to reduce the flow of Chinese immigrants into the U.S. The first of the central state's acts to limit opium emerged as a result of treaty negotiations with China. In 1880, after several decades of anti-immigrant activism on the Pacific Coast, President Hayes appointed James

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(Washington: Government Printing Office, 1871), 83-4; Department of State, *A Report on the Commercial Relations of the United States and Foreign Nations, for the Year Ending September 30, 1871* (Washington: Government Printing Office, 1872), 74-6; Department of State, *A Report on the Commercial Relations of the United States and Foreign Nations, for the Year Ending September 30, 1879* (Washington: Government Printing Office, 1880), 82-3.

[13] Department of State, *A Report on the Commercial Relations of the United States and Foreign Nations, for the Year Ending September 30, 1870* (Washington: Government Printing Office, 1871), 72; Department of State, *A Report on the Commercial Relations of the United States and Foreign Nations, for the Year Ending September 30, 1879* (Washington: Government Printing Office, 1880), 82-3, 721.

[14] Describing Chinese efforts to end opium use in the Empire, the *New York Times* claimed British revenues from the trade rendered it impervious to concerns of "humanity or right." Similarly, the *Chicago Tribune* concluded that, to satisfy its desire for revenue, "Great Britain is responsible for the prevalence of the opium plague among the 670,000,000 people in Asia." *New York Times,* September 15, 1881; *Chicago Daily Tribune*, March 26, 1892.

Angell, then the president of the University of Michigan, U.S. Minister to China.[15] Angell and two special commissioners set sail for China in June with orders to open treaty discussions. Federal officials hoped to set aside the Burlingame Treaty's guarantee of free immigration between the two countries. Angell negotiated two treaties, the first of which allowed the U.S. to limit, but not prohibit, Chinese immigration.[16] The second prohibited U.S. citizens from participating in the opium trade in China and forbade Chinese subjects from doing the same in the United States. According to Angell, Chinese officials requested the provision: The restriction on opium traffic, he claimed, answered "the anxiety of the Chinese government to suppress this iniquitous traffic." Angell also claimed it was the U.S. government's "well-known sentiments" concerning the opium trade that inspired the Chinese government's appeal.[17] Congress, then, learned early that a tough stance on the opium trade could yield important concessions—in this case, China's agreement to revise the Burlingame Treaty.

With Britain ensconced in the public imagination as an opium profiteer, Angell's treaty also allowed the U.S. to stake a claim to leadership in the fight against the opium traffic.[18] In tandem with the immigration-related treaty the two countries executed the same day, it also allowed Congress to stem the flow of Chinese immigrants and gave customs officials the green light to police cargo bound for Imperial subjects in the United States. At the inception of the

[15] In sending this delegation, President Hayes bowed to pressure following his veto of the "Fifteen Passenger law." That law would have capped the number of immigrants permitted to land to 15 passengers per ship. See Andrew Gyory, *Closing the Gate: Race, Politics, and the Chinese Exclusion Act* (Chapel Hill: University of North Carolina Press, 1998): 136-68; Diana L. Ahmad, *The Opium Debate and Chinese Exclusion Laws in the Nineteenth-century American West* (Reno: University of Nevada Press, 2007), 72.

[16] In setting aside the Burlingame Treaty's guarantee of free movement, the Angell Treaty set the stage for Congress's enactment of the Chinese Exclusion Act of 1882. See Gyory, *Closing the Gate*, 218-19; David FitzGerald and David Cook-Martin, *Culling the Masses: the Democratic Origins of Racist Immigration Policy in the Americas* (Cambridge: Harvard University Press, 2014), 94-5.

[17] *Washington Post*, March 25, 1880; January 14, 1881; *New York Times*, June 28, 1880; *Message from the President of the United States, Transmitting Two Treaties Signed at Peking on the 17th of November, 1880* (Washington: Government Printing Office, 1880).

[18] For an argument that moral reformers successfully called for an absolute prohibition on commerce in opium in the Philippines as a means to demonstrate "moral and political leadership" in Asia, see Ian Tyrrell, *Reforming the World: The Creation of America's Moral Empire* (Princeton: Princeton University Press, 2010), 146-59.

central state's efforts to establish a federal drug policy, in other words, anti-Chinese agitation drove decision-making. Lamentations about opium's harms to white American citizens played a minor role, if any, in Angell's negotiations or in Congress's consideration of the treaty. And as the Senate's approval of Angell's commercial treaty demonstrated, Congress felt confident in this exercise of its power over treaties and foreign commerce.[19]

Congress had good reason to be confident in its exercise of authority abroad. In the same years that the federal government was developing its initial response to opium in China, the Supreme Court passed a series of cases that affirmed the federal government's plenary power over foreign affairs. Its relative freedom over wars, treaties, tariffs, and immigration stood in direct contrast to its authority over domestic affairs, where it had no plenary or general police power. The disparity between federal power abroad and at home explains both why Congress felt free to target opium and the Chinese subjects thought to consume it most habitually, on the one hand, as well as why it initially refrained from enacting a domestic control law.[20]

Lawmakers would soon attempt to use their plenary power over foreign affairs, though, to control domestic opium use. At the same time the central state revisited its treaty obligations with China, some lawmakers began to advocate for the government to use its tariff power to

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[19] The Senate confirmed both treaties on May 5, 1881, after a few hours of floor debate during which both of California's senators made speeches in favor of confirmation and against continued Chinese immigration. *Washington Post*, May 6, 1881; *New York Times*, May 3, 1881; May 6, 1881. Four years later, the Senate passed legislation designed to put the commercial treaty's provisions into effect. While the Senate passed the bill with little debate, the House had yet to consider the bill as late as 1886. 1884 Cong. Rec. – Senate 4742; *Presidential Message on Legislation Touching Treaty with China, May 21, 1886*, S. Rep. No. 49-148 (1886). For a detailed discussion of Angell's mission to China and its domestic aftermath, see Gyory, *Closing the Gate,* 212-41.

[20] For a helpful study of the plenary powers the Court imputed to the federal government during the late nineteenth century, relying on what it called the inherent powers of national sovereignty, see Sarah H. Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs," *Texas Law Review* 81 (November 2002): 1-284. For just one example of the plenary power at work, federal courts had long recognized Congress's authority to use its power over commerce with foreign nations to exclude certain merchandise altogether. See, for but one example, *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904) ("[I]t is not to be doubted from that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, bud indirectly, as a necessary result of provisions contained in tariff legislation.").

discourage opium use at home. Like the state legislators advocating anti-opium statutes, these Congressmen referenced the "evil" influence of Chinese immigrants and warned that domestic use was on the rise. In January 1883, for example, California's Senator John F. Miller, a staunch supporter of Chinese exclusion, proposed a tariff that would have curtailed importation of opium in strengths used for refining smoking opium. Miller claimed that opium smoking was a habit "destructive not only of the physical but mental powers of man." And he was not alone. In the same discussion, another senator claimed to regard the drug "as the most absolute curse in this country."[21] Seven years later, Congress would again amend its tariff schedule, making it prohibitively expensive to import or manufacture smoking opium in any licit form.[22]

As the new century dawned and state after state enacted narcotics legislation, Congress passed no new drug control laws.[23] Tariff measures and treaties remained the only federal inroads into policing narcotics commerce or use. So long as they viewed narcotics chiefly through the lens of smoking opium, federal policymakers saw it as a foreign Chinese problem and demonstrated little interest in pushing the bounds of federal power to act. Though Congress saw utility in acting to limit the opium trade, it achieved those ends through exercises of its well-accepted powers. By the century's end, though, a growing number of policymakers had come to believe that smoking opium use had spread domestically. Others began to suggest that the lack of

[21] 1883 Cong. Rec. – Senate 1239-40, 2363.
[22] In 1890, Congress raised the duties on smoking opium and on certain strengths of crude opium, making it infeasible to import the latter and refine it into smoking opium. Treasury Department, *United States Internal Revenue Regulations Concerning the Tax on Opium Manufactured in the United States for Smoking Purposes* (Washington: Government Printing Office, 1890); Treasury Department Circular — "Stamping of Imported Prepared Smoking Opium" (Oct. 29, 1890); 1890 Cong. Rec. — Senate 7959-60.
[23] By the beginning of 1909, only seven states and one territorial government had yet to pass a statute that prohibited commerce in or use of drugs under some circumstances. Treasury Department, United States Public Health Service, "Digest of Laws and Regulation in Force in the United States Relating to the Possession, Use, Sale, and Manufacture of Poisons and Habit-forming Drugs," *Public Health Bulletin* 56 (Washington, Government Printing Office, 1912).

federal control was to blame for what they now saw as a growing problem. Together, these shifts portended the coming of a greater federal interest in the subject.

II. International Developments, Domestic Study, and Early Constitutional Concerns

Developments outside the continental U.S. proved the catalyst of increased federal attention to narcotics control. During the first decade of the new century, American management of the Philippines alerted policymakers to the question of whether and how to regulate opium in the new colony. That, coupled with the Chinese Empire's 1906 edict prohibiting opium use and a unanimous resolution in the British House of Commons against the opium traffic, injected the question of narcotics control into domestic politics and international affairs as never before. Seeing in the global narcotics fight an opportunity to protect American interests in the Far East and maintain moral leadership in the fight against trafficking—to "help[] out China, as well as ourselves"—Secretary of State Elihu Root called for an international conference on opium.[24]

Representatives of 13 countries met in Shanghai in February 1909 for the first International Opium Commission. The attendees elected Bishop Charles Brent, Episcopal Bishop of the Philippines and head of the U.S. delegation, as President of the Commission. Earlier in the decade, Brent had served on a special committee on opium use in the Philippines. As part of the work of that committee, he had traveled throughout East Asia to assess opium use in the region and to look into governmental measures to address the drug. In opening the Commission's first session, he identified the "opium question" as an "extremely difficult one" and called on the

[24] *New York Times*, July 8, 1906; September 22, 1906; November 23, 1906; December 30, 1906; *Washington Post*, August 11, 1908; Hamilton Wright to Dr. George H. Simmons, July 30, 1908, Records of the U.S. Delegations to the International Opium Commission and Conferences, Records of Delegate Hamilton Wright, Record Group 43.2.9, National Archives, College Park, Maryland [hereinafter Wright Papers].

delegates to "recognize the fact and openly to admit it."[25] As Brent's admonition suggested, the Commission had its work cut out for it in forging an international consensus that opium use represented a problem in need of a solution.

Over the year prior to its departure for Shanghai, the U.S. delegation faced a similar challenge in convincing federal policymakers that domestic opium consumption had grown so widespread—and had such injurious consequences—as to require a governmental response. In planning the Commission, the participating governments resolved that each should study domestic opium use, their findings to serve as a basis of discussion in Shanghai. Secretary Root saw this investigation as particularly valuable to the U.S., for he claimed that insufficient attention had been given to domestic opium use. "An incidental advantage of the investigation," he suggested to President Roosevelt, "may be to point out the necessity, and the best method, of restricting the use of opium in the United States."[26] Preparation for the International Opium Commission proved the inspiration for a thorough study of domestic opium consumption.

Brent's fellow delegate, Dr. Hamilton Wright, spearheaded the effort. Wright, born in Cleveland in 1867, earned his medical degree at McGill. After graduation, he spent two years at the Royal Victoria Hospital in Montreal and then worked in a number of positions around the globe, including in the United Kingdom and Germany. He also spent several years in Southeast Asia, where he organized a laboratory system and investigated malaria and Beriberi—both then

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[25] *New York Times*, August 9, 1903; September 22, 1904; *Washington Post*, August 9, 1903; February 5, 1905; *Report of the International Opium Commission—Volume I—Report of the Proceedings*, Records of the U.S. Delegations to the International Opium Commission and Conferences, Shanghai, the Hague, and Supporting Documents, Record Group 43.2.9, National Archives, College Park, Maryland. It may have been a communiqué from Brent that motivated the U.S. State Department to propose the Commission. *Chicago Tribune*, March 11, 1907. Hamilton Wright claimed it was during the commission's work in the Philippines that "it became apparent that quite apart from the question as it affects the Philippine Islands, a serious opium evil obtained in the United States itself." Hamilton Wright, "Report on the International Opium Commission and on the Opium Problem as Seen within the United States and its Possessions," in S. Rep. No. 61-377, at 73 (1909).

[26] *Report of the International Opium Commission—Volume I—Report of the Proceedings*, Records of the U.S. Delegations to the International Opium Commission and Conferences, Shanghai, the Hague, and Supporting Documents, Record Group 43.2.9, National Archives, College Park, Maryland; "International Investigation of Opium Evil," H. Rep. 60-926 (1908).

"ravaging" the Malay Peninsula.[27] His marriage to Elizabeth Washburn, the daughter of a former U.S. senator and member of a well-connected political family, appears to have fed his ambition for an important government post, which he believed he had found when he joined the delegation. Following his service in Shanghai, Wright would prove a fixture in international opium work until his early death in 1917.[28]

After his appointment, Wright took charge of investigating domestic opium use. He began by sending letters to officials within each state. Wright claimed to have canvassed, among others: "the Police Departments; the City and State Boards of Health; the State Boards of Pharmacy; the State Agricultural Departments; the Universities, State and privately owned;" and "the Wardens of State Prisons." Wright asked law enforcement officials and state agencies how widely people in the state used opium and whether its use had increased in recent years. He asked university presidents and prison wardens about use among students and prisoners, respectively. And he queried agriculture departments about poppy cultivation.[29] He augmented these missives with information-gathering trips to New York, Boston, Baltimore, Atlantic City, Philadelphia, and Portland. In each he spoke with police and boards of health. He also met with Chinese merchants and pharmaceutical representatives.[30] And he sent letters to Customs Service offices, seeking information on opium seizures; to military officials, asking about opium use among enlisted men; and to the Post Office Department, inquiring about opium and the mails.

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[27] Hamilton Wright Curriculum Vitae, Wright Papers.

[28] Thereafter his widow would continue his efforts. Beyond her public advocacy for drug control laws, she represented the U.S. in at least one international conference in Geneva. *Washington Post*, January 11, 1917; *New York Times*, June 11, 1923.

[29] Hamilton Wright to Philander Chase Knox, November 5, 1909, Wright Papers; Hamilton Wright to Rev, Charles H. Brent, August 22, 1908, Wright Papers; Hamilton Wright to the State Board of Health, July 15, 1908, Wright Papers; Hamilton Wright to the President of the State University of North Dakota, July 29, 1908, Wright Papers; F. O. Hellstrom to Commission of the U.S.A. International Opium Commission of Shanghai, August 27, 1908, Wright Papers.

[30] He intended to carry on similar investigations in the West, Midwest, and South, but a lack of time and money prevented him from doing so. Hamilton Wright to The Honorable Elihu Root, August 14, 1908, Wright Papers; "Synopsis of Correspondence Relative to the Opium Question," Wright Papers; *New York Times*, Aug. 1, 1908; *Washington Post*, Aug. 11, 1908; Oct. 3, 1908.

His was an exercise in systematic information gathering, resulting in what he termed a “mass of material.”[31]

Wright summarized his findings in September 1908 letters to President Roosevelt, U.S. Senator Joseph Foraker, and Representative Edwin Denby, son of former U.S. Minister to China Charles Denby. He warned that the U.S. was “not far from being an ‘opium eating’ country,” and he detailed a vast increase in smoking opium and crude opium importation into the U.S., both far outpacing population growth. While smoking opium had long been described as a Chinese practice, neither an increase in Chinese immigration nor greater demand among Chinese-descended residents explained this surge in opium imports, Wright claimed. Instead, he attributed the increase to the fact that “the pernicious habit” had spread from the Chinese “to our own American population.” Wright claimed that African Americans had become especially frequent users of the drug. He continued: “Amongst the whites it is, of course, largely confined to the criminal and other abnormal classes.”[32] With the U.S. poised to claim center stage in the global fight against opium, Wright’s study confirmed the imperative of doing so: Opium, it showed, had become a serious domestic problem. His investigation helped make legislation appear both necessary and politically palatable.[33]

Wright suggested that Congress ban the importation of smoking opium and prohibit its domestic manufacture, as there existed no “legitimate” use of the substance in the U.S.[34] When

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[31] Hamilton Wright to Fred C. Harper, August 24, 1908, Wright Papers; Hamilton Wright to Henry McCall, August 24, 1908; J.C. Wheeler to Hamilton Wright, August 21, 1908, Wright Papers; J.E. Pillsbury to Hamilton Wright, July 9, 1908, Wright Papers; R.M. Webster to Hamilton Wright, July 6, 1908, Wright Papers. F.C. Harper to Hamilton Wright, September 3, 1908, Wright Papers; H.C. Stewart to Hamilton Wright, August 31, 1908, Wright Papers; Hamilton Wright to Rev, Charles H. Brent, August 22, 1908, Wright Papers.
[32] Hamilton Wright to President Theodore Roosevelt, September 2, 1908, Wright Papers; Hamilton Wright to Hon. J.B. Foraker, September 3, 1908, Wright Papers; Hamilton Wright to Hon. Edwin Denby, September 3, 1908, Wright Papers.
[33] “Opium Problem: Message from the President of the United States,” S. Rep. 61-377 (1910), 50-1.
[34] Hamilton Wright to President Theodore Roosevelt, September 2, 1908, Wright Papers; Hamilton Wright to Philander Chase Knox, Nov. 5, 1909, Wright Papers. Wright’s study turned on its head conventional wisdom

Congress moved to act on his recommendation, two concerns dominated. First, Congress debated the scope of federal power and the breadth of the opium law it could enact. Congressman Denby, one recipient of Wright's findings, introduced a bill in December 1908 that mirrored Wright's proposed legislation to prohibit the "importation, manufacture, sale, or gift" of crude opium or smoking opium except for medical purposes. The Supreme Court had ruled in 1895, though, that Congress could not use its power over interstate commerce to regulate manufacturing, because the Court described commerce as limited to the disposition, and not the production, of goods. Whether Congress could regulate domestic manufacture, therefore, proved a point of contention. Secretary of State Root, for one, claimed the bill beyond Congress's power and authored a substitute that omitted that provision.[35]

Other provisions in the bill raised different constitutional concerns. At least one member of the House believed the bill's burden-shifting clause went beyond Congress's power. That provision made possession of smoking opium sufficient evidence of guilt to convict, requiring the defendant to explain his or her possession rather than mandating that the prosecutor prove each element of the crime. One congressman claimed that the provision reversed "the well-recognized rule of criminal evidence . . . that a defendant is presumed to be innocent until his

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concerning the relationship between Chinese immigration and smoking opium. Wright claimed that the majority of Chinese immigrants arrived in the U.S. as non-smokers. Their better wages and the drug's availability encouraged them to join the ranks of opium smokers. Thus an increase in use among immigrants already in the U.S., plus the habit's "spread to a large part of our outlaw population and even into the higher ranks of society," helped Wright explain the increased importation of smoking opium during the period of Chinese immigration restriction. "Opium Problem: Message from the President of the United States," S. Rep. 61-377 (1910), 50-1.

[35] Representative Joseph Gaines of West Virginia, for example, voted against the bill on the ground that "to stamp out" the opium habit would take "plenary power," and "our federal government does not have it." Gaines proposed to work around Congress's lack of the police power by "imposing a prohibitive internal-revenue tax," which Congress would do in January 1914. 1908 Cong. Rec. – House 297; "To Prohibit the Importation of Opium for Other than Medicinal Purposes," H. Rep. No. 60-1878 (1909), 1-2; 1909 Cong. Rec. – House 1681-83; Pub. L. 63-47 (1914). For the Senate's debate of a similar bill, see 1909 Cong. Rec.—Senate 1396-1400. For the Supreme Court decision on manufacturing and Congress's power over interstate commerce, see *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

guilt is established by competent evidence." Other opponents of the bill ended this discussion by maintaining that courts had approved of such provisions in other contexts.[36]

Second, and despite Wright's focus on reversing the expanding use of smoking opium among non-Chinese persons, much discussion was had over the effect of the bills on Chinese opium consumption. In debate on the House floor, Congressman Payne suggested that Chinese immigrants and their children may have been targets of the bill. Explaining his reluctant support for the act, which he saw as only a partial response to the opium habit, he claimed that "Chinamen desire opium prepared for smoking in their own country." Banning its importation might discourage some use and would force Chinese subjects in the U.S. to turn to domestic smoking opium. Representative Joseph Gaines made a similar point, arguing that Chinese demand for opium smoking produced in China meant that even high tariffs had not "stimulated the manufacture of opium in this country." He argued that the absolute prohibition would lead Chinese-descended U.S. residents to turn to domestic producers. Even Wright highlighted an effect he imagined the bill would have on "Chinese habitués," working a hardship on them that "might cause the emigration of a large number of them, a result to be devoutly hoped for."[37] Despite Wright's argument concerning the users who drove the surge in opium imports, when Congress considered smoking opium in any fashion it did so with one group in mind.

Although Wright addressed a Congress that appeared by and large to endorse his findings, he succeeded in the short term only in securing passage of a bill prohibiting the

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[36] 1909 Cong. Rec. – House 1683. The Supreme Court upheld the provision in 1925, in *Yee Hem v. United States*, 268 U.S. 178 (1925).

[37] 1909 Cong. Rec. – House 1681-83; Hamilton Wright to President Theodore Roosevelt, September 2, 1908, Wright Papers. In later discussing the successes of the Act, Wright claimed that it had indeed had this effect. "Importation and Use of Opium," Hearings Before the Committee on Ways and Means of the House of Representatives (Washington: Government Printing Office, 1910), 509.

importation of smoking opium.[38] Wright's presence in Shanghai, along with Brent and Professor C. D. Tenney, proved the impetus for Congress to act. Once there, the delegation cabled the State Department and urged passage of the anti-opium bill. Wright later explained that, in the absence of Congress's action, he and the other two delegates would have attended a conference to end the opium traffic while it remained legal under federal law to import smoking opium into the U.S. "That was the reason," he claimed, "we had to press for the passage of the opium exclusion law—so as to 'save our face' (to use a Chinese expression) in Shanghai."[39] Congress debated broader restriction, fueled by a continuing and potent mix of anti-Chinese sentiment, diplomatic strategy, and anxiety over domestic use. Its members' concerns about the limits of federal power, though, kept Congress from pursuing Wright's proposed legislative agenda. To bolster the U.S.'s position as the leader in the global fight against the opium traffic, Congress did act; its new law, however, rested on its long-settled power over international commerce and only prohibited traffic in a substance that had long been subject to tariffs designed to make it prohibitively expensive. Though Wright helped to consolidate a budding federal interest in further restricting smoking opium, diplomatic prerogatives and policymaker hesitation left the U.S. with only a limited response to the opium habit.

III. The Harrison Act and Pitched Battles over Congressional Power

When Congress at long last appeared ready to expand its control legislation, continued doubt about the constitutionality and wisdom of federal control dogged policymakers' moves.

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[38] In 1909, Congress passed the Narcotic Drugs Import and Export Act, also sometimes called the "Opium Exclusion Act." Pub. L. 60-221 (Feb. 9, 1909).
[39] *Washington Post*, Jan. 26, 1909; "Importation and Use of Opium," Hearing before the Committee on Ways and Means of the House of Representatives, 61st Congress (Washington: Government Printing Office, 1911), 89.

Working with Wright, then preparing to depart for the Second International Opium Conference,[40] Representative Francis Harrison—a Manhattan Democrat and graduate of Yale and New York Law School—introduced three narcotics bills in 1913. Harrison's bills reflected Wright's proposed fix for the international and domestic traffic in smoking opium. One of the bills, among other things, taxed the domestic manufacture of smoking opium and authorized a registration and tax system for dealers in narcotic drugs, the latter in an effort to control the interstate commerce and traffic in opium, cocaine, and their derivatives. This bill, which after enactment was known as the Harrison Narcotics Tax Act, formed the basis of federal drug law for several decades.[41]

Harrison's bills policed an expanded list of substances and supplanted Congress's once-singular focus on smoking opium with broader restriction. Wright argued for adding cocaine to federal control laws, reporting that its use had exploded in the U.S. "An unforeseen and almost strictly American vice," he reported, "had sprung into existence during the last twenty years." He characterized cocaine as an incentive to crime and highlighted black southerners' purportedly wide use of the drug to demonstrate its nefarious effects. Including cocaine in federal control laws would go some distance, he suggested, toward checking the "terrors" of the "drug problem" that "confronts the American people to-day."[42]

Questions of congressional power, not debates over the dangers of narcotics, assumed a prominent role in the House's discussion of Harrison's bills. Mississippi's Representative

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[40] Hamilton Wright to President Woodrow Wilson, June 7, 1914, Wright Papers. Wright wrote to Wilson in 1914, summarizing what he viewed as mistreatment he had suffered at the hands of William Jennings Bryan. For an account of Wright's efforts in 1910 and 1911 (Congress's discussion of which begins this chapter) to pass additional legislation, including a bill introduced by Representative David Foster of Vermont, see Musto, *The American Disease*, 40-8. Musto blames Congress's failure to pass the Foster bill—which contained many of the same provisions of the Harrison Act—on the opposition of pharmaceutical interests.

[41] *New York Times*, November 22, 1957; 1913 Cong. Rec. – House 2191-2211. A separate bill, Harrison's H.R. 1966, amended the 1909 Narcotic Drugs Import and Export Act by, among other things, prohibiting the export of opium, cocaine, and their derivatives except under specific enumerated conditions.

[42] Narcotic Drugs Import and Export Act Amendment of 1914, Pub. L. 63-46 (Jan. 17, 1914); Harrison Narcotics Tax Act, Pub. L. 63-223 (Dec. 17, 1914); "Opium Problem," S. Rep. 61-377 (1910), 34, 48-9.

Thomas Sisson, then in his third of seven terms in Congress, took vocal exception to the bills on this ground. He chided Harrison and his bills' supporters for allowing their sympathy with the bills' motivations to blind them to the power grab then occurring: "Congress is reaching out for power," he claimed, "it was never dreamed" it should exercise. Making a point that would prove crucial in later challenges, Sisson insisted the bills' purpose was not to grow the federal coffers but to "regulate among the people the manner in which they may get opium." And whether one believed Congress had the authority to involve itself in such matters, Sisson concluded, depended on whether one gave the Constitution a broad or narrow construction.[43]

While Sisson's opposition demonstrates that some in Congress viewed narcotics control as beyond the reach of the national legislature, lawmakers also heard from constituents who wished for Congress to go further than Harrison's bills attempted. Defending his bill to tax domestic manufacturing of smoking opium, Harrison described how "a great many persons" had criticized it as an attempt "to legalize the manufacture of smoking opium for revenue purposes." To some, anything short of a prohibition on domestic manufacture amounted to a tacit approval of such production. Their call for action, Harrison explained, had little merit, as Congress's only means of prohibiting narcotics was through imposing a heavy tax on its manufacture.[44] Together, Harrison's and Sisson's arguments suggest a federal government in search of a legal means by which it might respond to a threat its leaders now agreed had gathered force.[45]

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[43] 1913 Cong. Rec. – House 2191-2211. I am not the first to suggest that Congress decided to write the Harrison Act as a tax measure to side-step concerns about its authority to prohibit narcotics under its power of interstate commerce. See Musto, *The American Disease*, 9-10; Bonnie and Whitebread, *The Forbidden Fruit*, 989-90. The point I wish to emphasize is that the decision to control narcotics through a revenue measure did not end the debate over whether the Harrison Act represented a federal police measure or whether Congress was encroaching on powers reserved to the states. That political and legal disagreement continued well after Congress enacted the law.
[44] "Opium Tax Act," H. Rep. No. 63-22 (1913). Importantly, Harrison's bill taxed domestically-manufactured smoking opium at $300 per pound, making it commercially infeasible to produce the substance in the U.S. On the Congress's power over interstate commerce and manufacturing, see footnote 35 and accompanying text.
[45] The Act's structure as a taxing measure offered some utility to House members arguing in its favor. When Representative Sisson attacked the Harrison Act on the potential expense of its administration, claiming that the

Though concern over Congress's power to criminalize narcotics explains the Act's design as a revenue measure, Harrison never described it as intended to grow the federal government's coffers. He instead claimed three motivations behind the Act. First, the bill would help stamp out traffic in and use of narcotics. Owing to the recent increase in drug use, he claimed, there was a "real" and "even desperate need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs." Second, Harrison described his bill as offering federal support for the states in their efforts against narcotics. In so doing, he acknowledged the now decades-old efforts by some state governments to control narcotics commerce and use within their borders. Third, he claimed commitments the U.S. made at the First International Opium Convention required Congress to pass his bill.[46] While Harrison and others made each of these points on the House floor, none claimed the bill's generation of federal revenue—a question that would emerge prominently in legal challenges to the Act—as a reason to support its passage.

The American public, too, viewed the Act as a prohibitory measure rather than a tax. Press reports claimed the law represented a federal campaign "to prevent the improper use of morphine, cocaine and other habit-forming drugs." In the Act, reports claimed, Congress "dealt the drug habit of the country what is believed will be its death blow." At least one account made clear that it was "improper use" of drugs, and not revenues, that motivated its passage: "While the Act will undoubtedly raise a small amount of revenue for the government its primary purpose is to prevent the improper use of habit-forming drugs." Congress acted to obstruct narcotics commerce and use, a purpose the public understood well.[47]

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amount of "espionage" in which the government engaged would determine its costs, Harrison defended his bill by pointing to its tax provisions. The fees paid by those required to register under the Act would, he contended, amount to more than the costs of administering it. Even if raising money remained a secondary or tertiary concern of Harrison and the Act's other supporters, its potential to pay for itself provided it political cover from one line of attack. 1913 Cong. Rec. – House 2203-04.

[46] "Registration of Producers and Importers of Opium, Etc.," H.R. Rep. No. 63-23, at 1-3 (1913).

[47] *New Orleans Times-Picayune*, Feb. 14, 1915; *Jackson Citizen Patriot*, Jan. 27, 1915.

Federal courts would debate the motivation behind the Act for more than a decade, but they turned their attention first to Section 8 of the law, which arguably gave the Treasury Department its most potent anti-narcotics weapon. That section made it unlawful "for any person not registered" as a dealer in narcotics to "have in his possession" any of the drugs named in the statute. In recognition of the medicinal uses of some drugs, Section 8 included an exception for the possession of narcotics prescribed in "good faith" by a registered physician. That exception aside, the section allowed for the arrest of private individuals for narcotics possession—in some jurists' estimation, a remarkable license for a tax measure to bestow.[48]

Whether the Act included such a license proved a subject of debate in the first weeks that federal officers enforced the statute.[49] Calexico, California, a dusty outpost of about 4,000 inhabitants more than 100 miles east of San Diego on California's border with Mexico, served as one site where Section 8's application caused a stir. In March 1915, an internal revenue agent arrested R. McGregor, known to local officials as a "dope fiend," after he received a package from a Chicago drug company containing several hundred opium tablets. McGregor claimed to have ordered the tablets so as to receive them prior to March 1, when the Harrison Act took effect. Whether Section 8 prohibited McGregor from having opium in his possession befuddled local agents. The Collector of Internal Revenue for the region read the Act as applicable only to dealers in narcotics, but he asked the federal prosecutor for the area whether "a person who purchases the narcotic for his own use" qualified as a dealer. If not, the Collector understood and the *Los Angeles Times* opined, the Act did not reach the private possession of opium, opening up a wide gap in its coverage.[50]

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[48] Harrison Narcotic Tax Act, Pub. L. 63-223 (1914).
[49] Ibid. The Harrison Act's provisions became effective as of March 1, 1915.
[50] *Los Angeles Times*, April 3, 1915; F. W. Roach, "Calexico," in *The History of Imperial County, California*, Finis. C. Farr, ed. (Berkeley: Elms and Franks, 1918): 269-70.

After deliberating for a week, the federal prosecutor averred that McGregor did not qualify as a "dealer." He read a broad hole in the new law, finding that it did not provide a means to prosecute persons "for merely having in their possession prohibited drugs, unless they are known to be dealers or dispensers." San Diego press reported that McGregor would go free. The *Times* called the opinion a "nick" in the law and predicted the confusion over McGregor's case would prove widespread, calling it an "inkling of the litigation that is promised on the Harrison narcotic act of Congress."[51] Whether Congress intended to make all such possession unlawful would remain a subject of disagreement in the Act's early years.

So, too, would questions of whether Congress had assumed police powers reserved to the states when it passed the Harrison Act. Lawsuits challenging the Act as a federal police action emerged quickly. An attorney for Hugh McCervey, a pharmacist's clerk, and Dr. W. F. Carroll, a physician, both of Macon, Georgia, for one example, argued that Congress had overstepped its bounds in passing the law. Prosecutors alleged Carroll had written bad prescriptions that McCervey had filled. Their attorney responded by arguing that the government had used revenue as a pretext to arrogate "to itself police power over the distribution" of drugs, a power vested exclusively in the states. While local press reported that the federal judge in Georgia would likely find the Act constitutional, it did not fare so well before Judge John Calvin Pollack, of the U.S. District Court in Kansas. He contended that the law "assert[ed] police powers" reserved for the states and therefore ran afoul of the Constitution. Skeptical it could stand as a revenue measure, Pollack spoke at length of its intrusion on the liberties that attached to American citizenship. He expressed bafflement as to "why a free people of the Anglo-Saxon race" would

[51] *San Diego Evening Tribune*, April 10, 1915; *Los Angeles Times*, April 3, 1915; April 10, 1915.

deliberately "enslave themselves to the state and to the government."[52] Separate and apart from the Act's attempt to criminalize possession, judges and attorneys across the country debated whether it amounted to congressional overreach.

The two issues—Congress's authority to pass the Act and the proper construction of Section 8—converged when the Act first came before the Supreme Court. In the same weeks McGregor remained behind bars in the San Diego County Jail, a similar drama unfolded more than 2,000 miles away in Pittsburgh, Pennsylvania. There, Dr. Jin Fuey Moy came under fire for prescribing morphine and heroin in violation of the new law. Federal agents claimed Jin sold opium to nearly 1,000 patients in Pittsburgh. Over a 23-day period, they charged, he wrote prescriptions for 10,000 heroin tablets as well as for a large number of morphine tablets. According to the government, Jin netted $100 each day from this practice. In its action against Jin, the government argued that he had prescribed morphine to one of his patients, Willie Martin, a known habitué, on a number of occasions. Possession by Martin did not qualify, the government argued, for the exception to Section 8 for good-faith prescriptions. The government charged Jin with nine counts of conspiracy to violate the Harrison Act.[53]

The distinction between a "revenue act" and a "police regulation," as well as concern over the individual liberties at stake in the case, occupied much of the Court's attention. Successful in having his indictment thrown out in the District Court, Jin responded to the government's appeal by maintaining that Section 8's possession clause applied only to persons required to register under the Act who had failed to do so. If Congress intended to reach all private individuals, though, Jin argued that Section 8 appeared much closer to a police regulation

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[52] *Atlanta Constitution*, May 27, 1916; *Macon Telegraph*, May 8, 1916; May 27, 1916; *Kansas City Star*, Oct. 2, 1915.

[53] Br. of Def. in Error, *U.S. v. Jin Fuey Moy*, 241 U.S. 394, 5-6; Tr. of Record, *U.S. v. Jin Fuey Moy*, 241 U.S. 394, 2; *Washington Post*, April 18, 1915. At least one press account identified Jin as a "Chink doctor" who had gotten rich by helping habitués secure narcotics. *Macon Telegraph*, April 16, 1915.

and would amount to congressional overstepping. Importantly, Jin also called attention to the individual liberties at stake in the case by noting the significant number of Americans who could be found guilty of a crime under the government's interpretation of the statute.[54] The government maintained, though, that private individuals who could "not bring themselves within" the Act's registration scheme were "not permitted to have possession" of narcotics "at all." It also pointed out that acceptance of Jin's reading of Section 8 would greatly weaken the Harrison Act, making it applicable to only a thin segment of the population.[55]

In an opinion by Justice Oliver Wendell Holmes, the Court adopted Jin's limited reading of the Act and ruled that it did not make unlawful the private possession of narcotics by those ineligible to register as dealers. The punishment to be meted out for violations of the law, coupled with the Court's view of congressional power, drove its decision. For Holmes, then fast becoming the "darling of the Progressives" for his "willingness to tolerate any regulatory measure he did not deem unconstitutional," the opinion represented one of the rare occasions on which he held that the government had gone too far.[56] The Act, he noted, called for violators to receive "serious punishment:" a fine of as much as $2,000, a prison sentence of up to five years, or both. He also noted the likelihood that many Americans had "some preparation of opium in their possession." Visiting such harsh penalties on so broad a swath of the public, he concluded,

[54] Br. of Def. in Error, *U.S. v. Jin Fuey Moy*, 241 U.S. 394, 2-5, 8.
[55] Br. for the United States, *U.S. v. Jin Fuey Moy*, 241 U.S. 394, 9-11, 15-7, 19.
[56] The characterization of Holmes comes from biographer Liva Baker's account of his life and legal career. Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New York: HarperCollins, 1991), 441. Baker also notes that Holmes' reputation as a Progressive grew despite the fact that he did not share the Progressives' reformist goals. In a more recent take on Holmes, Albert Alschuler also notes the mismatch between Holmes' views on legislation and his standing among Progressives. "Forty or so of the 873 opinions Holmes wrote as a Supreme Court justice," he explains, "were dissents from the Court's invalidation of regulatory legislation." Of these, his dissent in *Lochner v. New York* remains one of the most famous, though Alschuler describes that dissent as fueled not by agreement with the minimum hours law at issue but instead as evidence of his view of democracy as "Darwinian struggle" and his skepticism toward judges substituting the legislature's logic for their own. While Holmes voted to uphold legislation supported by Progressives, Alschuler argues, "he was equally inclined to uphold repressive legislation," including, for one example, an Alabama peonage law that the majority voted to strike down. Albert W. Alschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000), 62-4.

would "strain" Congress's powers almost if not quite to the breaking point." Under such circumstances, he determined, only "words from which there is no escape" would allow the Court to conclude that Congress intended such an aggressive exercise of its authority.[57]

Holmes' words deserve careful parsing, for in his decision striking down this exercise of federal power he signaled his willingness to authorize sizable assertions of congressional authority. After describing the Harrison Act's penalties and noting the many Americans who would be subject to those penalties under the government's reading of Section 8, remarkably, Holmes did not declare such a move by Congress to be beyond the pale. He did not, in other words, find that Congress lacked the power to make possession unlawful, nor did he declare that such a law would amount to an impermissible police regulation. He instead refused to assume that Congress intended so draconian a result unless and until it did so in express terms. Holmes thus communicated his readiness to countenance the federal government's reading of Section 8 under circumstances not then before the Court. He went one step further, though, and outlined the broad scope of similar federal legislation he was prepared to uphold. To suggestions that Congress's motivation for the act had little to do with federal coffers, Holmes acknowledged that the Harrison Act had a "moral end as well as revenue in view." He made clear, though, that such a purpose represented no constitutional problem. So long as Congress used an appropriately-framed statute to achieve the moral end, its motivation was of no effect.[58] In a decision that struck down an assertion of federal power, then, Holmes advanced a capacious vision of congressional authority.

[57] 241 U.S. 394, 400-01 (1915). Among those who joined the decision were Chief Justice White as well as Justices McKenna, Van Devanter, and McReynolds, all of whom would question Congress's authority to pass the Harrison Act in the years ahead.
[58] Ibid.

Despite the concessions to federal authority Holmes had embedded in his opinion, public and lawmaker responses to *Jin Fuey Moy* focused on its immediate effects. Reaction to the decision was swift. Press across the country reported that the Court had gutted the Act, leaving officers unable to prosecute claims against many suspects. And the Commissioner of Internal Revenue lambasted the opinion, complaining that it would make Harrison Act prosecutions incredibly difficult. In the future, he noted, mere possession of forbidden drugs would not constitute evidence of a violation. Instead, the government would have to "prove an actual sale" in all cases. Policymakers and the public alike saw in the Court's decision a serious impediment to future prosecutions under the Act. They must also have understood that the same groups Congress invoked to secure support for the Harrison Act—Chinese opium smokers and, in Wright's formulation, cocaine and opiate users among the African American and white criminal and "abnormal classes"—would escape punishment as a result of *Jin Fuey Moy* unless the government could collect evidence of a sales transaction.[59]

The decision had other, more tangible effects as well. Jin and McGregor were far from the only arrestees whose cases turned on an interpretation of Section 8. *Jin Fuey Moy* proved a stroke of good fortune for Macon's McCervey and Carroll. In the days after the Court's decision, the team prosecuting the two determined their case could no longer stand. Federal officials elsewhere reached the same conclusion. In Philadelphia, nine prisoners held on possession charges walked out of Moyamensing Prison the day after the Court announced its decision. A week later, the U.S. Attorney in Philadelphia ordered the release of 48 more defendants. Authorities in Fort Worth, Texas, followed suit, and it is probable that prosecutors across the

[59] *New Orleans Times-Picayune*, June 6, 1916; *Augusta Chronicle*, June 6, 1916; *Miami Herald*, June 6, 1916; *Lexington Herald*, June 6, 1916; *Portland Oregonian*, June 6, 1916; *Gulfport Daily Herald*, June 8, 1916; *Columbus Leger*, June 13, 1916; *Annual Report of the Commissioner of Internal Revenue for the Fiscal Year ended June 30, 1917* (Washington: Government Printing Office, 1917), 16.

country also released prisoners awaiting possession trials.[60] And the Attorney General recommended pardons for prisoners then serving sentences for possession convictions.[61] Federal prosecutors from across the country had proceeded on the same construction of Section 8 that the government proffered in *Jin Fuey Moy*. The Court's decision brought havoc to enforcement attempts throughout the U.S. It would be three years before Congress would patch the *Jin Fuey Moy* loophole.[62]

By 1913, federal policymakers had come to share the view that the narcotics problem in the United States had to be addressed by federal action. Despite this broad agreement, debates before passage of the Harrison Act continued to highlight the limits of congressional power. And concerns over the scope of federal power did not end once Congress passed the Act. Instead, a parade of Americans would challenge Congress's authority to pass the legislation it had, repeatedly bringing the issue before the country's highest court. Whether anti-narcotics law would prove a temporary experiment or a permanent exercise of federal power remained an open question for more than a decade after Congress passed the law.

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[60] *Macon Telegraph*, June 7, 1916; *Philadelphia Inquirer*, June 8, 1916; June 16, 1916; *Fort Worth Star-Telegram*, June 16, 1916. They reasoned that McCervey, an employee of a registered pharmacist, could not himself register under the Act and was therefore not subject to the provisions in Section 8. As a result, their allegation of possession against McCervey, and of aiding and abetting possession against Carroll, could not stand.

[61] *Annual Report of the Attorney General of the United States for the Year 1917* (Washington: Government Printing Office, 1917), 466-73, 476, 478, 482-5, 495, 503, 508; *Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1918* (Washington: Government Printing Office, 1918), 28-9. Annual reports list at least 31 prisoners pardoned at the Attorney General's recommendation, including prisoners convicted in federal courts in Texas, Mississippi, Louisiana, Virginia, Alabama, Connecticut, Michigan, Georgia, Ohio, New York, Vermont, Arkansas, and Washington. They had been convicted of possessing: morphine, codeine, cocaine, and smoking opium.

[62] 1918 Cong. Rec. – House 10466-7; House Committee on Ways and Means, "Revenue Bill of 1918," 65 H.R. Rep. 767, at 36 (1918). In its report, the Committee on Ways and Means noted: "The decision of the Supreme Court in the Jim Fuey Moy case (June 5,1916) has made it very difficult to enforce the act of December 17,1914. … Under that decision it is impossible to hold criminally liable a person having in his possession any amount of the habit-forming drugs included within that act, unless such person is a dealer therein. The proposed bill in section 1008 amends that act so as to place an internal revenue tax, payable by stamp, upon such drugs, and provides that the possession of an unstamped package shall be prima facie evidence of a violation of the act."

IV. The Decade-Long Legal Battle over Congress's Power to Regulate Drugs

Jin Fuey Moy represented the rare instance in which Holmes struck down an exercise of federal power, and he found himself in unusual company in doing so. For joining Holmes in the majority were Chief Justice White as well as Justices McKenna, Van Devanter, and McReynolds—all of whom shared a limited view of the federal government and its powers.[63] A decade of legal challenges to other provisions of the Act followed *Jin Fuey Moy*, and the Court's decisions in these cases saw the justices advancing two competing visions of the federal government and its power. One group of justices, including Holmes, saw federal power as capacious and proved willing to accommodate broad uses of Congress's enumerated powers. The second group, of which Justice McReynolds proved the most vocal, sounded two notes in their resistance. First, in an argument founded on both federalism and liberalism, they contended that the Act represented congressional assumption of the police power—authority never granted in the Constitution. Second, they highlighted how portions of the Act trounced on hitherto lawful behavior, changing the meaning of the privileges that adhered to U.S. citizenship and residency. Before 1930 the Court would settle on a new balance of federalism, individual liberties, and state action—but not before a dozen years of infighting that revealed both the significance of the changes Congress sought and the depth of resistance to those changes.[64]

Physicians arrested under the Act first confronted the courts with the claim that Congress had assumed powers reserved for the states. Their challenges involved their prerogative to

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[63] *Jin Fuey Moy*, 241 U.S. at 398. For evidence that White, McKenna, Van Devanter, and McReynolds subscribed to a view of the federal government as sharply circumscribed in its powers, one need look no further than Chief Justice White's dissent in *United States v. Doremus*, discussed in some detail below. Joined by the other three justices, White opined that the section of the Harrison Act challenged in that case had been "beyond the constitutional power of Congress to enact because … the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States." *United States v. Doremus*, 249 U.S. 86, 95 (1919).

[64] For brief discussions of the Supreme Court's narcotic-related jurisprudence during this period, see Musto, *The American Disease*, 128-32, 183-89; Joseph F. Spillane, "Building a Drug Control Regime, 1919-1930," in *Federal Drug Control: The Evolution of Policy and Practice*, Jonathan Erlen and Joseph F. Spillane, eds. (New York: Pharmaceutical Products Press, 2004): 25-59, 34-42.

distribute narcotics to habitués. Federal officers insisted that doctors could prescribe drugs to addicts only for a medical reason or to effect a cure of their addiction. Physicians contended that the Act allowed them to distribute narcotics to "maintain" habitués—to allow them to continue consuming narcotics at their present rate and thereby stave off the uncomfortable or even fatal effects of withdrawal.[65] When Treasury agents pursued actions against doctors who helped maintain addicts, courts across the country heard Harrison Act challenges.[66] In fighting their arrests, physicians argued that such regulation of medical practice had nothing whatsoever to do with revenue collection—that once doctors and dealers paid the taxes owed under the Act, any further restriction made the law a general police measure. And such a measure, they argued, Congress had no authority to pass.

Resolution of these cases turned on how far courts would allow Congress to extend its revenue power. When it began to look like a general police power under another name, would courts determine Congress had gone too far? Some courts that heard these challenges responded in the negative and applied a lenient standard to government action. Judge Learned Hand, who presided over one such trial, made expressly clear how little—in his view—the government had to demonstrate. "The statute must be sustained," he wrote, "so long as any plausible support for it can be found." Hand, like other judges who upheld the Act, saw the limits on physicians as drawing narcotic sales into the open, allowing federal officials to track sales more precisely, and

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[65] Inarguably, from the perspective of the habitués who depended on physicians for maintenance, the Court's determination that such distribution fell outside the practices permitted under the Harrison Act proved the most important consequence of the law. For discussions of the Act as it concerned narcotics addicts, see Alfred R. Lindesmith, *The Addict and the Law* (Bloomington: Indiana University Press, 1965); Jill Jonnes, *Hep-Cats, Narcs, and Pipe Dreams: A History of America's Romance with Illegal Drugs* (New York: Scribner, 1996), 50-4.

[66] *Blunt v. United States*, 255 F. 332 (7th Cir. 1918); *Foreman v. United States*, 255 F. 621 (4th Cir. 1918); *Hughes v. United States*, 253 F. 543 (8th Cir. 1918).

preventing habitués from securing supplies they could resell.[67] Under Hand's formulation, Congress's ability to claim for itself something akin to the police power appeared unimpeded.

Not every lower court agreed. The well-publicized case of Arthur Blunt offered one court the opportunity to strike down the law's control over physicians and throw a wrench in Congress's claim to police-like powers. In his sixties by the time he came to public attention, Blunt practiced in Chicago in a West Harrison Street office two blocks from Grant Park. Assailed by the government as the mastermind of a profitable drug trade—prosecutors alleged he wrote 20,000 prescriptions in the six months before his arrest, and charged up to $1 for each—Blunt saw himself as the protector of addicts who had lost access to narcotics. According to press reports, at his arraignment he claimed to have "saved 600 men from death and worse than death since" the Harrison Act took effect. When a jury found him guilty in October 1915, he became the first physician in Chicago convicted under the Act. While he appealed, prosecutors claimed, Blunt continued to distribute narcotics to known addicts, resulting in a second arrest and trial.[68] He appealed that conviction, too.

While Hand hypothesized a relationship between the Act and revenue collection, the court that heard Blunt's appeal saw the Act as endeavoring to do too much to be a mere revenue measure. It invalidated the law as outside the scope of Congress's authority. Though it acknowledged that, in passing legislation for the collection of revenues, Congress may lawfully have other motivations, the court claimed Congress's effort to control intrastate sales bore no relation to its taxing power. Rather, the court saw it as "an attempt, in the guise of an incidental

[67] *Hughes*, 253 F. at 544-5; *Foreman*, 255 F. at 623-4; *United States v. Rosenberg,* 251 F. 963 (S.D.N.Y. 1918). Hand went further, adding what may well have been on other judges' minds as they considered the issue: Addicts, he claimed, were "of greatly impaired will and of little sense of social obligation" and were "unlikely to observe any law which imposed upon them an excise as a condition of resale."

[68] *Chicago Tribune*, September 2, 1915; October 21, 1915; October 22, 1915; October 31, 1915; December 5, 1915; December 5, 1917; December 7, 1917; December 8, 1917; January 3, 1918. Blunt had run-ins with the law prior to his trials in federal court. In 1911 and again in 1912, he was arrested and tried for violating state drug law. *Chicago Tribune*, January 14, 1915.

tax regulation, to exercise the police powers reserved to the states."[69] Before the issue reached the Supreme Court, then, the lower courts had come to different conclusions as to whether Congress had the authority to regulate physicians' practices. Jurists were not of one mind when it came to their review of the Harrison Act—at least some held the national legislature to a more exacting review and required it to prove a regulation's relationship to revenue collection.

While a number of lawsuits worked their way through the lower courts, a pair of cases brought the issue of Congress and the states' police power before the Supreme Court in 1919. Both involved charges that a physician dispensed narcotics to known addicts for maintenance—and made a good deal of profit in the process.[70] In their trials and on appeal,[71] the defendants challenged their arrests as made pursuant to a police act, rather than a revenue measure.[72] Despite legislative history and popular consensus that suggested otherwise, the government argued the law's "main purpose" was to serve as "a revenue measure." Perhaps understanding the vulnerability of its claim, it did not rest on this contention. It also offered the Court a catalog of other instances in which Congress exercised its taxing power for purposes other "than mere revenue," including protective tariffs, federal licenses to sell lottery tickets, and others. The

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[69] *Blunt*, 255 F. at 335-6.

[70] Tr. of Record, *United States v. Doremus*, 249 U.S. 86 (1919), 1-6; Tr. of Record, *United States v. Webb*, 249 U.S. 96, 1-5.Webb also involved a pharmacist, Jacob Goldbaum. The trial court found that, "within a period of eleven months[,] Goldbaum purchased from wholesalers, in Memphis, thirty times as much morphine as was bought by the average retail druggist doing a much larger general business, and he sold narcotic drugs in 6,500 instances." Webb "regularly charged fifty cents for each so-called prescription, and within this period had furnished" over 4,000 such prescriptions.

[71] The district court in which Doremus was indicted quashed his indictment, holding that the indictment did "not state an offense against the laws of the United States." *United States v. Doremus,* 246 F. 958, 965 (W.D. Tex. 1918). The Supreme Court had jurisdiction over the appeal pursuant to the Criminal Appeals Act, which gave it original appellate jurisdiction over indictments quashed for an underlying statue's unconstitutionality. Webb and Goldbaum's case came before the Supreme Court as a result of the Sixth Circuit certifying questions concerning the Harrison Act's meaning and constitutionality.

[72] In his motion to quash the indictment in the District Court, for instance, Doremus asserted that Congress lacked the authority to pass the "pretended law" under which he was charged, except for those provisions having to do with taxing narcotics and those dealing with interstate traffic in narcotics. Tr. of Record, *United States v. Doremus*, 249 U.S. 86 (1919), 7. In their brief to the Supreme Court, Webb and Goldbaum contended the Harrison Act was not a revenue measure. Br. and Argument of W.S. Webb and Jacob Goldbaum, *Webb v. United States*, 249 U.S. 96, 2-6, 9-10.

Court's treatment of these laws, the government claimed, demonstrated its reluctance to overturn a measure "because it is claimed to interfere with the reserved powers of the States" or to have been motivated by other purposes. It also argued that, even if the Harrison Act's main purpose had been to promote a moral or social end, that intent would be insufficient "to render it unconstitutional."[73]

In votes much more in keeping with his reputation at the time, Holmes joined 5-4 majorities to uphold the Act in both of these cases. Justice William Day wrote both decisions.[74] He acknowledged Congress's broad discretion over revenue in language that suggested approval of the capacious view of the power that many members of Congress espoused. Echoing Judge Hand, he wrote that, so long as a piece of legislation bore some "reasonable relation to the exercise of the taxing authority," that alone was "sufficient to sustain it." That other motivations may have impelled its passage did not "authorize the courts to inquire into that subject." In upholding the Harrison Act, in other words, the Court gave Congress a broad license to seize on its taxing authority to increase its power over domestic affairs.[75] Challenges to congressional power that suggested the national government had claimed a general police power had failed to move the Court.

Day's opinions in *Doremus* and *Webb* reopened the question of how broadly Congress may use its enumerated powers, much debated among the justices only the previous summer. In

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[73] Pl.'s Br., *United States v. Doremus*, 249 U.S. 86 (1919), 8-16; Br. on Behalf of the United States, *Webb v. United States*, 249 U.S. 96, 8-9.

[74] The Court explained its reasoning in *Doremus*. In *Webb*, it pointed to *Doremus* to answer two of the Sixth Circuit Court's questions. As to its third question—whether a physician may lawfully maintain a habitué in "his customary use"—the Court claimed that to call Webb's orders "for the use of morphine a physician's prescription would be so plain a perversion of meaning that" word that "no discussion of the subject [was] required." *Webb et al. v United States*, 249 U.S. 96, 99-100 (1919).

[75] *United States v. Doremus*, 249 U.S. at 93-4. The popular press appears not to have reported *Doremus* or *Webb* widely. A couple of the accounts that did make the newspapers, though, reported on the question of the national legislature's taxing power involved in the cases. They also ensured readers that the Harrison Act had been found constitutional and explained that the decisions confirmed both that retailers could not sell drugs without a prescription and that physicians could not prescribe drugs to maintain an addict in his or her habit. *Wall Street Journal,* January 9 1919; March 4, 1919; *Atlanta Constitution*, March 4, 1919.

September 1916, Congress, acting under its power over interstate commerce, passed a law that made it unlawful to transport across state lines goods manufactured by any business that employed children as laborers. A father with two sons, all employees at a cotton mill in Charlotte, North Carolina, challenged the law as beyond Congress's power, and Justice Day authored the majority opinion in the case, *Hammer v. Dagenhart*, that struck down the child labor law on those grounds. He concluded that Congress's power to regulate interstate commerce did not include the "authority to control the states in their exercise of the police power over local trade and manufacture." Holmes dissented, arguing that the Court should uphold any act of Congress that lay within its enumerated powers, regardless of the law's likely effects and Congress's motivation in passing the law.[76]

Day's opinions in the two Harrison Act cases greatly amused Holmes, who saw in them a validation of the view of federal power he had advanced in his *Hammer* dissent. The opinions certainly offered Holmes a solid basis to accuse Day of an about-face. Day wrote in *Doremus*, for one example, that, if an act of Congress "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." Holmes read the opinion as adopting his perspective on congressional power. In a letter written to Hand shortly after the Court announced its decisions in the two cases, Holmes claimed:

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[76] *Hammer v. Dagenhart*, 247 U.S. 251, 273-74, 277 (1918). Political scientist Samuel Konefsky, who authored studies of several Supreme Court justices, identified Holmes' dissent in *Hammer* as driven not by humanitarian concerns—in private correspondence, Holmes had expressed no small degree of skepticism about other labor legislation, including maximum hours laws—but by his insistence on the proper roles of legislator and judge. Through such dissents, though, Konefsky claims the "social conservative" became the "liberal judge." In a eulogy of Holmes published in the *Columbia Law Review*, Karl Llewellyn made a similar point. He noted that the public came to view the socially conservative Holmes as a radical because "he had the detachment to refuse to substitute his judgment for that of the legislature." Samuel J. Konefsky, *The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas* (New York: MacMillan, 1956): 111-17; Karl Llewellyn, "Holmes," *Columbia Law Review* 35, no. 4 (April 1935): 485-92, 485.

> As to the Harrison Drug Act, (between ourselves) I am tickled at every case of that sort as they seem to me to confirm the ground of my dissent in the Child Labor case last term. … Also I think the drug act cases rightly decided. In my opinion Congress may have what ulterior motives they please if the act passed in the immediate aspect is within their powers—though personally, were I a legislator, I might think it dishonest to use powers in that way.

At least as Holmes read Day's decision, the Court appeared ready and willing to allow Congress much more assertive uses of its enumerated powers.[77]

If Congress emerged from *Doremus* and *Webb* with judicial approval of its claim to new power, it also found the seeds of more vocal resistance to its presence in the drug control arena. Chief Justice White, along with Justices McKenna, Van Devanter, and McReynolds, thought the issue simple. Reserving opinion as to the constitutionality of the Act as a whole, he claimed that its application in these actions fell "beyond the constitutional power of Congress" and characterized the statute as an attempt to exercise the states' police power.[78] McReynolds, especially, would prove a vocal opponent of Congress's moves to police narcotics, consistently complaining that Congress lacked authority to pass much of the anti-drug legislation it had approved.

McReynolds' name has long been tied to *Lochner*-era laissez-faire constitutionalism, and contemporaries, historians, and legal scholars have all charged him with inventing doctrine to serve the wealthy. While his commitment to limited government had already become clear by the

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[77] *United States v. Doremus*, 249 U.S. at 93-4. Letter from Oliver Wendell Holmes to Learned Hand, dated April 3, 1919, Oliver Wendell Holmes Jr. Addenda, 1818-1978, Photocopied items and miscellany: Box 8, Folder 8, Hand, Learned, Correspondent, 1918-1919, Historical & Special Collections, Harvard Law School Library. Hand had written to Holmes only a couple of days earlier, in which letter he claimed to have been "amused at the Harrison Law decisions." In what may be a reference to Day's efforts to emphasize those portions of the Harrison Act that appeared to most directly relate to revenue collection, Hand joked that the two decisions demonstrated the importance of what he called "importation," or "being able to infer to Congress purposes you know they didn't have." Letter from Learned Hand to Oliver Wendell Holmes, dated April 1, 1919, Oliver Wendell Holmes Jr. Addenda, 1818-1978, Photocopied items and miscellany: Box 8, Folder 8, Hand, Learned, Correspondent, 1918-1919, Historical & Special Collections, Harvard Law School Library.

[78] *United States v. Doremus*, 249 U.S. at 94. The same four judges dissented in *Webb* by referencing White's four-line dissent in *Doremus*. *United States v. Webb*, 249 U.S. at 100.

time the Court heard *Doremus* and *Linder*, that intellectual position would receive nationwide publicity in the 1930s. Widely known as the self-styled leader of the "four horsemen," the group of justices who voted to invalidate many pieces of New Deal legislation, he regularly hosted the other three at his Washington apartment. His hatred of Franklin Roosevelt was well known, as was the President's hatred of him, and Roosevelt at one point labeled McReynolds the "living antithesis of all that the New Deal represented." Roosevelt was not alone in his dislike of McReynolds. He earned the enmity of many of his fellow justices, to whom he was famously hostile, reportedly writing comments meant to offend on circulated draft opinions. His anti-Semitism led him to treat Justices Brandeis and Cardozo particularly badly: He turned his back when the former spoke in conference and lobbied against the latter as Hoover considered his nomination. He was, in short, cantankerous, a bigot, and widely detested.[79]

The descriptions of McReynolds' jurisprudence contain some truth. He indeed felt strongly that the Constitution protected freedom of contract, and he voted in support of that belief. A recent biographer notes, though, that the justice felt a "deep and abiding commitment to those individual rights which he believed were guaranteed by the Constitution"—a list that included many more personal freedoms than the right to contract, and many of them not expressly in the Constitution.[80] His belief that the Constitution guaranteed a litany of unenumerated rights, coupled with a distrust of the administrative state and a concern with federal government overreaching, led McReynolds to spend a decade opposing federal narcotics control in most respects. Aside from his view that only a general police power could fully legitimate the Harrison Act, his concerns over government encroachment on individual rights

[79] James E. Bond, *I Dissent: The Legacy of Chief Justice James Clark McReynolds* (Fairfax: George Mason University Press, 1992), viii-ix, 53-6, 72, 84-5; Dennis J. Hutchinson and David J. Garrow, eds., *The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington* (Chicago: University of Chicago Press, 2002), 36-7.
[80] Bond, *I Dissen*t, 72

also animated his opposition to the Act. In the years following *Doremus* and *Webb*, the irascible McReynolds went out of his way to criticize the Harrison Act, frame an analysis that might lead to its undoing, and call for a renewed challenge to its constitutionality.

McReynolds and Holmes, then, represented two ideological extremes on the Court, the latter adhering to a capacious view of congressional authority while the former saw much federal legislation as well beyond the constitutional purview of the central state. Nonetheless, two Harrison Act cases in the first half of the 1920s saw the pair vote together. Both involved questions of what conduct by physicians Congress meant to make unlawful when it passed the Act. In the first, *Behrman v. United States*, Justice Day wrote for the majority in upholding the conviction of a physician who prescribed enough cocaine, heroin, and morphine to a known addict to put several thousand doses of the drugs in his possession. These acts, the majority determined, went well beyond those the Harrison law permitted. Holmes authored a dissenting opinion, which McReynolds and Brandeis joined, in which he reasserted the concern that had moved him in *Jin Fuey Moy*. He acknowledged that there existed grounds for suspecting the physician in *Behrman* had acted outside the bounds of legitimate medical practice, but he noted that the government had not argued as such. In the absence of a claim of bad faith, he reminded the majority, it must assume the physician had acted in good faith. He charged the majority with construing the statute to "tacitly mak[e] such acts, however foolish, crimes;" with, in other words, "creating a crime" without "a word of warning."[81] As in *Jin Fuey Moy*, then, Holmes refused to assume that Congress intended to make a category of hitherto legal behavior illicit without it doing so expressly. He may have viewed Congress's authority as broad, but it had to wield that authority openly and in plain language.

[81] *United States v. Behrman*, 258 U.S. 280, 288-89 (1922).

Concerns over federalism remained prominent in the second case that brought McReynolds and Holmes together. Following on the heels of its victory in *Behrman*, which involved large quantities of narcotics, the Narcotics Division charged Dr. Charles Linder with dispensing one tablet of morphine and three tablets of cocaine to a known habitué. Linder and the government disputed whether these actions met appropriate standards for medical treatment.[82] Questions of statutory construction and federal power dominated before the Court, where Linder argued that the government's interference in his practice represented an unconstitutional intrusion on the powers of the states. In language McReynolds might have himself penned, Linder's counsel warned of a recent tendency of Congress to yield to "the meddling spirit that would draw every activity in life within the purview of its constitutional power." If the Court did not wish to watch Congress turn on its head "the doctrine that the states are supreme in matters of police," then it must act. Linder urged the Court to adopt "a strict rule concerning the relation of a prohibited act to the federal grant of power on which it [was] predicated."[83]

Writing for a unanimous Court, McReynolds accepted Linder's invitation. He proclaimed that Congress could not, "under the pretext of executing a delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government." Rather, Congress's acts must be "naturally and reasonably adapted" to the exercise of a constitutionally-authorized power. The Act, McReynolds held, must not be read to prohibit a physician from dispensing a moderate amount of narcotics to relieve pain from addiction. If that had been Congress's intent,

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[82] Tr. of Record, *Linder v. United States*, 268 U.S. 5, at 34-164. The government relied on *Behrman* to argue that a doctor may not dispense narcotics to an addict. While the government claimed that the lower quantity involved in *Linder* should not change the analysis, Linder contended the small number of tablets he dispensed proved he appropriately treated his patient's addiction. Br. of the United States, *Linder v. United States*, 268 U.S. 5, at 3-4; Pet.'s Br., *Linder v. United States*, 268 U.S. 5, at 12-6.

[83] *Linder v. United States*, 268 U.S. 5 (1925); Pet.'s Br., *Linder v. United States*, 268 U.S. 5, at 1, 16, 24-8; Br. of U.S., *Linder v. United States*, 268 U.S. 5 at 4; Seattle *Times*, April 13, 1925; *Bellingham Herald*, April 13, 1925.

he chimed, the Act would "encounter grave constitutional difficulties."[84] McReynolds' analysis indicated that physicians had broader latitude to prescribe and dispense narcotics than earlier cases had suggested. As importantly, it also intimated a more biting review of congressional actions might be forthcoming, with questions of congressional motivation front and center in the Court's consideration. Under the test advanced by McReynolds, the Harrison Act as well as many other acts of Congress might not pass muster. McReynolds believed that he had identified the path to the Act's undoing: challenging those of its provisions that failed to bear a reasonable relationship to Congress's exercise of a lawful power. He could reinsert federalism into the discussion, he thought, by forcing Congress to spell out the connection between a law and the basis of power on which Congress had passed it.

A second child labor case gave McReynolds further reason to believe the Harrison Act might not survive another constitutional challenge. After the Supreme Court's decision in *Hammer* invalidated the federal government's first child labor law, Congress passed another that used a taxing scheme to make child labor prohibitively expensive for most businesses. When a North Carolina furniture company challenged the law after paying a tax bill in excess of $6,000, the government argued that the Court should be guided by its Harrison Act cases, in which time and again it had approved a tax that had a moral purpose apparent to all. The Court disagreed and struck down the law. The new chief justice, William Taft, wrote the Court's opinion, from which only one justice dissented. While the Court had gone "far to sustain taxing acts" in the past, Taft wrote, it had to set aside its usual "presumption of validity" when proof that Congress intended the tax as a penalty, rather than as a means of generating revenue, could be "found on the very face" of the law. He distinguished the child labor tax and the anti-narcotics law on the ground

[84] *Linder*, 268 U.S. at 17-22.

that, in his view, the latter maintained a much closer relationship to revenue collection than the former.[85]

Despite Taft's work to distinguish the Harrison Act from the child labor law, McReynolds quickly seized on the *Child Labor Tax Case* to make a renewed call for constitutional challenges to Congress's anti-narcotics law. Writing for a unanimous Court in a 1926 case that concerned sentencing under the Harrison Act, McReynolds claimed the question of the Act's constitutionality had proven divisive before the Court. Though he acknowledged that the parties had not raised the issue, he nonetheless took the opportunity to reference a series of cases the Court had decided since *Doremus* and *Webb*, including the *Child Labor Tax Case*, all of which had invalidated exercises of Congress's taxing power. He explained that the decisions in those cases "may necessitate a review" of the Act's constitutionality "if hereafter properly presented." With a considerable majority of the Court having only recently voted to strike down the child labor tax as an impermissible penalty and a unanimous decision preventing the government from proceeding against physicians as aggressively as it wished, McReynolds thought the time ripe to revisit Congress's basis of power to pass the Harrison Act.[86]

Two cases in 1928 dashed McReynolds' hopes and settled the question of Congress's authority to control narcotics. The first, in another decision written by Chief Justice Taft, laid to rest once and for all the question of Congress's authority to pass the Harrison Act. The case,

[85] *Child Labor Tax Case*, 259 U.S. 20, 37-43 (1922). Taft worried: "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have not parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it."

[86] *United States v. Daugherty*, 269 U.S. 360, 363 (1926). Two years later, McReynolds wrote again in another Harrison Act challenge. This time, McReynolds voted to uphold a provision of the law as falling "clearly within the power of Congress to lay taxes." Even then, though, he drew attention to what, in his view, separated this provision from others in the Act, which he believed "subject to reasonable disputation." He continued: "They do not absolutely prohibit buying or selling; have produced substantial revenue; contain nothing to indicate that by colorable use of taxation Congress is attempting to invade the reserved powers of the States." *Alston v. United States*, 274 U.S. 289, 294 (1927).

Nigro v. United States, called on the Court to decide how broadly the Act's provisions applied.[87] Once the Court decided the Act's principal restrictions applied to all persons, it addressed the constitutionality of the prohibition. Taft repeated that the Act must be sustained, if at all, as a revenue act and found the purpose behind the Act relevant to that inquiry. If Congress enacted it to control traffic in narcotics, he opined, it had overstepped its authority and usurped power reserved to the states.[88] He also noted the *Doremus* dissenters' opinion that the Act's tax on narcotics was subterfuge, mere incident to its real, prohibitory purpose. Despite vast evidence to the contrary, Taft held the act to be a revenue measure. He found in the revenues earned by the government proof "as to the character of this Act."[89]

What motivated Taft, a conservative justice usually viewed as hostile to the national administrative state, to uphold the Harrison Act in *Nigro*? As Joseph Spillane has suggested, Taft may have viewed his decision as compelled by, and hewing to, Justice Day's opinion in *Doremus*. There, Justice Day found sufficient evidence of the Act's revenue-generating purpose to uphold it. Amendments to the Act since *Doremus* meant that the government collected even more money from its administration of the Act by 1928, when Taft wrote the *Nigro* opinion, than it had in 1919, when Justice Day authored the *Doremus* decision. Or, as Robert Post has written of Taft's general support of the federal government's enforcement of Prohibition, Taft's decision in *Nigro* may have represented a fusion of the "conservative belief in social control with an

[87] Like the accused in *Jin Fuey Moy*, Nigro argued that the Act's reference of "any person" must be limited to those persons required to register under the Act who failed. Essentially, Nigro made the same argument with respect to Section 2 that Jin made 12 years earlier concerning Section 8. *Nigro v. United States*, 276 U.S. 332 (1928).
[88] *Nigro*, 276 U.S. at 341.
[89] *Nigro*, 276 U.S. at 352-7. McReynolds, joined by Justices Butler and Sutherland, dissented. He insisted that, as a purported revenue act, the law's provisions stood or fell according to their relation to that end. He claimed it illogical to suppose that Congress would ensure collection of the revenue by applying the Act's administrative requirements to those who could only deal in narcotics illicitly. McReynolds maintained that the "plain intent" of the Harrison Act was to "control the traffic within the States by preventing sales except to registered persons and holders of prescriptions." This, he reminded the Court, "amounts to an attempted regulation of something reserved to the States." While McReynolds shared Congress's and his fellow justices' dislike of narcotics, he maintained that dislike did not justify Congress's assumption of new powers not delegated to it. The "admitted evils incident to the use of opium," he concluded, did not warrant federal "disregard of the powers" reserved to the states.

embrace of legal positivism," whereby Taft viewed opposition to Prohibition enforcement as "resistance to the legal order itself."[90] Regardless, the take-away was clear: A few recent decisions notwithstanding, arguments that Congress had claimed a police-like power would have some traction, but not enough in the final analysis.

The second case involved the validity of Congress's patch to the Harrison Act after *Jin Fuey Moy* and raised questions of individual liberty like those before the Court in that case. The accused, a Seattle attorney, challenged the Act's presumption that a person in possession of unstamped drugs purchased those drugs illicitly—that is, outside the channels for which the Act made provision. Justice Holmes wrote for the majority and upheld this possession clause. While in *Jin Fuey Moy* he had refused to assume that Congress had meant to punish possession by all Americans, even those ineligible to register under the Harrison Act, his deference to the legislative branch guided his decision in the later case. He found the second possession provision, which placed the burden of proving lawful behavior on those who possessed unstamped narcotics, "consistent with all the constitutional protections of accused men." Congress had, in other words, made its intention clear and express. Under such circumstances, as Holmes had indicated in his private correspondence with Judge Hand, he would not strike down congressional legislation so long as supported by one of its enumerated powers.[91]

The case inspired three dissents. Brandeis argued that the government had engaged in unlawful entrapment in pursuing its case against the accused. Butler chimed in with a note on federalism, reprimanding the government for its overzealousness in fighting the opium habit. McReynolds, though, raised concerns over the individual rights violated by the Act's

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[90] Spillane, "Building a Drug Control Regime, 1919-1930," 36-7; Robert Post, "Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era," *William and Mary Law Review* 48 (October 2006): 1-122, 1-3.
[91] *Casey v. United States*, 276 U.S. 413, 420 (1928).

presumption that a person in possession of unstamped drugs purchased those drugs illicitly. He argued that the challenged provision conflicted with "those constitutional guaranties heretofore supposed to protect all against arbitrary conviction and punishment." He also likened the presumption of illegality that attached to unstamped narcotics to "the thumbscrew and the following confession."[92] If concerns over states' rights can explain much of Justice McReynolds' opposition to federal drug law, his dissent here demonstrates that a commitment to earlier notions of freedom also figured into his continuing resistance.

V. Conclusion

Two views of the American state and congressional power collided in debates over anti-narcotics law. One group of policymakers and jurists elevated federalism over federal action and decried Congress's drug laws as usurpations of power reserved for the states. They cast a suspicious eye at new exercises of authority by the central state, and preferred power to radiate out from statehouses or, even better, from city and town halls. They also clung to a model of liberalism that harkened back to the early nineteenth century, when decentralized state governments and a more limited federal state intervened far less often in Americans' personal affairs. The key to preserving Americans' constitutional freedoms resided in containing federal power, they thought, not in enumerating rights and giving the government the power to enforce them. From the perspective of these political and legal authorities, state and municipal leaders could address the need, if any, for drug control laws. They, like Champ Clark in the anecdote that opened this chapter, responded to the specter of comprehensive federal narcotics control by invoking Americans' traditional liberty to do as they wished in the privacy of their homes.

[92] *Casey*, 276 U.S. at 420-1, 426-7.

They confronted a second group who saw the world in different terms. Immigration, industrialization, and urbanization, they understood, had forever altered the country, giving rise to new exigencies that demanded far-reaching action. Because the liberal state had proven incapable of protecting the rights of all Americans, they believed that only a more expansive and powerful national government could meet the needs of the country's large, interconnected population. From their vantage point, federalism represented less a deterrent to congressional action and more a requirement that Congress be creative with its exercises of power. For adherents of this view of the central state and its legislature, only a broad congressional response to narcotics had any possibility of reducing domestic drug use and trafficking.

The story of federal drug control law between 1870 and 1930 is, in large part, a tale of this latter view of the American state coming to supersede the former. It is also, though, a tale of how Congress's interest in narcotics changed dramatically from the 1910s to the 1920s and helped usher in this new, more powerful state. When lawmakers first inserted opium into federal law, they did so to advance American claims of moral leadership or to eke out immigration concessions from the Chinese government. Their concerns sounded in foreign affairs, and Congress premised its limited drug responses on its power over treaties and commerce. These were uncontroversial exercises of power that had limited effect on most Americans. A generation later, policymakers had come to believe domestic narcotic use rampant, and they credited claims that racial minorities and lower-class whites were especially taken with the habit. Policymakers and jurists, no matter their view of congressional power, agreed on the "evil" of narcotics and the nefariousness of foreign influence, and they understood the motivation behind an expanded response. Under these circumstances, objections to federal power premised on federalism and liberalism lost ground, and Congress interpreted its powers broadly and criminalized acts that, at

one point or another, many Americans had committed. By 1930, in part through its consideration of federal anti-narcotics law, the highest court in the land had begun to accommodate both changes: the growth of federal power and the recalibration of personal liberties.

CHAPTER 4

POLICING "UNDESIRABLE CITIZENS:"
FEDERAL NARCOTIC AGENTS, STATE LAW ENFORCEMENT, AND THEIR SUSPECTS IN THE 1920S

Several hours after dusk on January 16, 1922, Pasquale Napolitano and Nunzio Dispenza, undercover "special employees" of the Bureau of Internal Revenue's Narcotic Division, boarded a trolley car headed over the Brooklyn Bridge from Manhattan.[1] Accompanied by the head of the Narcotic Squad in New York, Ralph Oyler, and a handful of his agents, the two set off with $350 in marked bills to purchase cocaine and heroin from Stephen Alba, whom they had first approached two days earlier. The budding skyline of lower Manhattan and the waters of the East River behind them, the men alighted at the intersection of Court and Union Streets, in the center of a South Brooklyn Italian neighborhood.[2] There, Napolitano and Dispenza walked down Union Street and entered Alba's home. Oyler's men stationed themselves nearby, hoping to witness what transpired without signaling their presence to Alba or anyone else in the area.[3]

This trip, like the others the group had already made to Alba's home, nearly ended without an arrest. During their first visit, Dispenza had introduced himself by claiming an acquaintance with a neighborhood fruit vendor. Satisfied, Alba introduced Napolitano and Dispenza to his friend, Antonio Centerino, who reportedly had access to both cocaine and heroin. Centerino dealt in large volumes: He refused to sell the men anything less than a kilo of each

[1] The Division appears to have engaged "special employees," like Napolitano and Dispenza, on an occasional basis to assist in undercover operations. Dispenza, in fact, testified that this operation was his first. Transcript of Record at 30, 262-65, *Agnello v. United States*, 269 U.S. 20 (1925) (No. 45) [hereinafter *Agnello* Transcript].

[2] While residents would begin calling the area "Carroll Gardens" in the 1960s, most people referred to it as "South Brooklyn" before then. South Brooklyn also included present-day Cobble Hill and had become, by the turn of the century, the "chief" Italian neighborhood in Brooklyn. See *Brooklyn Daily Eagle Almanac* VIII, no. 1 (1903), 402. See also Suleiman Osman, *The Invention of Brownstone Brooklyn: Gentrification and the Search for Authenticity in Postwar New York* (New York: Oxford University Press, 2011), 39-41, 201-02; Nancy Foner, *From Ellis Island to JFK: New York's Two Great Waves of Immigration* (New Haven: Yale University Press, 2000), 41-2.

[3] *Agnello* Transcript, 10-19, 23-30, 66-73; *Agnello v. United States*, 269 U.S. 20, 28-9 (1925).

drug, at a cost upwards of $1,000. Though they had already come to terms when Napolitano and Dispenza returned on January 16, the deal nearly fell through when Centerino demanded the pair accompany him to retrieve the narcotics—away from Alba's home and the agents standing nearby. When Napolitano insisted the sale be made at Alba's, Centerino relented and left to collect his merchandise. Oyler dispatched several of his men to follow.[4]

If the prospect of a big seizure and two arrests kept Oyler on the scene, he must have been delighted when Centerino returned with three other men in tow. He and his agents watched the now-seven men inside Alba's home converse, and they caught sight of several packages of narcotics atop a nearby table. Once Napolitano handed over the bills, the agent with the best view of the transaction fired his gun to signal the rest of the officers, who broke through three doors to detain the men inside. The agents searched the apartment, and then several left to investigate the grocery store and home Centerino had visited during his absence. After rummaging through both, they found a can of cocaine in the bedroom of Frank Agnello, one of the men who accompanied Centerino back to Alba's. All told, the agents' trip yielded five arrests and the seizure of well more than $1,000 worth of narcotics.[5]

Only a few years earlier, Oyler's investigation would not have occurred—or would not have taken place under the auspices of a federal office. For many Americans, their experiences with or knowledge of a narcotic agent represented their first exposure to federal policing. Before the twentieth century, federal criminal law had remained limited primarily to admiralty, internal revenue, immigration, and the military. The early twentieth century, though, ushered in a period of growth in the federal criminal law. [6] The Mann Act and Dyer Act, approved in 1910 and 1919,

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[4] *Agnello* Transcript, 18, 50-3, 225, *Agnello*, 269 U.S. 20 (No. 45).
[5] *Agnello* Transcript, 73-85, 476-79, *Agnello*, 269 U.S. 20 (No. 45); *Agnello,* 269 U.S. at 28-9; *New York Times*, January 17, 1922; *New York Times*, October 13, 1925. The *Times* put the drugs' value at $1,800. Agnello's
[6] Though Congress had made only limited forays into criminal law earlier, its actions occasionally proved weighty.

respectively, expanded the federal criminal justice apparatus substantially, as did efforts to quiet dissent during World War I and to enforce the Volstead Act after January 1920. This chapter contributes to recent scholarship outlining the contours of early federal criminal law by adding the investigative activities Narcotic Division agents to the mix of nascent power emerging at the time.[7] Narcotic agents stood among a handful of federal officers and moved about a population unaccustomed to policing by the central state. Their tactics and motivations helped determine what Americans would come to expect of federal law enforcement.

Though the bounds of their authority remained untested, agents quickly devised a set of investigative techniques to enforce Congress's drug laws. They worked with informers, went undercover, and orchestrated sting operations to catch dealers and users alike. And they brought their new power to bear in operations that targeted prominent traffickers and common street peddlers as well as addicts and casual users. Through their enforcement of anti-narcotics law, the Division's agents pushed the state more deeply than ever into Americans' private lives and subjected a broad range of activities to government attention.

Agents' actions during the 1920s helped give rise to the American penal state. But the size and reach of the Narcotic Division suggest both that lawmakers had determined to erect a penal state and that, at least in the 1920s, they had not yet fully done so. Throughout the decade, the Narcotic Division remained a small agency with only limited manpower—one unit within the

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In the Comstock Law, for example, Congress used its power over the mail to prohibit the transmission of "obscene" literature and material intended for "immoral" purposes. See Nicola Kay Beisel, *Imperiled Innocents: Anthony Comstock and Family Reproduction in Victorian America* (Princeton: Princeton University Press, 1997).

[7] Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (Cambridge: Harvard University Press, 2014); John A. Heitmann and Rebecca H. Morales, *Stealing Cars: Technology and Society from the Model T to the Gran Torino* (Baltimore: Johns Hopkins University Press, 2014), 21-6; William H. Thomas, Jr., *Unsafe for Democracy: World War I and the U.S. Justice Department's Covert Campaign to Suppress Dissent* (Madison: University of Wisconsin Press, 2008), 3-8; and Peter Zavodnyik, *The Rise of the Federal Colossus: The Growth of Federal Power from Lincoln to F.D.R.* (Santa Barbara: Praeger, 2011), 382-86. On the growth of federal criminal law, see Lawrence Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 261-66; Elizabeth Dale, *Criminal Justice in the United States, 1789-1939* (New York: Cambridge University Press, 2011).

larger Bureau of Prohibition. It operated out of a handful of offices, each with no more than two- or three-dozen agents to cover large swaths of territory.[8] Few in number and geographically dispersed, agents owed much of their success to the work they did with local and state officers, who surrendered arrestees to federal officials, accompanied agents during investigations, and offered up tips on suspects. These joint efforts led to thousands of arrests annually, filling the country's three federal penitentiaries.

As agents gave effect to Congress's laws, they made important decisions about where to focus their attention. They set their sights on groups of offenders they viewed as loathsome. They described these violators as "unworthy citizens" and worked to exclude them from the body politic both by marking them as criminal as well as by imprisoning them. Agents viewed their work as an exercise in policing citizenship, and their judgment of a suspect's fitness for national belonging at times depended on the suspect's racial or ethnic identity. That is, agents pursued ethnic and racial minorities for infractions to which they attached little seriousness when committed by whites.[9] Such decisions meant that the punitive arm of the penal state fell disproportionately on non-white suspects and reified an ethno-racial view of U.S. nationalism.[10]

But agents distinguished between and among suspects on grounds other than race. Whether and why a suspect trafficked proved the weightiest of these concerns. Agents acted with leniency when dealing with physician-suspects, only throwing the full weight of their authority

[8] "Narcotic Activities for All Divisions for Month of June 1925," Record Group 170, Records of the Drug Enforcement Agency, MLR A1 4, "Monthly Statistical Reports Relating to Narcotic Activities," National Archives, College Park, Maryland [hereinafter Monthly Statistical Reports]; *Report of the Commissioner of Prohibition for the Fiscal Year Ended June 30, 1927* (Washington: Government Printing Office, 1927), 4, 6, 13.
[9] Agents' focus on ethnic ghettoes raises the possibility that anti-narcotics law allowed agents to position immigrants from Southern and Eastern Europe as non-white. See David R. Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (London: Verso, 1991); Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge: Harvard University Press, 1998). See also Peter Kolchin's critique of this literature. Peter Kolchin, "Whiteness Studies: The New History of Race in America," *Journal of American History* 89, no. 1 (June 2002): 154-73, 159.
[10] See Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997); Eric Foner, *The Story of American Freedom* (New York: W. W. Norton, 1998); and Gary Gerstle, *American Crucible: Race and Nation in the Twentieth Century* (Princeton: Princeton University Press, 2001).

against doctors accused of widespread sales. Similarly, agents viewed addicts and drug users, especially if white, with some measure of compassion. Agents loathed traffickers, though, and especially those who acted only for financial gain. They insisted that these traffickers had proven their unworthiness for citizenship. In their hands, anti-narcotics law became a means to exclude specific categories of drug offenders—as well as ethnic and racial minorities—from the nation.[11] In passing the Act, Congress had claimed the authority to regulate narcotics; agents, though, led the way in linking narcotics violations to national belonging. They took a budding association between narcotics and criminality and gave it a conceptual framework and lasting consequences, paving the way for its permanent absorption into U.S. legal and political culture.[12]

Agents did not, however, make these moves unopposed. Suspects challenged agents' investigations and recorded some successes in the courts. In describing the legal arguments suspects offered and their reception before the federal judiciary, this chapter makes clear that criminal defendants and jurists, too, saw federal policing as bearing on the meaning of citizenship. As agents pursued violators, they pushed the boundaries of police action, and a number of suspects caught in the Division's web argued that agents had violated the Fourth Amendment in their investigations. Among these was Frank Agnello, the man in whose home

[11] As a growing scholarship of early twentieth-century views of citizenship has made clear, the category included far more than formal political membership. Americans viewed a range of personal qualities and behaviors as entitling those so defined to the perquisites of "full citizenship," an expanded set of rights defined culturally, legally, and politically. This more expansive citizenship was underwritten by a simultaneous constriction in the meaning of the term, its unavailability central to its value. For scholarship on "full citizenship," see Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2009); Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (New York: Oxford University Press, 2001); and Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York: Oxford University Press, 2008).

[12] My characterizations of agents' actions and words in this chapter are based on a review of several hundred letters the Division sent the Board of Parole in 1924. These letters provide factual detail concerning investigations and spell out the Division's rationale for opposing early release. They thus provide a comprehensive view of the Division's work for a six-month period in the 1920s. See Record Group 170.2, Records of the Narcotic Division, 1918-35, "Letters sent by the Commissioner of the Bureau of Prohibition, 07/1924-12/1924," HMS/MLR Entry Number: NC-50 3, National Archives, College Park, Maryland [hereinafter Commissioner Letters NACP].

Oyler's men had found cocaine, but he was far from alone. Numerous suspects stepped forward in the 1920s. While they did not directly contest agents' views of their fitness for citizenship, they laid claim to citizenship's traditional privileges. They advanced a view of the relationship between the state and its citizens as limited—at odds with agents' ideas about that relationship. In the hands of these parties, Fourth Amendment challenges in narcotics cases became fertile ground for working out the prerogatives and meaning of U.S. citizenship.[13] And, though many of the suspects who challenged their arrests and asked the courts to circumscribe the Division's power were members of vulnerable minority groups, these suspects nevertheless succeeded in limiting how aggressively federal authorities could police U.S. citizens and residents.

Agents' aggressive investigations also came to Congress's attention in early 1930 as it debated strengthening the federal response to illicit drugs by creating a narcotics bureau separate and apart from prohibition enforcement. In response to physicians' complaints about agents' burdensome investigations, Congress directed federal narcotic agents to work cooperatively with state and local law enforcement. It did so believing that, if federal agents provided information to local and state authorities, the latter could revoke the medical licenses of the worst physician-offenders of the Harrison Act.[14] Congress, along with the American Medical Association, hoped that preventing these physicians from practicing would leave narcotic agents with little cause to focus on physicians who committed only unknowing or technical violations of federal drug law. Despite the rather narrow purpose of Congress's directive, the newly-formed Bureau of Narcotics interpreted it to allow a much more robust law enforcement partnership between state

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[13] For arguments that race and notions of citizenship lay behind the Supreme Court's early-twentieth century uses of due process to invalidate convictions in state criminal courts. See Michael J. Klarman, "The Racial Origins of Modern Criminal Procedure," *Michigan Law Review* 99 (2000): 48-97; Tracey L. Meares, "What's Wrong with *Gideon*," *University of Chicago Law Review* 70 (2003): 215-31; and Bennett Capers, "Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle," *Harvard Civil Rights-Civil Liberties Law Review* 46 (2011): 1-49, 4-7.
[14] For the two laws, see 45 Stat. 1085, Chap. 82 (1929); 46 Stat. 585, Chap. 488 (1930).

and federal officers. As a new decade of narcotics enforcement dawned, in other words, the informal cooperation between state and federal officials that had given the emerging penal state its sharpest edge became formal procedure.

The American penal state thus started to take form during the 1920s in part through the work of narcotic agents. The Narcotic Division's status as a unit of the Bureau of Prohibition as well as its few offices and small number of officers make clear that a fully-developed penal state remained to be built. Despite those constraints on the Division's capacity, though, it spread its agents throughout the country to investigate and arrest drug violators, normalizing the experience of federal policing for the American populace. To do so, it drew on the information and personnel of local, state, and federal law enforcement, thereby expanding the nascent penal state's coercive power. Though its authority emanated from multiple sources, in other words, the penal state was not weaker as a result. Rather, its various forces learned to work in tandem during the 1920s and, in so doing, demonstrated well the power of the criminal law to both call up and preserve particular ideas about U.S. citizenship.

I. Bringing Federal Investigative Techniques to Bear Against the U.S. Population

Congress's passage of the Harrison Narcotics Act in December 1914 marked the beginning of a new era in how the central state categorized, monitored, and punished those who lived within its borders. That law required lawful dealers in narcotics to register with the federal government. It also prohibited the sale of narcotics by unregistered persons and required that a stamp be affixed to narcotics brought into the country and sold through lawful channels. A subsequent amendment attached a presumption of illegality to anyone in possession of

unstamped narcotics.[15] Though a statute premised on Congress's taxing power, the Harrison Act empowered federal agents to pursue a broad range of actors.

Before a decade had elapsed, much had changed. Narcotic squads had appeared across the country, working from offices in major cities. Officers conducted undercover investigations, recruited and built relationships with informants, and engaged in surveillance operations to enforce federal narcotic laws. They also used minor violations as pretext to search suspects for narcotics and relied upon city police departments to do the same. Americans thus became subject to a variety of new police activities, significantly altering the consequences of a run-in with federal or state officers. Centerino, Alba, and Agnello would prove far from the only suspects to be caught in the snare of this expanded state.

Despite the scope of its efforts, the Narcotic Division remained modest in size during the 1920s. Throughout the decade, 15 offices, located in the country's largest cities, handled all of the Division's investigative work. And they did so with very little manpower. At the beginning of the decade, for instance, the Atlanta squad, responsible for investigations in Georgia, South Carolina, and much of Florida, employed only six officers. The San Francisco squad, which operated in California, Nevada, Washington, and Oregon, employed only 20 officers. Though most of the squads grew over time, they remained small relative to the areas for which they had responsibility. By 1926, the Atlanta office had 15 officers; the San Francisco office had reached 22, though the opening of a Seattle office shrank its geographic area of responsibility. At a time when the Bureau of Prohibition's field staff numbered nearly 4,000, the Narcotic Division employed fewer than 300 agents. Their small numbers meant that these offices' success in

[15] For the original law, see 38 Stat. 785. For the 1918 amendment that clarified the possession charge, see 40 Stat. 1057 at sections 1006-1008.

uncovering narcotics offenses depended on their methods and on the investigative assistance of local and state officers—and not on federal agents' ubiquity.[16]

How did federal agents go about their work? They brought a variety of police tactics to bear on the U.S. population. Agents dealt in rumor and tips, often stationing squad members to monitor suspects. Occasionally, their surveillance efforts led to the capture of a major figure in the drug underworld. In February 1924, for example, agents received a tip concerning Michael Heller, known in Manhattan's Lower East Side for his chauffeured cars and expensive suits. After the local squad received information that Heller had connections with several steamship lines, through which he brought drugs into New York City, its officers spent six weeks watching him. Late in March, they saw him carrying a package and walking toward his home. When they approached, he dropped the package and ran. After a foot chase that ended with Heller's surrender on the roof of his building, he admitted the officers into his home. There, they found a considerable amount of morphine. Packaged in cans the Division had seen only on the West Coast, Heller's morphine proved a source of supply for "the motion picture colony in Hollywood." According to officials, the haul represented "the largest cache of smuggled drugs ever seized in New York"—perhaps worth $1,000,000.[17]

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[16] "Narcotic Activities of all Divisions for the Month of May 1924," Monthly Statistical Reports; *Annual Report of the Commissioner of Prohibition for the Fiscal Year ended June 30, 1928* (Washington: Government Printing Office, 1928), 9-10; *Annual Report of the Commissioner of Prohibition for the Fiscal Year ended June 30, 1930* (Washington: Government Printing Office, 1930), 20-1; Atlanta Division, "Monthly Report of Work Performed by Narcotic Officers for the Month of December 1919;" San Francisco Division, "Recapitulation of Narcotic Activities for the Month of July 1922;" Atlanta Division, "Recapitulation of Narcotic Activities for the Month of January 1926; " San Francisco Division, "Recapitulation of Narcotic Activities for the Month of April 1926;" Seattle Division, "Recapitulation of Narcotic Activities for the Month of February 1926," Monthly Statistical Reports; *Annual Report of the Commissioner of Prohibition for the Fiscal Year ended June 30, 1927* (Washington: Government Printing Office, 1927), 4, 6. The figures comparing the Bureau of Prohibition to the Narcotic Division are from June 1927.

[17] Letter from R. A. Haynes to President, Board of Parole, Department of Justice, August 12, 1924, Commissioner Letters NACP; *New York Times*, March 28, 1924; Chicago *Daily Tribune*, March 28, 1924; *Los Angeles Times*, March 28, 1924. Heller received a sentence of 18 months in the Atlanta Penitentiary.

More often, agents' surveillance operations led only to the arrest of small-time dealers, or "peddlers." Agents began monitoring the movements of Eduardo Kelly, a taxi driver in El Paso, for example, after they received information that he was selling drugs. On several occasions, they stopped and searched him, but each time they failed to find narcotics in his possession. Finally, in April 1924, they succeeded in stopping him when he had several doses each of heroin and morphine. Agents in New Orleans, for a second example, received information of an illicit traffic in drugs occurring in the checkroom of the Louisville & Nashville Railroad station on Canal Street. They visited the station to interview railroad employees and stake out the checkroom, arresting a suspect after they discovered one ounce of morphine in a parcel he had checked.[18] Agents' surveillance operations, then, led to the arrests of narcotics offenders involved in nationwide trafficking schemes as well as those in possession of only a few doses.

Agents also worked undercover. Some investigations lasted only hours. In July 1924, for example, a pair of officers approached Arturo Gaeta, an Italian national who worked aboard a steamship that ran the circuit between Naples, Italy, and New York City. The officers posed as bootleggers from Connecticut who had come to New York to secure narcotics. After showing Gaeta $200, the officers received instructions to meet him in his stateroom aboard the ship, then docked at Pier 97 on Manhattan's West Side, later that same evening. As Gaeta prepared heroin to be lowered from the steamship into the officers' motorboat, one of the undercover agents gave a signal to officers in the area, who swarmed the boat. They arrested Gaeta and several accomplices and seized nearly 600 ounces of heroin.[19]

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[18] Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 8, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 21, 1924, Commissioner Letters NACP; Maury Klein, *History of the Louisville & Nashville Railroad* (Lexington: The University Press of Kentucky, 2003), 158-9.

[19] Letter from R. A. Haynes to President, Board of Parole, Department of Justice, September 17, 1924, Commissioner Letters NACP; *Los Angeles Times*, July 16, 1924; *New York Times*, July 16, 1924; *Chicago Daily Tribune*, July 16, 1924.

On other occasions, agents worked undercover for weeks and even months. They shielded their identities by moving through the large regions over which their offices had responsibility and by conducting operations in other areas. Maurice Helbrant, an agent who joined the Narcotic Division in 1924, claimed to have participated in cases "scattered over some one hundred and fifty cities and towns in thirty-six states." After 15 years with the Division, he retired and penned a memoir of his time working undercover. His stories reflect the range of the Division's operations. While some were relatively small, other campaigns lasted months and involved elaborate cover stories. In 1929, for instance, Helbant posed as a dealer from Miami, seeking a supply of morphine and cocaine in Tampa to sell in South Florida. He traveled with an informer, who posed as his wife, and he told his would-be supplier in Tampa that he had several employees selling narcotics on the streets of Miami. Helbrant's Tampa operation lasted nearly four months and netted the arrest of three well-connected traffickers in Florida.[20]

While agents engaged in surveillance and undercover operations, they depended more often on the participation of informers. Most of the Division's informers, according to Helbrant, were addicts willing to "inform on dope peddlers" in exchange for money or leniency.[21] Agents were especially likely to employ an informer when investigating minor cases, where they sought to catch a small-time peddler in the act of selling drugs. In July 1924, for one example, an agent and an informer together approached Rudolfo Ramirez in El Paso and succeeded in purchasing one tablet of morphine from him, at a cost of $1.50. On the evidence secured by this informer, Ramirez received a sentence of one year and one day at the Leavenworth Penitentiary.[22]

[20] Maurice Helbrant, *Narcotic Agent*, 2nd ed. (Arno Press: New York, 1981), 8-9, 69-71, 192-49.
[21] Ibid., 71-2.
[22] Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 9, 1924, Commissioner Letters NACP.

Officers also relied on informers, though, when they had reason to believe a suspect played a prominent role in trafficking. In March 1924, for instance, narcotic agents in New York City sent an informer with marked money to the apartment of Edward Jegle. Agents had good reason to suspect Jegle of widespread violations. He had previously served time for a narcotics offense, and officers believed he supplied a number of local peddlers with narcotics to sell on the streets. The informer succeeded in gaining entrance to Jegle's apartment and admitted the officers, who uncovered numerous cans and vials of heroin. Jegle received a relatively stiff four-year sentence in the federal penitentiary in Atlanta.[23]

In sum, narcotic agents' activities subjected Americans to a more exacting and consistent federal presence—one to which they had little exposure before narcotics law enforcement began. By the mid-1920s, one's behavior on city streets, one's activities at home, and one's conduct in a motor vehicle might all serve as the basis for federal attention and a prison sentence, as proved true for Heller, Jegle, and Kelly, respectively. What's more, agents' interest in violators selling single doses demonstrated well the depth of the Division's aim to stamp out narcotics trafficking and use altogether. Its message was clear. Though its limited size meant it could not catch every narcotics violator, it would bring the central state's power to bear against every violator it apprehended, no matter how small-scale the suspected violation.

II. The Cooperative Origins of the American Penal State

Agents' success in apprehending violators owed much to the work of municipal police officers and other local law enforcement personnel throughout the country, without whose

[23] Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 9, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, Department of Justice, December 31, 1924, Commissioner Letters NACP.; Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 1, 1924, Commissioner Letters NACP.

assistance they would have been spread even thinner than their small numbers required. These joint efforts took a number of forms. Local officers shared information with narcotic agents, for instance, pointing them toward a suspect rumored to be actively trafficking in narcotics. They also turned over arrestees to narcotic agents, both so that the suspects could be charged under federal law and so that narcotic agents might use the suspects as sources of information on individuals more deeply involved in smuggling narcotics into the country and selling them. Local officers also joined narcotic agents in their investigations, supplying manpower the Narcotic Division sorely lacked. Though federal policing may have been the novel experience for Americans, it was in the combined efforts of local law enforcement and agents of the Narcotics Division that they encountered the full force of the emerging penal state.

Local officers routinely tipped off federal authorities when they received information concerning drug-related activity. Abbott Stokes, for one example, received a sentence of 18 months in Leavenworth Penitentiary in May 1924, after narcotic agents successfully engaged an informer to purchase cocaine from him. Narcotic agents only knew to pursue Stokes after local authorities in Salinas, California, advised them that he was dealing in narcotics in that city. Multiple accounts in the letters the Narcotic Division sent opposing parole or pardon confirm the importance of local and state officers' tips to narcotic agents' arrests.[24] Better positioned through their relationships with community members and as a result of their patrolling city streets, municipal police and other local law enforcement officers provided narcotic agents with information that the Division's small number of agents could not have otherwise developed.

The cooperation between narcotic agents and local officers involved more than mere tips. In a considerable number of the Narcotic Division's cases, local law enforcement originally

[24] Letter from R. A. Haynes to President, Board of Parole, Department of Justice, undated (July or August 1924), Commissioner Letters NACP. For a second example, see letter from R. A. Haynes to President, Board of Parole, Department of Justice, August 9, 1924, Commissioner Letters NACP.

arrested a suspect and then turned the suspect over to federal authorities. In April 1924, for instance, a city detective in Tucson, Arizona, watched as Julio Miranda bought morphine from an unknown peddler. The detective arrested Miranda, and police in Tucson turned him over to federal agents for prosecution. The following month, city detectives in El Paso arrested 20-year-old Salvador Lugo. They had received information that he was dealing in narcotics, and they found heroin in his possession when they detained him. Division agents, to whom El Paso police handed Lugo, labeled him a "well-known dealer in narcotic drugs." Both Miranda and Lugo received sentences in Leavenworth Penitentiary.[25] The Division's records are rife with similar accounts, demonstrating the importance of investigations by local law enforcement to narcotic agents' success in apprehending Harrison Act violators.

While officers arrested Miranda and Lugo on drug charges, local law enforcement personnel regularly arrested suspects on charges unrelated to narcotics and then, having discovered drugs upon arrest, turned the suspects over to narcotic agents. Police officers in Hannibal, Missouri, for instance, arrested Arthur Davis in December 1923, on suspicion of having been involved with a "gang of thieves" active in the city. When they found him in possession of morphine, they alerted narcotic agents in Kansas City, one of whom traveled to Hannibal. As a result of the agent's work, Davis received a sentence of two years in Leavenworth for violating the Harrison Act. City detectives in El Paso, for another example,

[25] Letter from James E. Jones to President, Board of Parole, Department of Justice, July 24, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 9, 1924, Commissioner Letters NACP. Miranda received a 13-month sentence; Lugo one year and one day. Local forces even demonstrated a willingness to turn the same suspect over to federal authorities on multiple occasions. On February 20, 1924, several police officers in Kansas City, Missouri, conducted an investigation during which they successfully purchased capsules of morphine and cocaine from LeRoy Brown. They handed him over for federal prosecution, and he was charged with a Harrison Act violation and then released under bond. Kansas City police officers, receiving a tip from Brown's bondman that he planned to forfeit his bond and flee to Oklahoma, visited Brown. Once there, they saw him hand his wife a "small Vaseline bottle," which they found to contain morphine. They handed him over once again to narcotic agents for federal prosecution, and he was arraigned a second time for violating the Harrison Act. Letter from James E. Jones to President, Board of Parole, Department of Justice, July 15, 1924, Commissioner Letters NACP.

arrested Melcher Hernandez for vagrancy on May 6, 1924. Upon searching him, they found that he had heroin in his possession. They turned him over to federal officers for prosecution. Police officers in Johnson City, Tennessee, for yet a third example, arrested Earl Brown for vagrancy in July 1924. They found him in possession of cocaine and handed him to the Narcotic Division. Drug criminalization and cooperation between local and federal officers thus heightened the cost of otherwise low-stakes illegal activity and gave law enforcement officers incentive to use minor violations to unearth evidence of more serious crimes.[26]

Local police had a number of motivations for turning suspects over to federal agents. Lean staffing at the local level, a perception that agents had expertise in dealing with violators, and a belief that offenders received harsher punishment under federal law than local or state law all entered officers' calculations. While the Division's letters leave us to speculate on some of these motivations, they reveal the centrality of another. Local officers regularly turned over to agents suspects whom they hoped would prove useful in developing new information about smugglers and traffickers. Agents liked to turn police officers' arrests into information about higher-ups in the drug supply chain. In March 1924, for one example, Chicago police officers charged James Lee and William Beverley with possession, and they turned both over to the Narcotic Division. Narcotic agents used the testimony of Lee and Beverley to identify the two traffickers who had sold them drugs and to secure search warrants for those two traffickers' homes.[27]

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[26] Letter from R. A. Haynes to President, Board of Parole, Department of Justice, August 4, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 16, 1924, Commissioner Letters NACP; Letter from James E. Jones to President, Board of Parole, Department of Justice, August 16, 1924, Commissioner Letters NACP.

[27] Letter from James E. Jones to President, Board of Parole, Department of Justice, July 24, 1924, Commissioner Letters NACP; Letter from James E. Jones to President, Board of Parole, Department of Justice, July 10, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 10, 1924, Commissioner Letters NACP.

Local law enforcement and federal narcotic agents also conducted joint investigations. Officers and agents followed leads, conducted sting operations, and hired informers together. On August 12, 1922, for instance, narcotic agents and officers of the Chicago Police Department together visited a home located on Prairie Avenue in Chicago's South Side. There, they watched as Walter Spight left his room, from which there emanated "a strong odor of opium." They searched Spight's room and found large quantities of cocaine and morphine as well as opium and an opium pipe, which earned Spight a sentence of 18 months in Leavenworth. In January 1924, two police officers and a narcotic agent in El Paso used an informant to purchase morphine from Jesus R. Frausto, known locally as "Black Jesus." Together, the police officers and the narcotic agent hid nearby to watch the transaction. Their informant approached Frausto, who handed over a cube of morphine. The agent and two officers then arrested the suspect, and found him in possession of additional morphine. He received a sentence of one year and one day in Leavenworth Penitentiary. Narcotic agents and police officers in Louisville, Kentucky, did much the same when they pursued Ed Denenhauer, known locally as "Rabbi." They instructed an informer to approach Denenhauer, who eventually took flight—all under the watchful eyes of the agents and police officers. He received a sentence of one year and one day in the Atlanta Penitentiary.[28]

The Division's conviction rates provide one measure of its agents' success in detecting and bringing charges against narcotic offenders in the 1920s. In the last full fiscal year before Congress's 1914 narcotic acts, the total population in the government's three penitentiaries

[28] Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 17, 1924, Commissioner Letters NACP; Letter from James E. Jones to President, Board of Parole, Department of Justice, July 19, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, Department of Justice, July 28, 1924, Commissioner Letters NACP.

amounted to roughly 2,260 prisoners—for all crimes.[29] Eight years later, narcotic squads reported 2,707 violations of drug law by unregistered peddlers, dealers, and users.[30] They secured 1,328 convictions from among this group, a considerable uptick in incarceration relative to the pre-Harrison inmate population. That same year (1922), narcotic offenders at Leavenworth represented 49 percent of new inmates; they had accounted for only eight percent of new inmates two years earlier.[31] While these figures suggest agents' successes in apprehending drug offenders, Prohibition agents and the federal courts sent violators of the country's liquor laws to prison in much higher numbers.[32] The Division's actions, then, including its agents' quite regular cooperation with local law enforcement personnel, led to a small but increasing number of drug offenders serving time in the country's penitentiaries.

These conviction rates demonstrate that the American penal state gathered strength yet remained a work-in-progress during the 1920s. Importantly, though, they do not capture all of the ways in which that emerging apparatus subjected Americans to scrutiny. For, in addition to assisting in the Narcotic Division's campaigns, state officers and courts continued to process their own drug-related cases. Where they believed anti-narcotic statutes and law enforcement infrastructure were up to the challenge, federal officials wanted state officers and judges to

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[29] *Annual Report of the Attorney General of the United States for the Year 1913* (Washington: Government Printing Office, 1913), 296-7, 311-2, 322. Congress amended the Import and Export Act of 1909 in January 1914. It passed the Harrison Narcotic Act in December 1914. As of June 30, 1913, there were 880 prisoners in Atlanta, 1,160 in Leavenworth, and 220 in McNeil Island.

[30] "Unregistered" suspects refer to offenders who participated in narcotic commerce in one way or another without being properly registered with the federal government pursuant to the Harrison Act. Unlike importers, wholesalers, pharmacists, and physicians, street peddlers were not permitted to register under the Act. 38 Stat. 785.

[31] *Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1921* (Washington: Government Printing Office, 1921), 33-4; *Limiting the Production of Habit-Forming Drugs and the Raw Materials from which they are Made, Hearings on H.J. Res. 430 and H.J. Res. 453, Day 2, Before the House Comm. on Foreign Affairs*, 67th Cong. 38 (1923) (reading into the record wire from W.I. Biddle to the Hon. Stephen G. Porter, February 13, 1923; wire from J.E. Dyche to the Hon. Stephen G. Porter, February 13, 1923).

[32] In 1927, for instance, the federal courts handed out nearly 12,000 jail sentences to Prohibition offenses; only 4,278 Harrison Act violators received convictions. Because federal prisons lacked the capacity to hold 12,000 prisoners, the vast majority of these presumably served their sentences in local, county, and state lockups. *Report of the Commissioner of Prohibition for the Fiscal Year Ended June 30, 1927* (Washington: Government Printing Office, 1927), 13.

handle certain drug perpetrators—those whom they viewed as least significant. L.G. Nutt, the head of the Narcotic Division during the 1920s, wrote to a sheriff in Detroit concerning what he called "cases of minor importance." These, he believed, could be effectively handled in Michigan courts. Federal narcotic agents did not, in other words, completely supplant state and local officers in the handling of narcotics violations. Instead, they worked cooperatively alongside them, accepted their arrestees and their tips, and also carved out particular categories of acts that they wished for local and state officials to continue managing.[33] Local, state, and federal officers together laid the groundwork for the powerful and cooperative penal state that would soon emerge.

III. Narcotics Offenses, Fitness for Citizenship, Race, and Trafficking

As they subjected more and more Americans to policing, narcotic agents made key decisions about which offenders ought to bear the weight of their authority. As they considered whether and how to deploy their relatively scarce resources, agents characterized the suspects that most troubled them in two related ways. First, they described many of the suspects they arrested as moral degenerates with poor reputations in the communities in which they lived and worked. Narcotic officers in Kansas City, Missouri, for instance, used informers to purchase morphine from Sam Terino on two separate occasions in April 1924. In opposing his application for parole, the Division claimed Terino had developed a reputation as "an extensive dealer in narcotic drugs" and labeled him a "flagrant and persistent violator of the Harrison Narcotic Law." It raised similar arguments against the release of Ralph Jackson, also arrested in Kansas City after informers purchased morphine from him on two separate occasions in February

[33] Letter from L.G. Nutt to Honorable Delos G. Smith, September 3, 1924, Commissioner Letters NACP.

1924.[34] The Division occasionally opposed parole on the basis of a suspect's poor reputation even when it had no other basis on which to contest early release.[35] In such cases, it relied on characterizations of suspects by agents and local law enforcement officers.

Second, agents described narcotic offenders as unfit citizens and claimed their freedom to be incompatible with society's best interests.[36] When Charles Darrow, of Peoria, Illinois, for instance, applied for early release, the Division objected on the ground that it had proven Darrow a trafficker in morphine. Evidence he sold narcotics to an informer, it claimed, laid bare his lack of fitness for society.[37] Writing in response to the Parole Board's inquiry concerning John Anderson, arrested in Colorado after selling morphine to an informer, the Division recounted his criminal record, which included previous convictions for grand larceny and highway robbery, and noted his repeated insistence in his innocence. In the Division's opinion, Anderson's transgression rendered him "undesirable as a citizen," a charge it repeated twice.[38] As they worked to isolate offenders in federal penitentiaries, then, agents also deployed a rhetoric of fitness for citizenship that explained and supported their actions.

Which offenders did narcotic agents consider "undesirable citizens?" Perhaps as a result of thinking in terms of national belonging, agents paid particular attention to non-white suspects.

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[34] Letter from James E. Jones to President, Board of Parole, July 15, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, July 16, 1924, Commissioner Letters NACP. Female offenders also fared poorly when the Division described their characters. While it turned its attention to a relatively small number of women, the Division used pointed language to impugn their decency. When it recommended against parole for Marguerite Davis, arrested in El Paso and known in that community for associating with underworld figures, the Division expressly labeled her a "woman of low character" when it opposed her early release. It made the same claim against another Texan, Lottie Harris, a repeat offender with a reputation as a narcotic dealer. Letter from James E. Jones to President, Board of Parole, July 24, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, July 31, 1924.
[35] Letter from R. A. Haynes to President, Board of Parole, July 31, 1924; Letter from R. A. Haynes to President, Board of Parole, August 1, 1924, Commissioner Letters NACP.
[36] See, for one example, letter from R. A. Haynes to President, Board of Parole, July 9, 1924, Commissioner Letters NACP, in which the Division labels the suspect's status as an addict as one factor among several that would make his early release "incompatible with the best interests of society."
[37] Letter from R. A. Haynes to President, Board of Parole, July 9, 1924, Commissioner Letters NACP.
[38] Letter from James E. Jones to President, Board of Parole, July 22, 1924, Commissioner Letters NACP.

A suspect's race, that is, proved one basis on which the Division might express scorn. Although evidence is slim, the importance of race to agents' calculations can be espied by assessing how the Division proceeded against addicts and users, as opposed to traffickers, who were non-white. The Division's officers only rarely took the time to oppose parole for an addict against whom it had no evidence of commerce. They described addicts who did not make a profit from drugs, at least on occasion, as objects worthy of pity. A remarkable number of the instances on which the Division opposed parole on this ground, though, involved an allegation against a non-white suspect. In July and August of 1924, for instance, the Division wrote to oppose parole for Cruz Callero, Francisco Tarrago, and Carlos Gurolla, all described as having Mexican parentage and all found in possession of small quantities of drugs. In each instance, the Division acknowledged that the suspect had not trafficked in narcotics and that it ordinarily did not oppose parole in such situations. Nevertheless, the Division recommended against parole for all three.[39]

While the Division also occasionally argued against early release for some white addicts, it turned its attention to drug users—as opposed to addicts—*only* when those users were non-white.[40] Between July and December 1924, the Division opposed early release for five prisoners against whom it alleged neither addiction nor trafficking. All five were of Chinese descent. It recommended against parole for Ah Ming, Harry Quong, and Eng Fon, all arrested in Seattle on suspicion of smoking opium. It also opposed parole for Ching Ko, for possession of yen shee, and Chin Fung, for possession of smoking opium. In each case, the Division admitted it had no evidence the suspect had dealt narcotics and made no allegation that the suspect was an addict.

[39] Letter from R. A. Haynes to President, Board of Parole, July 9, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, re: Tarrago, August 28, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, re: Gurolla, August 28, 1924, Commissioner Letters NACP.

[40] There is evidence to suggest the Division turned a searching eye toward ethnic minorities—in repeated references to a prisoner's Italian heritage, for instance. Such evidence, though, is diffuse and appears but occasionally, making fraught any attempt to draw more general conclusions about how ethnicity functioned in the Division's enforcement of federal narcotics law against whites.

Instead, it claimed the Board should deny parole because the circumstances of these prisoners' arrests indicated their intention to violate the law. The Division charged that, by attempting to flee or to hide evidence, these men had proven that they understood the requirements of federal narcotics law and had deliberately disobeyed them. They had become "willful" violators.[41] During this same period, the Division never opposed parole for a white user on this ground.[42] Their focus on non-white suspects for such crimes suggests their investigations may have had much to do with confirming their preexisting views of racial fitness.

While agents' effort to cull unworthy citizens proved race-inflected, they paid at least as much attention to the line between commerce and use as to the line between non-white and white. When assessing a suspect's alleged violation, agents showed the most deference to physicians caught in the Division's web. During the 1920s, agents charged far more physicians and druggists than street peddlers, addicts, or casual users. The Division described the vast majority of these offenses, though, as "technical," a category that included delinquent registration, failure to provide required information, and late tax payments. Such violations numbered in the thousands annually. In 1921, for example, officers uncovered nearly 38,000 "technical" violations of the Act. It resolved all of these violations through fines, imposing a small penalty of 25 percent of the original tax bill for delinquent registration. Importantly, though, it also allowed a collector to excuse the delinquency if the delay "was due to a

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[41] Letter from R. A. Haynes to President, Board of Parole, re: Ming, July 30, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, re: Quong, July 30, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, re: Fong, July 30, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, re: Ko, July 30, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, re: Fung, August 9, 1924, Commissioner Letters NACP.

[42] Persons of Mexican and Chinese descent figure prominently in this chapter. Given the volume of data and the occasionally spotty availability of some records, I have endeavored to determine race and national origin by analyzing prisoner names. While I believe it likely the Division also applied differential standards for use and addiction to African Americans, I am unable to infer race from names in their case.

reasonable cause and not to willful neglect."[43] Though agents accused a large number of physicians and druggists of violations, the greatest share of these charges involved relatively low-stakes claims and small penalties—often under one dollar.

Physicians did not necessarily share the Division's view of these charges as minor. At least some bemoaned that the Act focused in part on the medical profession and made its members potentially liable for what often amounted to inadvertent violations. In November 1924, for one example, a physician in Philadelphia complained in the pages of the *Journal of the American Medical Association* that a regional Collector of Internal Revenue had recently imposed on him a penalty of less than one dollar for his failure to report an address change. Though he supported the Act, he identified several of its requirements as "petty and annoying" and decried their tendency to cast physicians as "potential miscreants." He also suggested that keeping aware and following all "the detailed and insignificant regulations" of the Act would prove impossible.[44] From the perspective of physicians charged with these relatively minor violations, then, the Act represented both a bother and an aspersion on the profession.

Not every charge against these physicians and druggists, though, involved a technical offense. The same year it reported 38,000 minor offenses by registered parties, the Division

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[43] *Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1921* (Washington: Government Printing Office, 1921), 33-4; Treasury Department, *Regulations No. 35 Relating to the Importation, Manufacture, Production, Compounding, Sale, Dispensing, and Giving Away of Opium or Coca Leaves* (Washington: Government Printing Office, 1919), 31. In instances where a false or fraudulent return was "willfully made," the regulations called for a heightened penalty of 50 percent the original tax bill.

[44] "The Harrison Narcotic Law," *Journal of American Medical Association* 83, no. 18 (Nov. 1, 1924): 1450-1. In another demonstration that physicians feared inadvertent violation, two Jacksonville physicians warned doctors not to hand out blank prescription forms in lieu of formal business cards, which they explained might constitute a violation of the Harrison Act. "Guarding Against Violation Of The Harrison Act," *Journal of American Medical Association* 82, no. 24 (June 14, 1924): 1984. While the American Medical Association supported the Harrison Act, its members complained about the number of requirements it placed on them. They complained, too, about the tax they were forced to pay to dispense narcotics. Physicians also complained when the Division restricted their prescription power, and the AMA began to "waiver in its support of federal intervention in medical affairs" as a result of this development. Musto, *The American Disease*, 54-9, 182-9; "Protest Increase In Tax Under Narcotic Law," *Journal of American Medical Association* 72, no. 15 (Apr. 12, 1919): 1097; "Proposed Legislation Reducing Federal Narcotic Tax," *Journal of American Medical Association* 80, no. 7 (Feb. 17, 1923): 477-8.

recorded 1,307 physician and druggist violations "of greater significance." In pursuing these cases, too, the Division demonstrated a greater willingness to settle or drop charges against physicians and druggists than against unregistered violators. Though it secured convictions against nearly half the peddlers and users it charged that year, the Division won only 255 convictions against physicians and druggists charged with a serious offense—less than a quarter. It accepted 286 settlement offers and dropped 328 of these cases, which meant that it prosecuted only a small share of these violations.[45] The Narcotic Division did indeed pay some attention to physicians and druggists; it expended little effort, though, to see these violators behind bars.

The Division and its agents moved most forcefully against physicians when confronted with evidence that they dispensed narcotics to addicts and users solely to line their own pockets. When an informer purchased morphine from Dr. A. W. Findley, a physician in North Georgia, to satisfy his craving for the drug, the Division opted to pursue the case. And, when Findley sought a pardon after his conviction, the Division recommended against it, claiming that Findley had sold drugs to a large number of addicts. When the Division received similar evidence against Dr. A. B. Reeves, of Fort Worth, it requested that the U.S. Attorney in Dallas prosecute Reeves. It laid bare its rationale for doing so. "It is not the practice of this office," the Division's officer explained, "to show leniency in cases where these elements are involved, but to recommend vigorous prosecution."[46]

Division officials and other policymakers regarded physicians who sold narcotics to satisfy addicts' cravings as dangerous. In his letter recommending that Dr. Griffin be prosecuted, for instance, one official claimed that "persons of [Griffin's] class are a menace to society and a

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[45] *Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1921* (Washington: Government Printing Office, 1921), 33-4.

[46] Letter from R. A. Haynes to Mr. James A Finch, Attorney in Charge of Pardons, Department of Justice, August 18, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to Narcotic Agent in Charge, El Paso, Texas, August 2, 1924, Commissioner Letters NACP.

constant source of annoyance to the Federal officers." Others went further. Before Congress, one Department of Justice lashed out at the less "competent," "lower-class" physicians who remained willing to risk legal consequences and prescribe narcotics "for a little money."[47] To the officials charged with enforcing the Harrison Act, doctors who risked imprisonment to sell drugs to addicts represented the dregs of the medical profession.

Agents cast an even less deferential eye on the unregistered persons they charged with selling narcotics. Officials described unregistered persons who "commercialized in" narcotics as the group most deserving of censure. When the Division received inquiries from the Board of Parole concerning a prisoner, evidence that he or she had trafficked in narcotics proved the factor it cited most frequently in opposing parole. When the Division received an inquiry concerning Robert Barnes, for example, whom city detectives in Tucson had arrested and turned over to narcotic officers, it advised the Board of Parole to reject the request because of Barnes's "commercializing." Similarly, when it responded to a request concerning Raymond Wilkes, whom agents in Los Angeles had watched sell heroin in July 1924, it recommended against granting parole solely in view of Wilkes' "commercializing." It even acknowledged it had "no additional information relevant to this individual."[48] A suspect's commerce in narcotics alone proved a sufficient basis for the Division to oppose early release.

The Division reserved special condemnation for those who trafficked in narcotics but did not appear to be users or addicts. Its agents identified such suspects as commercializing "only for financial gain" and compared them unfavorably against suspects who trafficked to feed their

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[47] Letter from James E. Jones to Honorable Henry Zweiful, July 29, 1924, Commissioner Letters NACP; *Limiting the Production of Habit-Forming Drugs and the Raw Materials from which they are Made, Hearings on H.J. Res. 430 and H.J. Res. 453, Day 2, Before the House Comm. on Foreign Affairs*, 67th Cong. 51, 58 (1923) (testimony of Assistant Attorney General John Crim).

[48] Letter from R. A Haynes to President, Board of Parole, August 24, 1924, Commissioner Letters NACP; Letter from James E. Jones to President, Board of Parole, July 24, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, August 9, 1924, Commissioner Letters NACP.

addictions. When the Board of Parole sought its opinion of Jesus Prieto, arrested in El Paso with heroin concealed in his hat, the Division recommended against his release because the prisoner, "who [was] not an addict, was trafficking in narcotic drugs for monetary gain only." When agents in Cleveland uncovered a trafficking operation organized by James Kirk, the Division exhorted the Parole Board to deny Kirk's request for release in part because he was "not addicted to the use of narcotic drugs" and "engaged in the illicit traffic solely" for "financial benefit."[49] The Division thus distinguished between dealers who trafficked for financial gain, on the one hand, and those who did so because of addiction, on the other. It soundly condemned the former.

Which is not to suggest the Division showed any leniency to those who sold drugs to support their addictions. It occasionally used less-inflammatory language to describe such dealers; nevertheless, the Division often used prisoners' admissions of addiction—or its agents' suspicions—as a ground on which to oppose parole. In the spring of 1924, for example, narcotic officers in Los Angeles gave an informer $10 to purchase morphine from James Finley. Finley led the informer to an alley, where he retrieved a stash of morphine he had hidden under a board. The Division opposed Finley's parole on his admission that he was an addict. It did the same when the Board of Parole sought information concerning Al Peterson of Omaha, Nebraska. Though Peterson appears never to have confirmed agents' suspicions that he suffered from addiction, the Division mentioned his criminal record and his addiction in its letter opposing his release.[50] While the Division may have viewed suspects who trafficked for profit as particularly abhorrent, its agents also took a negative view of those who commercialized to feed addictions.[51]

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[49] Letter from James E. Jones to President, Board of Parole, August 18, 1924, Commissioner Letters NACP.
[50] Letter from James E. Hones to President, Board of Parole, August 11, 1924, Commissioner Letters NACP; Letter from R. A. Haynes to President, Board of Parole, August 19, 1924, Commissioner Letters NACP.
[51] Particularly when dealing with Chinese and Mexican violators, the Division proved willing to oppose parole if it had evidence the suspect possessed narcotics for habitual, or even casual, use. It also often opposed parole for suspects who trafficked for profit only. Together, the two arguments offered the Division room to oppose early release even when it could prove neither trafficking or addiction—a tactic it employed only once in the last six

Narcotic agents thus viewed their investigative actions as doing important work to purge racial and ethnic minorities as well as morally suspect whites from the national body. That the Division and its agents saw their efforts in this light helps explain their treatment of registered suspects who committed "technical" violations and physician-addicts who agreed to seek treatment: Both groups were comprised of redeemable citizens. Conversely, traffickers for profit, whether registered or unregistered and regardless of race, had made clear their unsuitability. The Division's language also suggests what lay at stake when agents opposed parole for non-white addicts and users: It used drug convictions to describe these prisoners, many of them legal citizens of the U.S., as undeserving of that honor. In their hands, anti-narcotic law became a means to sort out deserving from undeserving citizens, expel the most morally suspect among them, and reconsolidate a race-inflected understanding of citizenship in an era when formal belonging had become more democratic and those claiming it more diverse.

IV. Using the Fourth Amendment to Circumscribe Federal Investigative Power

Given the variety of measures agents took to uncover Harrison Act violations and the manner in which they cast offenders as outside the body politic, resistance from suspects may have been inevitable. In the years following passage of the Act, Americans had to accommodate a new set of criminal laws and adjust to new exercises of power. These changes led a number of

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months of 1924. In April, agents received a tip that E. M. Trujillo had narcotics in his home in the Mexican-dominated Belvedere neighborhood of East Los Angeles. Agents claimed to have found Trujillo attempting to hide morphine. The Division found no evidence of trafficking. It advised that, if the Board found Trujillo to be an addict, it would not object to his parole "upon completion of a cure." If the Board found Trujillo not to be an addict, it claimed it "probable that it was his intention to sell the drugs." In that event, it suggested the Board refuse his request. In the Division's estimation, Trujillo had to be an addict or a trafficker; either alternative justified his incarceration. Trujillo's case illustrates how the Division could bring two arguments against parole for unregistered violators to bear even when it could prove neither—and its perhaps greater willingness to do so against some categories of violators. Letter from R. A. Haynes to President, Board of Parole, September 23, 1924, Commissioner Letters NACP; George J. Sanchez, *Becoming Mexican American: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900-1945* (New York: Oxford University Press, 1995), 3, 75.

suspects to view their detentions as contravening important limits on the federal government's authority over its citizens. They turned to the courts for relief. While some defendants challenged Congress's power to pass a control regime and encouraged the courts to invalidate parts or all of its drug laws, others focused on how agents enforced these laws. Faced with federal officers' new power and investigatory assertiveness, these defendants cited the Fourth Amendment and its guarantee against unreasonable searches and seizures, and they sought judicial protection of Americans' long-cherished right to remain secure in their persons, houses, and effects.[52] If the Division and its agents used drug law to exclude some offenders from citizenship, these suspects and the courts that heard their challenges took narcotic trials as opportunities to consider what privileges attached to national belonging.

Litigants' and jurists' turn to the Fourth Amendment marked a break from the past. For nearly 100 years after its adoption, the Fourth Amendment reached the Supreme Court on only the rarest of occasions. In the decades just before Congress passed the Harrison Act, though, the central state's expansion of federal criminal law had raised the Amendment's profile. A number of cases invoking the Fourth Amendment had come before the nation's highest court during this period, offering it several occasions to consider the Amendment's parameters.

As the Court interpreted it, the Fourth Amendment codified fundamental principles of liberty and represented a bulwark against government encroachment on citizens' (and residents') individual freedoms. Its origin lay in hard-fought battles in England and the Colonies. In his

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[52] While this chapter suggests that jurists' resolution of narcotics offenders' constitutional challenges in the 1920s provided many of the pivot points that determined the scope and shape of Americans' Fourth Amendment rights at the time, other scholars have criticized the effect the late-twentieth-century War on Drugs has had on the depth of Fourth Amendment protections. Susan F. Mandiberg, "Marijuana Prohibition and the Shrinking of the Fourth Amendment," *McGeorge Law Review* 43 (2012): 23-62; Kenneth C. Betts, "Fourth Amendment—Suspicionless Urinalyis Testing: A Constitutionally 'Reasonable' Weapon in the Nation's War on Drugs?," *Journal of Criminal Law & Criminology* 80 (1990): 1018-51; Thomas Regnier, "The 'Loyal Foot Soldier': Can the Fourth Amendment Survive the Supreme Court's War on Drugs?," *University of Missouri Kansas City Law Review* (2004): 631-68; and Stephen A. Saltzburg, "Another Victim of Illegal Narcotics: The Fourth Amendment," *University of Pittsburgh Law Review* 48 (1986): 1-26.

1886 opinion in *Boyd v. United States*, Justice Joseph Bradley recounted eighteenth-century debates over general warrants and writs of assistance that, he claimed, led English courts and lawmakers to develop safeguards against unreasonable searches and seizures. As the Court reiterated eleven years later, the framers intended the Amendment to perpetuate these principles of "civil liberty," secured "in the mother country only after years of struggle." Bradley described these protections as guarding citizens' individual freedoms—their "right of personal security, personal liberty, and private property"—rather than as representing a comprehensive set of limitations on government action. A choice of rhetoric, perhaps, but one consonant with the liberal and laissez-faire ideologies to which many of the justices subscribed. Later courts would describe the Fourth Amendment in similar terms. In 1915, for instance, the Court concluded that the Amendment codified the "fundamental law" that "every man's house is his castle."[53]

In bringing their claims to the federal courts, narcotic suspects helped transform the Fourth Amendment from one of the least-discussed provisions of the Bill of Rights into one of its "most prominent and litigated."[54] The adoption of the Eighteenth Amendment and Congress's foray into narcotics criminalization together vastly expanded the scope of federal criminal law and ushered in a period of heightened attention to the Fourth Amendment in the federal courts.[55]

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[53] *Boyd v. United States*, 116 U.S. 616, 625-6, 630 (1886); *Bram v. United States*, 168 U.S. 532, 544 (1897); *Weeks v. United States*, 232 U.S. 383, 391 (1913) (internal quotation marks omitted). According to Bradley, general warrants allowed English law enforcement officials to search private houses "for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel." Writs of assistance allowed revenue officials in the colonies to conduct broad searches for smuggled goods. Bradley was not the only late-nineteenth-century jurist to be concerned with questions of personal privacy. Samuel Warren and Louis Brandeis, borrowing a phrase from Thomas Cooley, argued that Americans had a right to be "let alone." Though their focus was on private actors who interfered with others' right to privacy, rather than state interference, they nonetheless raised a forceful case for the "desirability – indeed of the necessity – of some" protection for that right. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (December 1890): 193-220, 196.

[54] Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (Baltimore: The Johns Hopkins Press, 1937), 106

[55] Lasson, *The History and Development of the Fourth*, 106; John P. Bullington, "Constitutional Law—Searches and Seizures—A New Interpretation of the Fourth Amendment," *Texas Law Review* 3 (June 1925): 460-72, 460; Comment, "Search, Seizure, and the Fourth and Fifth Amendments," *Yale Law Journal* 31 (March 1922): 518-22, 518 (praising the courts' "vindication" of Americans' right to be free of government intrusion in their homes, a

As one gauge of this surge in cases, the newly-formed Bureau of Narcotics published a digest of decisions under the Harrison Act and "related statutes" in 1931. Its discussion of "Searches and Seizures" covered 46 pages and described 98 separate cases—nearly all from the 1920s. The decade represented a period of flux in Fourth Amendment jurisprudence, in other words, as jurists, federal officials, and criminal defendants worked to determine how much power narcotic agents wielded and what right the U.S. public had to be free of their intrusions.[56]

Narcotics suspects raised issues concerning their constitutional right to privacy in the same years that the U.S. Supreme Court began to demonstrate a separate interest in the civil liberties guaranteed by the Fourteenth Amendment. Following the Court's 1833 decision in *Barron v. Baltimore* that the limits found in the Bill of Rights bound only the federal government, the states remained free to enact laws that did not comport with the Court's interpretation of those limits. In 1925, though, the Court began to reverse course. In *Gitlow v. New York*, which involved a First Amendment challenge to a New York anarchy statute, the Court suggested that the Fourteenth Amendment's due process clause might have incorporated First Amendment protections to guard against state actions. While the Court would continue to incorporate other provisions of the Bill of Rights over the next several decades, *Gitlow* revealed the Court's concern with government overreach in the definition and punishment of crimes—subjects of clear importance as it considered Fourth Amendment challenges.[57]

The parties involved in, and records of, the trials in which defendants raised Fourth Amendment challenges offer some evidence of agents' targeting of racial minorities and ethnic

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development it claimed to have "been partly occasioned by activities of various over-zealous federal agents in the enforcement of the Eighteenth Amendment.").

[56] U.S. Treasury Department, Bureau of Narcotics, *Digest of Court Decisions Under the Harrison Narcotic Law and other Related Statutes for Narcotic Agents and Inspectors, United States Attorneys, and Others Concerned* (Washington: Government Printing Office, 1931), 209-57. Though a fair number of these cases involved unlawful liquor production or sales, as many dealt with challenges raised in the context of narcotic prosecutions.

[57] *Barron v. Baltimore*, 32 U.S. 243 (1833); *Gitlow v. New York*, 268 U.S. 652 (1925).

whites. They also suggest these defendants' refusal to accept their exclusion from the benefits of U.S. citizenship and residency. In the paragraphs that follow, Italian and Chinese surnames appear frequently. So, too, do allegations that officers entered homes or businesses after smelling opium fumes or at the sight of the "first Italian" in a New York tenement. While the defendants who raised Fourth Amendment challenges represented only a small subset of all narcotics suspects, the prominence of specific groups in the historical record and the ways evidence of race and national origin entered agents' and courts' deliberations suggests that attitudes about certain Americans informed how government actors enforced the Harrison Act.

Two types of Fourth Amendment arguments predominated among individuals charged with narcotic offenses. First, when government agents acted pursuant to warrants, suspects challenged the warrants' sufficiency as well as the adequacy of the information on which they were based. Many of these warrant contests involved agents' search of private businesses or dwellings, a practice central to the courts' understanding of the Fourth Amendment. Second, when agents conducted searches without seeking the authorization of a judge or commissioner, defendants contended that they had overstepped their bounds and should have obtained a warrant. Both arguments asked the courts to act as interlocutors between the Division and the general public, and both sought to formalize a set of constraints on agents' efforts to end the narcotics traffic.

Narcotic suspects who questioned the sufficiency of a warrant proved more successful in using the Fourth Amendment to ward off or challenge a conviction. Throughout the decade, a steady line of criminal defendants argued that officers had failed to provide critical information in their warrant applications and that the resulting warrants were, as a result, defective. The Supreme Court's decision in *Weeks* mandated that, if they accepted the defendants' arguments,

courts hearing such challenges had to exclude evidence uncovered in the searches.[58] As a practical matter, then, decisions in these cases often determined defendants' fates. More than that, jurists' openness to warrant challenges indicates that their attention to the individual liberties involved in Fourth Amendment cases ran highest when agents contemplated searching the private offices or dwellings of suspects they had not yet placed under arrest. To the federal courts, entering the private space of a citizen to unearth evidence of wrongdoing when an officer lacked sufficient evidence to make a direct arrest raised the specter of a federal hunting expedition—exactly the sort of government search the framers developed the Fourth Amendment to prevent.

Defendants in narcotic trials successfully challenged warrants when agents failed to detail either the persons they suspected or the basis of their suspicion. M. A. Woods, a dentist in Columbia, South Carolina, accused Agent J. H. Wannamaker of violating the Fourth Amendment when he applied for a warrant to search Woods's office based only on an allegation that it had served as the site of "a fraud upon the revenue." A U.S. Commissioner issued the warrant, though Wannamaker's application failed to name Woods or his alleged crime. Wannamaker searched Woods's office and found a marked bill an informer had used to purchase narcotics from Woods. On that evidence, the trial court convicted Woods and sentenced him to 18 months in the federal penitentiary in Atlanta. The appellate court, though, reversed. It held the warrant materially defective because it failed to describe, among other things, "what fraud was being committed or by whom." Such a warrant, it concluded, gave the person whose premises were

[58] In *Weeks*, the Court adopted the exclusionary rule, which rendered evidence obtained through unlawful searches inadmissible against the suspect. It reasoned that, "if letters and private documents" could "be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and … might as well be stricken from the Constitution." 232 U.S. at 393.

searched no basis to understand the "object or purpose" of the search.[59] From the perspective of the person searched, in other words, the warrant appeared to have little foundation and to authorize, with few limitations, a search of private property. Such government action violated the Fourth Amendment.

Other defendants raised similar challenges during the decade. In April 1924, three Chinese-descended defendants won exclusion of evidence that agents had found opium in their homes. In securing warrants to search their homes, these defendants argued before a federal court in San Francisco, Agent J. W. Smith had baldly asserted that they had committed a crime and claimed he would find opium in their homes. The court invalidated the warrants and found that Smith had provided too little factual information to back up his claims. Across the country, three other Chinese-descended defendants made a similar argument before a federal court in Massachusetts. There, the agent claimed to have smelled opium coming from a building in Springfield. In securing a warrant, the defendants contended, he incorrectly identified one suspect as living in the building and failed to state the rooms he intended to search. As a result, the court held that the agent's warrant did not describe "the place to be searched" with sufficient particularity. Four years later, another suspect challenged the warrant under which officers in Boston searched his Back Bay apartment. There, the court invalidated the warrant because it failed to describe, "even in the most general way, the property to be seized."[60] The courts required agents to comply with the formal requirements of the Fourth Amendment when they sought warrants, and they invalidated warrants founded on inaccurate or incomplete information.

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[59] *Woods v. United States*, 279 F. 706, 709-10 (4th Cir. 1922); *The State*, May 20, 1921; *The State*, June 15, 1921; *Charleston Evening Post*, June 15, 1921; *Charleston Evening Post*, June 18, 1921; *The State*, June 19, 1921; *The State*, February 9, 1922.

[60] *United States v. Lai Chew, et al.*, 298 F. 652, 653-4 (N.D. Cal. 1924); *United States v. Chin On*, 297 F. 531, 532-3 (D. Mass. 1924); *Rice v. United States*, 24 F.2d 479, 480-1 (1st Cir. 1928). In *Lai Chew*, the court held that, to suffice, an agent's application must include "the facts tending to establish the grounds of the application or probable cause for believing that they exist."

As they saw it, the Constitution guaranteed U.S. citizens and residents a sphere of privacy free from government intrusion, even when agents intruded to find evidence of narcotics law violations. Suspects insisted on this right, and federal courts proved receptive to these claims.

Federal courts reacted differently, however, when agents could show they had acted reasonably when they detained and searched suspects. Richard King, a decorated war veteran in Seattle, for example, fought his conviction and six-year sentence by challenging officials' warrantless search of his vehicle. Early one April morning in 1923, Agent A. B. Hamer, working with Seattle detectives, stopped King as he drove toward Seattle. They found $20,000 worth of opium in King's car, hidden in sacks in the back seat and under the engine hood. King contended that Hamer's search violated the Fourth Amendment. Hamer claimed to have had information of King's involvement in trafficking; to have known a boat carrying opium had arrived in town; and to have stationed himself to watch for King that evening. Under these circumstances, the trial and appellate courts decided, "the officers had reliable information and cause to believe" King was committing a felony and so did not run afoul of the Constitution when they searched King without a warrant.[61]

The decision in *King* made clear the courts' willingness to uphold convictions against individuals whom agents had a good (and articulated) cause to arrest. Appellate courts denied challenges when, for instance, agents claimed to have had a suspect under surveillance for over a month and to have arrested him only after witnessing him twice approach a drug store "notorious as a rendezvous for drug peddlers." At least one federal court found officers' entry into a laundry, after smelling opium fumes wafting from its windows, enough to demonstrate a reasonable belief that those inside were committing felonies. And several found that agents had

[61] *King v. United States*, 1 F.2d 921 (9th Cir. 1923); *Seattle Times*, April 16, 1923; October 23, 1923; November 5, 1923.

acted properly when they used informers to purchase morphine and then entered the suspects' homes, placed them under arrest, and searched their premises for evidence.[62] At least as interpreted by most federal courts, the Fourth Amendment allowed agents considerable leeway to conduct warrantless searches of suspects against whom they had already collected evidence.[63]

Suspects fared somewhat better when they challenged a warrantless search not by contending the agents should have obtained a warrant, but instead by arguing that agents had exceeded their authority to act. Guiseppe Ganci, a Manhattan barber, made such a claim after two agents arrested him and searched his home in November 1921. The pair of agents had watched as a known trafficker entered the building in which Ganci lived and worked. After they apprehended the suspect and found him in possession of heroin, the agents returned to the building and searched every floor for the trafficker's source of supply. When they entered Ganci's apartment, the officers grabbed him and demanded to know where they would find narcotics in his home. They based their suspicion on the fact that Ganci was the "first Italian" they found in the building. At the agents' threats, Ganci turned over a box that contained heroin and morphine. Though the trial court allowed the prosecutor to offer the evidence, the appellate court held that the agents had been on an impermissible "roving expedition." While agents might have authority to search a suspect incident to his arrest, they overstepped "constitutional

[62] *Green v. United States*, 289 F. 236, 237 (8th Cir. 1923); *Lee Kwon Nom v. United States*, 20 F.2d 470, 471-2 (2d Cir. 1927); *Yip Wah v. United States*, 8 F.2d 478, 479 (9th Cir. 1925); *Mattus v. United States*, 11 F.2d 503, 504 (9th Cir. 1926); *Appell v. United States*, 29 F.2d 279 (5th Cir. 1928).

[63] Not every court agreed that an informer's purchase of narcotics rendered a search warrant unnecessary. Against this backdrop of judicial deference, one court threw out evidence gathered in a search following agents' use of informers to secure evidence of guilt. *Henderson v. United States*, 12 F.2d 528, 528-30 (4th Cir. 1926). Narcotic suspects had little success using the decision in *Henderson* to broaden Fourth Amendment protections against searches. See *Taylor v. United States*, 55 F.2d 58, 59 (4th Cir. 1932); *U.S. v. Solomon*, 33 F.2d 193, 195 (D. Mass. 1929); *U.S. v. Pearson*, 293 F. Supp. 1334, 1338 (D. Minn. 1968)

safeguards" when they entered a person's home with no articulable suspicion he had committed a felony.[64]

Even when agents had legal authority to arrest a person and search his or her immediate surroundings without first obtaining a warrant, they could not use that authority to search other places for evidence. When Agent Ralph Oyler sent his men to search the home of Frank Agnello, after the surveillance operation that began this chapter, they found a can of cocaine in Agnello's bedroom. When federal prosecutors attempted to admit the cocaine into evidence at trial, Agnello raised a Fourth Amendment challenge. He noted that the agents had to walk several blocks between the site of his arrest and his home, and he contended that the search of his home could therefore not be justified as incident to his arrest. The U.S. Supreme Court agreed. It held that the Fourth Amendment prohibited agents from arresting a suspect in one place and then making a warrantless search of another place, however closely related. "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws," it noted. "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant."[65]

Agnello made headlines. It represented a constraint on how far officers could proceed with their investigations without first applying to a federal judge or commissioner. The *New York Times* explained that, after the decision, it would "be impossible for Government agents charged with enforcement of the prohibition, narcotic or other laws to carry on a legal search of premises and make seizures in a home without a warrant unless an arrest has been made on the

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[64] *Ganci v. United States*, 287 F. 60, 62-4 (2d Cir. 1923); *New York Times*, January 19, 1923. Another defendant in a narcotic trial, John Poulos of Toledo, Ohio, also succeeded in having evidence secured in a warrantless search excluded. In that case, officers search his home without a warrant on three separate occasions in one evening—the first several hours before his eventual arrest. The federal court that heard his appeal claimed it "clear" that all three searches violated the Fourth Amendment. *Poulos v. United States*, 8 F.2d 120, 120-1 (6th Cir. 1925).
[65] *Agnello*, 4269 U.S. at 32-33.

premises."[66] While before the case agents believed themselves authorized to search broadly following an arrest, *Agnello* substantially circumscribed that power.

Congress's increase in federal policing subjected ever larger numbers of Americans to the watchful eyes of the central state, and some suspects responded by challenging how federal officers enforced Congress's new drug regime. They won their cases when they could describe agents' investigations as lacking in detailed suspicion, as invasions of private property without appropriate prior authorization, or as playing fast and loose with their limited authority to arrest and search without a warrant. In bringing their challenges, narcotic suspects reasserted their right to a sphere of liberty and privacy free from government intrusion. They claimed one of the prerogatives of U.S. citizenship, in other words, even as agents conceptualized their efforts as an exercise in culling poor citizens from the national body. They also helped convert the Fourth Amendment into a check on how much authority narcotic agents wielded over suspects.

V. Formalizing Cooperation among Local, State, and Federal Officers

As the 1920s gave way to the 1930s, criticism of agents' tactics indirectly prompted federal officials to deepen their commitment to use intergovernmental cooperation to apprehend and punish Harrison Act violators. Suspects charged after an aggressive investigation by federal agents proved not to be the only source of complaints about the Narcotic Division's activities. After more than a decade of enforcement, physicians had grown tired of what they viewed as agent overreach and repeated a list of grievances concerning the technical Harrison Act violations of which many had been charged. When Congress began deliberating a pair of bills to amend the federal government's approach to narcotics control, in the spring of 1930, representatives of the AMA saw an opening to address its members' complaints. Rather than

[66] *New York Times*, October 13, 1925.

recommend that Congress relax the law's provisions that bound physicians, however, it proposed instead that Congress require federal narcotics officials to cooperate with state authorities. It hoped this state-federal collaboration would facilitate the efforts of state medical boards to revoke the licenses of medical professionals involved in illicit narcotics commerce. Removing the worst physician-offenders from practice, the AMA believed, might reduce agents' focus on those physicians who remained. Despite that intention, federal officials seized on the AMA's provision and pushed for ever-more comprehensive investigation of drug crimes—now, with a mandate to partner with the very local and state officials who had already proven so critical to agents' success. The future promised even more intrusion by the penal state into Americans' private lives.

Pennsylvania's Stephen Porter, then in his tenth and final term as a member of the House of Representatives, introduced both narcotics-related bills before Congress that spring. Porter had long shown an interest in the subject of drugs. During the 1920s, he introduced a number of bills concerning narcotics, including one that called on the U.S. government to help reduce international cultivation of poppies and coca plants and another to establish two federally-administered hospitals to treat addicts. Notably, Porter also chaired the U.S. delegation to the Second International Opium Conference in Geneva, which began in November 1924. There, he endeavored to convince attendees to agree to the so-called "American plan," another proposal to limit poppy and coca leaf cultivation. When the emissaries failed to rally around that plan, Porter famously withdrew the U.S. delegation and returned to Washington.[67]

[67] 67 H.J. Res. 453 (1923); 70 H.R. 13645 (1928); *New York Times*, February 2, 1925; February 4, 1925; February 7, 1925; February 22, 1925. Porter died two weeks after Congress passed his bill to establish the Bureau of Narcotics. He was remembered as an "outstanding figure in the fight against the illegal use of narcotics." *New York Times*, June 28, 1930; *Washington Post*, June 28, 1930.

Porter's first bill established a federal Bureau of Narcotics, separate and apart from the Prohibition Bureau in which responsibility for Harrison Act enforcement had been reposed since shortly after Congress approved the Volstead Act. The Prohibition Bureau and its responsibility over narcotics law enforcement were both in their infancy when Porter first recommended the creation of an independent narcotics enforcement division. In a meeting with President Calvin Coolidge in October of 1923, he insisted that "enforcement of the narcotic laws" was "far more important to the health and safety of the nation than" prohibition enforcement. He believed putting narcotic enforcement on equal footing with prohibition and adding to the ranks of federal agents tasked with drug investigations represented important first steps in meeting that important goal.[68] Seven years later, in hearings before Ways and Means, Porter offered similar points in support of his bill. He contended that there was "absolutely no relationship" between narcotics law and prohibition: "The latter is highly controversial," he quipped, while "the former is not." Only a separate bureau, led by a capable administrator, could demonstrate American commitment to eradicate the narcotics traffic and address the exorbitant cost of narcotics commerce and use on the country.[69] Questions of the country's international standing as well as of the domestic consequences of narcotics both demanded, in Porter's estimation, an independent narcotics unit led by a capable administrator.

Porter's second bill would have given the federal government unprecedented control over the medical profession. It expanded on the Harrison Act's registration scheme by creating a system of federal licenses to sell or otherwise dispense narcotics. It called on federal narcotic officials to deny a license or to revoke a previously-granted license to any applicant or licensee

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[68] *Washington Post*, October 19, 1923.

[69] *Bureau of Narcotics, Hearings before the Committee on Ways and Means on H.R. 10561*, 71st Cong., 2nd Sess. 13-23 (1930) (testimony of Honorable Stephen G. Porter). Porter suggested the cost of narcotics use and commerce might amount to as much as $1 or $2 billion a year, a figure he reached by including the cost of drugs to users as well as government expenditures to catch, try, incarcerate, and (after release) support users and traffickers.

who was addicted to narcotics or who had been convicted of violating any state or federal law relating to narcotics. It also established a licensing system for drug manufacturers and provided that a license must be denied or, if issued, revoked, if narcotic officials discovered "that such license is not necessary to supply the medicinal and scientific needs of the United States."[70] Only the first of Porter's two bills—which created a federal Bureau of Narcotics—would become law.

On a committee hearing concerning that bill, the AMA sent its legislative counsel, Dr. William C. Woodward, to testify. Though he was reminded that only one of Porter's bills was before the committee, Woodward offered testimony that touched on both. When pressed, he admitted that he could conceive of no specific objection that doctors would offer to the creation of an independent narcotics bureau. Porter's two bills in tandem, though, appear to have aroused frustration at the AMA. In an effort to discuss the two bills together, Woodward claimed that a rumor had circulated that the country's supposedly sizeable number of physician-addicts explained the need for a separate narcotic division. He took exception to the suggestion.[71]

Much of Woodward's testimony focused on the harms that narcotic agents' investigations already visited on medical professionals. He reminded the committee that existing federal law made physicians register to dole out narcotics to their patients and required that they maintain scrupulous records. These obligations raised, he claimed, a "presumption of guilt" for doctors, who lived and worked under fear of inadvertently violating one of these rules. Anxious about the reputational harm that would follow a trial in open court, many opted to settle any claims the Narcotic Division brought against them regardless of the claims' merits. That rush to settle, in turn, encouraged agents to devise new schemes to detect—and even encourage—violations. Woodward opined that a separate Bureau of Narcotics might ameliorate some of these

[70] 71 H.R. 9054 (1930).
[71] *Bureau of Narcotics, Hearings before the Committee on Ways and Means on H.R. 10561*, 71st Cong., 2nd Sess. 78-83 (1930) (testimony of Dr. William C. Woodward).

conditions, because a well-chosen leader confident in his authority might feel freer to direct agents' energies elsewhere.[72]

In Woodward's view, though, neither of the bills offered a solution to the problem of physician-addicts diverting narcotics to illicit channels, which he saw as a root cause of agents' over-policing of doctors. He and the AMA believed they had a solution to both problems. He recommended that Porter's bill establishing a separate Bureau of Narcotics be amended to require that the new unit "cooperate with the several State governments in the enforcement of the State medical practice acts and narcotic laws." "Such cooperation," he lamented, was not then "forthcoming from the Federal Government." Rather than institute a system of federal licenses and deny them to physician-addicts, Woodward and the AMA instead wanted the federal government to share information and collaborate with state law enforcement and medical boards to see such doctors driven from practice altogether. Such a plan, they insisted, would prevent physician-addicts from distributing narcotics. Left unsaid was what underlay the AMA's plan: Forcing the worst physicians from practice would leave narcotic agents with little cause to focus on doctors who committed unknowing or technical violations of federal drug law.[73]

Though the AMA's call for collaboration among state and federal officials had focused on identifying physician-offenders and ensuring that state medical boards revoked their licenses to practice medicine, the newly-formed Bureau of Narcotics saw different potential in the cooperation clause Congress passed. In a letter he sent to the agents in charge of all the offices of the Bureau of Narcotics shortly after Congress formed the Bureau, then-Acting Commissioner H.J. Anslinger outlined a protocol for cooperation that he specifically intended to increase the coercive effect of local, state, and federal law enforcement. Echoing earlier views among federal

[72] Ibid.
[73] Ibid.

officials of the kinds of cases local and state officers should manage, Anslinger advised agents to allow local officers to take charge of "the apprehension and prosecution of petty addict and possession cases." Because a "considerable portion of the narcotic cases" then "pending in the Federal courts [were] of this petty character," giving primary responsibility for such cases to local and state law enforcement personnel would free federal agents to focus on "worth-while cases involving actual peddlers and dealers in narcotic drugs." While the AMA and Congress had described the cooperation clause as facilitating federal assistance to state officers, Anslinger saw it as an opportunity to reallocate law enforcement resources to ensure fewer Harrison Act violators would avoid detection.[74] He hoped to harness the country's overlapping laws and multiple enforcement forces and put them to their greatest investigative and prosecutorial effect.

By 1930, Congress had determined to turn a new page in its approach to narcotics control. It formally removed responsibility for narcotics law enforcement from the Prohibition Bureau, where it had rested during the 1920s. A harbinger of narcotic law's staying power and Prohibition's impending demise, perhaps, the organizational change and the discussions that led to it signaled Congress's view that the country continued to have a narcotics problem. The creation of a separate Bureau of Narcotics also raised the specter that federal narcotic agents would intensify their efforts in the years ahead. While some share of narcotic agents' success in detecting and punishing Harrison Act violators had always depended on the ad hoc assistance of local and state officers, Congress's 1930 law creating the Bureau of Narcotics gave federal officials a basis on which to make such cooperation a formal, permanent policy. Together, the possibility that federal agents would persist or enhance their efforts and the likelihood that they

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[74] Bureau of Narcotics, Circular Letter No. 13, August 2, 1930. Where Congress and the AMA focused on physician-offenders, states' need for information, and the burden of narcotics law enforcement on the medical profession, Anslinger instead claimed the provision had been designed: "(1) to bring about a more active cooperation on the part of state officials, (2) materially assist in lightening the calendar of the various Federal courts, and (3) materially reduce the number of prisoners in Federal penal institutions."

would do so with greater help from local and state officials certainly suggested an American public all but sure to be subject to new policing efforts.

VI. Conclusion

The Division and its agents saw the Harrison Act as authorizing a vast expansion of federal power, and they acted as such. They spread throughout the country and used an array of policing tactics against a population unaccustomed to such attention from the central state. They worked in close collaboration with local and state law enforcement officials, subjecting the U.S. public to a growing and multi-layered penal state. Together with the local and state forces on which they relied, agents apprehended thousands of narcotics suspects and filled the country's penitentiaries, demonstrating that the twentieth-century U.S. state would pay closer mind to the smallest details of Americans' lives.

As importantly, narcotic agents saw Harrison Act violations as signifying more than criminal culpability. They also described some violations as evidence of a suspect's poor fit in the nation. Race proved critical, yet not always determinative, to their enforcement decisions. They brought charges against members of every race—including against physicians who trafficked in prescription drugs for money. They demonstrated a greater willingness, though, to arrest the urban poor and members of racial and ethnic minorities for some violations. In a country that granted legal citizenship to former slaves, to new immigrants whose physiognomy qualified them as white, and to the U.S.-born children of all immigrants, agents endeavored to cast national belonging as something more than a legal category and to exclude racial minorities and poor whites from its privileges. In so doing, agents helped reinscribe a racial prerequisite for national belonging.

While narcotic suspects never expressly referenced the meaning agents assigned to Harrison Act violations, they nevertheless resisted it. As agents described offenders as unfit citizens and made use of a broad set of policing tools to apprehend and exclude these suspects from the body politic, suspects raised Fourth Amendment challenges in which they laid claim to the privileges of national belonging. Though the federal courts reserved considerable discretion for agents, narcotics suspects nonetheless succeeded in challenging, in some instances, agents' entry into private homes and workplaces without a properly-issued warrant. Though agents maintained the authority to search incident to a lawful arrest, even without a warrant, narcotic suspects enjoyed a measure of success in resisting agent efforts to expand that authority. Regardless of the odiousness of narcotics or the dangers involved in many drug crimes, about which the courts' sympathies aligned with agents' views, the Harrison Act did not authorize federal agents to overrun completely the traditional freedom from government interference Americans had always enjoyed.

In the same years that the Division's agents and criminal defendants debated the scope of old liberties in light of new federal claims to power, Congress considered its first major adjustment to its narcotics control apparatus. While it did so because it came to believe that effective narcotics law enforcement required a separate organization and a leadership devoted to that task, physician complaints convinced Congress to require federal cooperation with local and state officials. Despite the very limited aims Congress intended for this cooperation, though, narcotics officials quickly seized on that mandate to collaborate and described it as a new obligation on local and state officials. A criticism about federal agents' overreach became, in other words, a ground on which federal narcotic officials claimed even greater authority and sought to use the multiple sources of government power in the United States to bring more

suspects to justice. Ever-larger and ever-more coercive—such was the logic of the American penal state by 1930.

The 1920s confronted U.S. citizens and residents with a larger and more assertive central state, and narcotic agents represented a tangible manifestation of what might have otherwise remained an abstraction. As agents and suspects advanced their divergent views of federal power, national belonging, and American liberties—and courts and policymakers heard them—narcotic suspects managed to secure some individual checks on federal officers' investigations. Despite these victories, though, the Narcotic Division succeeded in expanding the reach of federal power and in equipping its agents with considerable discretion and authority. Agents also succeeded in multiplying the cooperation with local and state officials that proved so important to many of their arrests. Policing of the American public and the expansion of the penal state thus picked up speed as the decade progressed, altering in numerous ways the meaning and privileges of national citizenship.

CHAPTER 5

THE STATE'S POWER TO EXPEL AND ITS LIMITS: THE FEDERAL GOVERNMENT'S DECADE-LONG EFFORT TO MAKE DRUG LAW VIOLATIONS INTO DEPORTABLE OFFENSES

Disagreement erupted one March day in 1922 at a meeting of the House Committee on Immigration and Naturalization. Pending in Congress that spring were four proposals to rework immigration law to make non-citizens convicted of drug violations eligible for deportation.[1] The Committee's discussion of one bill embroiled its members in debate, though not concerning the wisdom of expelling narcotics law violators. The discord had to do instead with whether the Bureau of Immigration needed additional legislation to begin deporting violators of Congress's anti-narcotics laws. Isaac Siegel, a representative from New York, insisted that the "moral turpitude" clause of the Immigration Act of 1917 already gave the Bureau all the authority it needed to expel drug offenders. That clause called for the deportation of any non-citizen who, within five years of entry, received a prison sentence of one year or longer for a conviction of a "crime of moral turpitude." Siegel, who spoke about narcotics offenders in condemnatory terms, took it as a given that drug-related offenses qualified. He quipped: "As far as the narcotic end of the situation is concerned, … every one of them can be dumped into the sea." An official in the Treasury Department, though, saw the matter differently. He claimed that, absent congressional direction, judges would be reluctant to find that drug offenses involved moral turpitude.[2]

Even before the judiciary had an opportunity to resolve whether the moral turpitude clause reached narcotics offenders, though, Bureau of Immigration officials had already staked

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[1] Only one of these four bills became law in 1922. See 42 Stat. 596 (1922).

[2] *Deportation of Aliens Convicted of Violation of Narcotic and Prohibition Acts: Hearings on H.R. 11118 Before the Committee on Immigration and Naturalization*, 67th Cong. 536 (1922), 542, 548 [hereinafter *Hearings on H.R. 11118*]; *Official Congressional Directory, 67th Congress, 2d Ed.* (1922), 267; 39 Stat. 874 (1917), at § 19.

out their position on the question. They maintained that they needed clearer authority to expel non-citizen drug offenders and called on Congress to authorize such deportations in direct terms. Consequently, for at least half a decade, they refrained from even attempting to remove narcotic offenders on the basis of that clause.[3]

In developments that revealed the limits of federal power at the time, the Bureau's inaction changed in two ways soon after the Committee's hearings. First, despite their preference for clearer authority to deport, officials began in 1923 to use the "moral turpitude" clause to remove narcotics violators. They would do so for only a short time. A federal court decision three years later ended the practice, though not because the judge in that case reached a different conclusion about the relative morality of narcotics offenders. Rather, because Congress had framed the Harrison Act as a tax measure, the defendant's crime consisted of failing to register and pay a tax.[4] Such infractions, the court found, did not involve moral turpitude.

Second, within a few months of the hearings, Congress heeded the Bureau's call and expressly authorized the deportation of some drug offenders. It passed the Jones-Miller Act, which controlled drug imports and exports and provided for the deportation of any "alien" who violated it "at any time after his entry." Despite Congress granting this new license to expel, federal courts again circumscribed the Bureau's ability to deport. Judges interpreted the Act to offer non-citizens several protections found in then-controlling immigration law, including a clause that conferred discretion on the courts to prevent deportations.[5] On a number of occasions

[3] *Hearings on H.R. 11118* at 542, 548.
[4] *Andreacchi v. Curran*, 38 F.2d 498, 499 (S.D.N.Y. 1926).
[5] My characterizations of judges' actions are based on my review of the Bureau of Immigration's deportation files covering the 1920s and 1930s. Only a subset remains. In the second half of the twentieth century, the Immigration and Naturalization Service purged almost all of the early-century files. Suspecting those relating to Chinese immigration might have value to researchers, it preserved files for cases from in its Hawaii and California offices.

judges used that discretion to proscribe removal for non-citizens who were aged or ill, who had long resided in the U.S., or who had close family in the country.

Immigration law has rarely been described as demonstrative of the limits of national state power. Instead, historians have viewed the federal state's exertion of control over its borders as reflecting its increasing centralization and authority. Erika Lee, for one, claims the "gatekeeping ideologies, policies, and practices that originated in Chinese exclusion" helped drive federal government growth in the turn-of-the-twentieth-century United States. Deirdre Moloney, too, claims that deportation law "arose as an important function of the modern, industrial state."[6] Scholars describing the central state's use of deportation law to define non-whites as unfit for U.S. citizenship, as well as those arguing that the late-nineteenth century federalization of immigration law drew on earlier state models, have also shared this view, describing federal immigration law as an example of raw, national power.[7]

If scholars widely share an image of deportation law as emblematic of U.S. state power, many also agree on the role that law and the courts played in the development of the federal government's immigration apparatus. They have demonstrated that the Supreme Court, well before the nineteenth century ended, read the Constitution as giving Congress "plenary power"

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[6] Erika Lee, *At America's Gates: Chinese Immigration during the Exclusion Era, 1882-1943* (Chapel Hill: University of North Carolina Press, 2003), 10; Deirdre M. Moloney, *National Insecurities: Immigrants and U.S. Deportation Policy since 1882* (Chapel Hill: University of North Carolina Press, 2012), 12.
[7] For studies arguing that federal immigration law depended on and constructed social and cultural ideas about race and citizenship, see Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004); Kelly Lytle Hernández, *Migra! A History of the U.S. Border Patrol* (Berkeley: University of California Press, 2010); and Desmond King, *Making Americans: Immigration, Race, and the Origins of the Diverse Democracy* (Cambridge: Harvard University Press, 2000). For arguments that federal immigration law drew on earlier state laws, see Kunal M. Parker, "State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts," *Law & History Review* 19, no. 3 (Fall 2001): 583-643; Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge: Harvard University Press, 2007); and Hidetaka Hirota, "The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy," *Journal of American History* 99, no. 4 (March 2013): 1092-1108.

over immigration.[8] When the Court used that doctrine to uphold the Chinese exclusion cases, Daniel Kanstroom has hypothesized, it breathed a "sigh of relief." After so many of its decisions dealt with limits on national power, he explains, the Court's immigration cases gave it the opportunity to define a vast federal authority.[9] Scholars have seen the courts as playing only a limited role in the turn-of-the-twentieth-century build-up of federal immigration capacity following the Supreme Court's development of the plenary power doctrine.[10]

Historians are certainly correct to view federal power over immigration as expanding in the early decades of the twentieth century. They are also right to see the central state's consolidation of authority over immigration as one facet of a considerable growth in administrative power during the period. Nevertheless, and despite all that studies of immigration law and federal power have revealed about the scope of national authority at the time, the federal government's earliest efforts to deport narcotics violators came up against these two constraints. That is, limits on Congress's powers continued to have consequence when it tied immigration law to other acts. And, even when the national legislature acted in clear and unambiguous terms, congressmen and immigration officials faced a considerable adversary in the federal judiciary. The central state's efforts to police its borders may allow us to glimpse federal power in one of its strongest forms, in other words, but it also offers a window to explore the constraints that

[8] Unlike the power to prescribe a "uniform Rule of Naturalization" Article I does not confer power over questions of immigration to Congress. See U.S. Const. art. I, § 8. Instead, the Supreme Court found the power to control immigration an incident of national sovereignty. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). For discussions of the Court's decisions in this arena, see Angelo N. Ancheta, *Race, Rights, and the Asian American Experience*, 2d ed. (New Brunswick: Rutgers University Press, 2006), 88-91; and Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton: Princeton University Press, 2002), 108-110. On the Supreme Court's naturalization decisions, see Ian Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996).
[9] Kanstroom, *Deportation Nation*, 97.
[10] Sociologist John Skrentny offers this observation in his helpful review of the literature on the role of law and the courts in the development of the American state. See John D. Skrentny, "Law and the American State," *Annual Review of Sociology* 32 (2006): 213-44, 225. Scholars' general agreement concerning the courts' participation in the development of federal immigration capacity stands in marked contrast to their longstanding disagreement as to whether law and the courts obstructed or facilitated the growth of the American administrative state.

continued to act on the national government even when it called on one of its indubitably broad powers.[11]

The difficulties federal officials faced in making narcotics convictions into deportable offenses are all the more remarkable in light of deportation advocates' clear targets. More than any other group of non-citizens, Chinese subjects proved central to lawmakers' efforts to expand the deportation of narcotic offenders. Lawmakers' focus on Chinese immigrants can be seen in their references during congressional debates to Chinese drug users and sellers, in the role legislators from the Pacific Coast played in advocating for stronger deportation policy, and in the deportation statistics compiled by the Bureau of Immigration. Federal determination to make narcotics violations into deportable offenses involved Congress's exercise of a plenary power over members of vulnerable racial and ethnic groups who committed near-universally condemned acts.[12] That it took Congress more than a decade to accomplish this end, and that limitations on the federal capacity to expel persisted long after, demonstrates that the national government's authority remained circumscribed even as it grew.

This chapter tells how, over the course of 17 years, Congress succeeded in transforming narcotics convictions from crimes that nominally involved no moral turpitude, and therefore no basis for deportation, into infractions that could support a deportation regardless of how long the

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[11] This is not the first account of federal judges frustrating the efforts of immigration officials to keep or remove Chinese immigrants from the U.S. Lucy Salyer has also made clear that, much to the consternation of the Bureau of Immigration, the lower federal courts proved a receptive audience for non-citizens who challenged their exclusion. The analysis in this article builds on her insights in two ways. First, while Salyer's study focuses on exclusion hearings, over which federal judges lost jurisdiction in 1905, I argue that the courts continued to play a role in obstructing the efforts of Bureau of Immigration officials much later. Second, where Salyer identifies the rules of law and evidence as principal constraints on federal judges in exclusion hearings, I argue that a range of other concerns—including a non-citizen's length of residence in the U.S. and family connections—motivated judges to recommend against deportation for non-citizen drug offenders. Lucy Salyer, *Laws as Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995).

[12] Mexican nationals were the second-largest group deported for drug convictions in the early 1930s. *Report of the Commissioner General of Immigration for the Fiscal Year Ended June 30, 1932* (Washington: Government Printing Office, 1932), 28-9.

suspect had resided in the U.S.[13] In doing so, though, it highlights the federal government's rocky path to accomplishing that end. Together, lawmakers' efforts to deport and the resistance those efforts galvanized—which imbued immigration authorities with broad authority to expel and ended safeguards against removal non-citizens had hitherto enjoyed but also preserved the courts' authority to intervene—demonstrated that liberal and constitutional limits on the modern, administrative state persisted even as the New Deal began and even with respect to exercises of power for which Congress's authority to legislate had already received judicial approval. In part through its claim to capacious authority over its borders, a stronger central state emerged in the twentieth century's first decades. Even as it did so, the challenge of expanding a liberal state in a federal system remained, impeding and shaping the immigration apparatus that resulted.[14]

I. Congress, Narcotics Violations, and Moral Turpitude

During the decades just before and after the turn of the twentieth century, Congress began to use its plenary power over immigration to subject more and more non-citizens to exclusion or expulsion. By the early 1920s, federal lawmakers appeared ready to add drug offenders to the list of deportable criminals. As Congress prepared to do so, though, its members debated whether, in the "moral turpitude" clause of the Immigration Act of 1917, they had already given the Bureau of Immigration ample authority to deport drug offenders. While some claimed that the moral depravity of such crimes was self-evident, others maintained that "crimes of moral turpitude" did

[13] Immigrants from Asia suffered particular harms from the decision to make drug violations a ground for removal no matter when after entry committed, because they were ineligible to become citizens. In the 1920s, the Supreme Court affirmed that East and South Asians did not qualify as "white persons" and therefore could not become citizens. *Ozawa v. United States*, 260 U.S. 178 (1922); *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).
[14] For a recent argument that liberal ideology continued to exert pressure on U.S. lawmaking well into the twentieth century, see Gary Gerstle, *Liberty and Coercion: The Paradox of American Government* (Princeton: Princeton University Press, 2015). Gerstle identifies in the "birthright citizenship clause" and its limitations on Congress another way that "liberal governing principles" continued to matter even with respect to Congress's plenary power over immigration and naturalization. Ibid., 96-100.

not encompass conduct that became illicit only through an act of positive law. Before it worried about what it was constitutionally permitted to do to make narcotics violators deportable, in other words, Congress debated whether it had already done so.

Federal consolidation of power over immigration was a product of the late-nineteenth and early-twentieth centuries. For nearly a century after the Revolution, the U.S. took no formal steps to keep immigrants from entering the country. While state governments devised a variety of measures to regulate movement within and across their borders, federal officials offered no national complement.[15] That changed beginning in 1862, when Congress passed "An Act to Prohibit the 'Coolie Trade' by American Citizens in American Vessels." It expanded on this restriction in 1875, when it prohibited the immigration of prostitutes and criminals. Seven years later, in 1882, the federal government banned all Chinese laborers from immigrating to the U.S. and passed a law that forbade the entry of any "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[16] After a long period of relatively little immigration law, the last years of the nineteenth century saw Congress attempt tighter control.

Federal immigration law trended in an ever-more-restrictive direction as the nineteenth century neared its close. Polygamists, anarchists, epileptics, importers of prostitutes, and beggars would soon join the ranks of persons forbidden to enter the U.S. In 1891, Congress added

[15] For scholarship that discusses the state-level immigration laws that preceded federal legislation in this area, see Parker, "State, Citizenship, and Territory;" Kanstroom, *Deportation Nation*; and Hirota, "The Moment of Transition." At least by the time of the Supreme Court's decision in the *Passenger Cases*, , 48 U.S. 283 (1849), where it held that Congress's authority over interstate commerce prevented states from collecting head taxes from ship passengers arriving from foreign ports, state officials promulgating immigration restrictions acted in full knowledge that their laws may have been vulnerable to a constitutional challenge.

[16] 12 Stat. 340 (1862); 18 Stat. 477 (1875); 22 Stat. 58 (1882); 22 Stat. 214 (1882). Moon-Ho Jung argues that the 1862 act, passed by a Republican Congress during the Civil War, represented the "last of America's slave trade laws" and also the "first federal statute to restrict immigration into the United States." While the law prohibited the entry of "coolie" laborers and permitted "free and voluntary" immigrants from China to continue journeying to the United States, it required Chinese migrants to prove to a U.S. consul they belonged to the former group rather than the latter group. Moon-Ho Jung, *Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2006), 36-8.

"persons who [had] been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude," an update to the blanket, though vague, exclusion of "convicts" in its earlier law.[17] The 1891 law also brought two other changes to Congress's immigration framework. First, it provided that any non-citizen who entered the U.S. in violation of federal immigration law could be deported if apprehended within one year after entry. The bases on which one could be denied initial entry, in other words, also supported removal if a non-citizen slipped into the country and came to the attention of public officials within a year. Second, it called for the deportation of any person who "became a public charge within one year after his arrival in the United States" because of "causes existing prior to his landing" in the country. While the law tethered expulsion to an immigrant's condition at entry, it allowed the federal government, for the first time, to deport for a condition that arose only *after* entry.[18]

The Immigration Act of 1917, passed over President Wilson's veto, broadly expanded the federal government's power to exclude and deport non-citizens. Notably, it defined a "barred Asiatic zone" and denied entry to immigrants from that region. It also augmented the bases for deportation that arose after an immigrant entered the United States. After 1917, non-citizens could be deported if, within five years of entry, the government apprehended them for advocating anarchy, for becoming a public charge, or for receiving a prison sentence for a term of one year or longer for a crime involving "moral turpitude."[19] The first two decades of the twentieth century thus saw Congress use its plenary power over immigration to broaden significantly the grounds on which the Bureau of Immigration could deport non-citizens.

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[17] 26 Stat. 1084 (1891); 32 Stat. 1213 (1903).

[18] 26 Stat. 1084 (1891) at Sec. 11. Under the 1891 law, whatever "cause" led a non-citizen to become a public charge after entering the U.S.—a latent illness not symptomatic at entry jumps to mind as one possibility—must have existed prior to the immigrant's landing in the U.S.

[19] 39 Stat. 874. (1917) §§ 3, 19. See also Ngai, *Impossible Subjects*, 37. The 1917 law also called for the removal of non-citizens sentenced more than once to such a prison term for crimes of moral turpitude, even if the immigrant received the second such sentence more than five years after entry.

Federal lawmakers appear not to have viewed drug violations as among the crimes that would support deportation under the 1917 law. When they debated the bill that became that law, congressmen never claimed that the moral turpitude clause included narcotics convictions. Moreover, only three years later, two members of Congress introduced bills that expressly permitted immigration officials to expel drug offenders. Representative Albert Johnson and Senator Wesley Jones, both of Washington, introduced their legislation in response to a request by constituents. In April, a grand jury in Seattle, noting an increase in the drug trafficking cases before it, recommended to Washington's congressmen "that a law be passed providing for deportation of repeated offenders of the Harrison anti-narcotic act."[20] Neither congressman argued that the federal government already had authority to deport drug violators. Instead, they introduced bills to accomplish that end less than three weeks after the grand jury announced its recommendation.

Beyond demonstrating that neither congressman believed the "moral turpitude" clause sufficient to deport narcotics violators, the bills also suggested the congressmen took a relatively lenient view of which narcotics violations warranted expulsion. Notably, while Congress had devised a means to charge mere users and possessors of prohibited narcotics, Johnson's and Jones's bills did not seek to deport violators accused of only a possession violation. Instead, both applied only to those "engaging in illegal traffic in narcotics." Moreover, while the moral turpitude clause of the Immigration Act would have permitted deportation on a first offense, so long as the sentence imposed satisfied the Act's requirements, Johnson and Jones made a non-citizen's second sentence a basis for instituting deportation proceedings.[21] Neither bill progressed very far in its respective chamber of Congress.

[20] 66 H.R. 13980; 66 S. 4337; *Seattle Daily Times*, April 29, 1920.
[21] 66 H.R. 13980; 66 S. 4337.

When Johnson next introduced a bill to make narcotics violations into deportable offenses, he took no such measured approach. In March 1922, he introduced a bill that called for the deportation of any person convicted of violating the National Prohibition Act, the Harrison Anti-Narcotic Act, or any other federal *or state* statute that prohibited or regulated the "manufacture, sale, transportation, importation, or exportation" of liquor, opium, coca leaves, or their salts, derivatives, or preparations. In addition to making the violation of both state and federal anti-liquor and anti-narcotics laws into deportable offenses, the bill required no second conviction and included no outer time constraint for its application, such that an immigrant might face deportation for a drug violation at any point after coming to the United States.[22]

Public demand in the Pacific Northwest led Johnson to offer this bill, too. Speaking about Johnson's bill, Clifton McArthur, a congressman from Oregon, claimed there had been "widespread agitation" in that region of the country for "legislation giving the Government authority to deport violators of the narcotic laws." Two months earlier, in fact, McArthur had responded to that campaigning by introducing his own bill to make narcotics convictions into deportable offenses. He did so after a conference of Oregon's "leading citizens" convened in Portland to discuss the "acute" problem of non-citizen drug offenders. That conference counted among its attendees Governor Ben Olcott, Portland Mayor George Baker, and a "band of men and women representing every arm of official life in" Portland. They formed the Oregon Narcotic Control Association and worked in concert with a federal immigration officer in Portland to draft the bill McArthur introduced in the House.[23]

Popular demand and political will thus aligned in support of deporting non-citizen drug offenders, but disagreement as to what preexisting immigration law already authorized proved an

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[22] 67 H.R. 11118; 67 H.R. 10075.

[23] *Hearings on H.R. 11118*, 537; *Oregonian*, January 12, 1922; January 24, 1922.

early sticking point in securing a new deportation law. Representative Siegel maintained that the 1917 law's moral turpitude clause covered drug violations. He appears to have believed that lawmakers' and the public's view of drug offenders determined whether they were deportable under the 1917 Immigration Act. His argument tapped into deep uncertainty among congressmen as to precisely which behaviors the "moral turpitude" clause reached. When, for instance, the Commissioner General of Immigration testified about a number of other classes of criminals, including keepers of gambling houses, that he wanted added to the list of deportable classes, Johnson himself mused: "Are not they deportable under the moral-turpitude clause?" He offered no explanation for why he believed keeping a gambling house involved moral turpitude while committing a narcotics crime did not. Another congressman, speaking only minutes later, queried: "Is it not true" that "what is bad" is "often a matter for the judge and the jury in the court?"[24] If Johnson's comment suggested the existence of only ill-defined lines between crimes that involved moral turpitude and those that did not, this question raised the possibility that such determinations were made on a crime-by-crime, or even a defendant-by-defendant, basis.

Two congressmen offered a common law distinction to explain the difference between crimes that did and did not involve moral turpitude. They predicted federal courts would hew to that definition. They claimed that courts would be reticent to find moral turpitude in acts made criminal only as a result of positive, and not natural, law. Anticipating how a judge would view the Harrison Act, they intoned, conjured up "the old distinction of things which are recognized as wrong in themselves" and "things which are wrong because they are forbidden by statute."[25] Because narcotics use and sales had been legal until the very recent past, these congressmen opined, courts would find that violations of the Harrison Act involved no moral turpitude.

[24] *Hearings on H.R. 11118*, 549.
[25] Ibid., 541-42, 549.

Members of the Immigration Committee were not alone in finding the term nebulous. Numerous courts confronting the provision came to see it, in the words of one federal judge, as a "somewhat loose expression."[26] While some jurists agreed that the common law distinction between crimes *mala in se* and *mala prohibita* offered a key to determining which violations involved moral turpitude, others pointed out that views on which acts belonged in each of these two categories had proven neither universal nor unchangeable.[27] Congressional efforts to define moral turpitude, in other words, shared common ground with discussions among jurists concerning whether the phrase restated a common law distinction or replaced it.[28]

By a three-to-one margin, the House passed Johnson's 1922 bill over heated opposition. Debates on the House floor focused more on the innovations Johnson included in his bill than on the wisdom of deporting narcotics offenders. Those in favor of the bill, in fact, took public and lawmaker support for expelling narcotics offenders as a given. Caleb Layton, a Republican congressman from Delaware, for instance, defended Johnson's bill on the ground that it covered "something that every normal man and woman in the United States is altogether interested in, and that is the suppression of the infractions of the Harrison Act." Supporters also occasionally connected Johnson's bill to the nefarious influence of foreign-born drug violators. John Raker, for instance, a Democrat from California, claimed that non-citizens represented between 50 and 90 percent of those who violated the narcotic acts. He intoned that "aliens in California," "these Chinese," had "debauch[ed] our country in the way of the narcotic trade." Johnson's bill

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[26] *Skrmetta v. Coykendall*, 16 F.2d 783 (N.D. Ga. 1926). For a contemporary account of decisions concerning moral turpitude, see Note, "Crimes Involving Moral Turpitude," *Harvard Law Review* 43 (Nov. 1929): 117-21.

[27] See, e.g., *U.S. ex rel Griffo v. McCandless*, 28 F.2d 287, 288 (E.D. Pa. 1928).

[28] While courts offered a range of definitions for "moral turpitude," including "inherent baseness or vileness of principle, words, or actions" and "contrary to the accepted and customary rule of right and duty between man and man," they generally agreed that a finding of moral turpitude required more than a violation of a criminal statute. See, e.g., *McCandless*, 28 F.2d at 288; *United States v. Carrollo*, 30 F. Supp. 3, 6-7 (W.D. Mo. 1939); and *U.S. ex rel Berlandi v. Reimer*, 30 F. Supp. 767, 767-68 (S.D.N.Y. 1939) aff'd, 113 F.2d 429 (2d Cir. 1940).

represented one way "to get a better and more wholesome condition of affairs."[29] Supporters of the Johnson bill thus reminded their colleagues of the perceived need to deport Harrison Act violators, sounded alarms concerning Chinese influence, and noted the high representation of foreign-born among narcotics offenders.

Opposition to the bill centered on two related points. First, congressmen speaking out against the bill highlighted the harshness of its terms. Representative William Stafford, a Republican from Wisconsin, and George Huddleston, a Democrat from Alabama, spoke at great length against the bill. Huddleston called deportation after prison a "double punishment" and took issue with the bill's failure to limit the period during which deportation might be sought. Unlike in the Immigration Act of 1917, he explained, "here there is no time limit" during which such infractions must occur. "The alien may have lived here until he has raised up American-born grandchildren to manhood, and then, forsooth, because fanaticism and unreason run riot in Congress, he is to be banished to a land which he may not have seen for 50 years."[30] Stafford focused his arguments on the liquor infractions that Johnson's bill would have made into deportable offenses, perhaps because less public opprobrium attached to liquor violations than to narcotics offenses. He proclaimed that the bill proposed to "out-Volstead Volstead by" authorizing deportation on the first offense, "whether committed within five years" or not, even though such violation did not involve moral turpitude.[31]

Second, both congressmen took issue with the bill's attempt to turn state prohibition and narcotic offenses into bases of deportation. Stafford, for example, lamented that the bill would

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[29] 1922 Cong. Rec. 5070; 1922 Cong. Rec. 5071.

[30] 1922 Cong. Rec. 5071. Huddleston called the bill "the high tide of fanaticism and intolerance." He voiced support for immigration restrictions to keep immigrants from entering. Once admitted, though, "the flag reaches out over him, and the Constitution, not merely its letter but in its spirit as the founders of the Republic conceived it, should grant him every protection."

[31] 1922 Cong. Rec. 5069. Congress James Mann, serving what would be his final term in the House, opposed the bill on a related ground. According to Mann, the threat that a defendant would be deported for minor offenses would make juries rather less willing to convict for the underlying violations. 1922 Cong. Rec. 5082.

"delegate to the States the right and power of determining what aliens should be allowed to remain within their borders." Huddleston, too, lamented that under the bill "aliens [would] be deported[] not only for violating a Federal statute but for violating a State law." Of course, state law violations already constituted bases for deportation; many of the crimes that inarguably involved moral turpitude—crimes against the person, such as murder and kidnapping, for example, and crimes against property, such as theft—were then, as now, state law violations.[32]

Neither Stafford nor Huddleston directly addressed the extent to which state law violations already served as bases for deportation. They appear, though, to have seen something particularly troubling about allowing the states this power when legislating on narcotics and liquor. Stafford, in particular, spoke at length of the results that would obtain if state legislatures could arrange for the deportation of every non-citizen farmer in northern Wisconsin who, at any time after entry, was caught making "home wine and home brew," while existing law permitted "aliens committing murder, rape, and the most heinous offenses after five years' residence to remain here."[33] He suggested, in other words, that state laws concerning liquor and narcotics criminalized a broad range of common behaviors; allowing such crimes to serve as the basis for deportations gave too much power to the caprices of state governments.

Stafford and Huddleston were not alone in so believing. Sixty-four House members voted for a motion to recommit the bill to the Immigration Committee to strike out the language that made state law violations deportable offenses.[34] A critical mass of federal lawmakers had become suspicious of their counterparts in statehouses and sought to limit the effect of state laws.

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[32] 1922 Cong. Rec. 5069; 1922 Cong. Rec. 5071. For a discussion of the many state law violations that courts had held to involve moral turpitude by the end of the 1920s, see Note, "Crimes Involving Moral Turpitude." Margot Canaday has also emphasized the importance of state and local violations to federal deportations in her discussion of the federal government's use of the "moral turpitude" clause against defendants convicted of state and local sodomy charges. Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2009), 24.
[33] 1922 Cong. Rec. 5070.
[34] 1922 Cong. Rec. 5082-83.

Concern over the state law provisions in Johnson's bill thus added a new wrinkle to the relationship between state and federal power over narcotics law: How much authority Congress should allow the states when it came to exercises of the federal deportation power proved a source of much debate. Perhaps this concern explains what befell Johnson's Act in the Senate, where it died in the Committee on Immigration without hearings or a vote. Despite strong support in the House as well as public demand on the Pacific Coast, Congress's first effort to clarify its immigration laws to make narcotics violations into deportable offenses had come to naught. Debates over existing law and about how broad a new power to confer on the Bureau of Immigration doomed these earliest efforts to make narcotics violators broadly deportable.

II. The Bureau of Immigration and *Andreacchi*

These debates eventually proved beside the point, as federalism and the limits of Congress's power, not distinctions between natural and positive law, ultimately constrained immigration officials' ability to deport Harrison Act violators. Echoing debates that took place in the national legislature, officials in the Bureau of Immigration routinely claimed in the opening years of the 1920s that "crimes of moral turpitude" had a specific, legal meaning that did not encompass narcotics infractions. Even as its leadership claimed to lack the authority to deport drug violators, though, the Bureau began to make occasional use of the moral turpitude clause to do precisely this. Immigration officials once feared that federal courts would exclude from their list of "crimes of moral turpitude" those acts that became illicit only through an act of positive law. The federal judge who decided the issue, however, rested his opinion on Congress's choice to frame its anti-narcotics law as a tax measure. The violation of a revenue measure, in his estimation, involved no moral turpitude.

In a real sense, debates in Congress and among immigration officials concerning the scope of the Bureau's power to deport assumed an immigration apparatus that did not yet exist. During the first years of the 1920s, deportation remained a decidedly small piece of the Bureau's work. Despite even the fervor of the Red Scare that developed after World War I, immigration officials deported very few people before 1920—an average of between two and three thousand per year between 1908 and 1920, when immigrants to the U.S. sometimes numbered a million annually. In 1923, that number had increased to more than 3,600 deportations, though only 394 of these removals relied on a non-citizen's conviction in a criminal case as a basis for his or her expulsion.[35] Though a legal power several decades in the making by then, deportation thus remained in its infancy as a fixture of American immigration practice.

Immigration Bureau officials made clear their view that the 1917 law had not made drug offenders deportable. They testified before the House Immigration Committee that, five years after the law's passage, the Bureau had not attempted to deport a single narcotics offender under the moral turpitude clause. Immigration officials had deported suspects charged and convicted of smuggling narcotics for violating other federal laws, but they had never used a Harrison Act conviction as the lone basis for deportation. They also explained their rationale to Congress. Officials contended that a law "stronger than the 'moral turpitude' provision" of the 1917 act would be "necessary to make certain the deportation" of non-citizen narcotics law violators.[36]

A Treasury Department official elaborated on the Bureau of Immigration's position. He suggested that federal judges might take Congress's silence on the narcotics laws, coupled with its enumeration of other acts as bases for deportation, as indicative of its view on the subject. He

[35] Ngai, *Impossible Subjects*, 58-9; *Report of the Commissioner General of Immigration for the Fiscal Year Ended June 30, 1923* (Washington: Government Printing Office, 1923), 4.
[36] *Hearings on H.R. 11118*, 545-46; H.R. Rep. No. 67-867 (1922), 1; Committee on Immigration and Naturalization, H.R. 11118, "A bill to provide for the deportation of certain undesirable aliens," H.R. Rep. No. 67-867 (1922), 3 [hereinafter H.R. Rep. No. 67-867 (1922)].

explained that “there are now on our statute books certain laws regarding the deportation of aliens for specific offenses mentioned in a number of laws, but violations of the … Harrison Narcotic Act are not included.” He championed an explicit statement from Congress on the ground that it had “seen fit to definitely specify” these “other offenses” as grounds for removal.[37]

The Bureau’s insistence that it needed stronger, more direct authorization from Congress to begin deporting narcotics offenders may have reflected a number of institutional concerns at the time. First, because of the regularity with which they had to appear before federal court judges, immigration officials may have been reluctant to do so when they lacked confidence in their argument. As Lucy Salyer has argued, the Bureau generally fared well in federal courts and “took any judicial decision against it seriously.”[38] Officials’ demand for a clearer statement of their power to deport may have owed much to their wish to protect their record of success in litigating before these courts—and, perhaps, a need to maintain their standing before the federal judges on whose opinions they relied.

Second, at least in the early 1920s, officials may have wanted to expend their resources on cases they felt on stronger footing. Officials complained regularly about their small budget. Commissioner General of Immigration W. W. Husband contended that the Bureau “never” received “enough appropriation to make a search for the aliens who ought to be deported.” He repeated the claim in his annual reports. As a result of the Bureau’s scarce resources, its leadership claimed, it devoted its attention to the “more extreme cases where, for peculiarly good cause, deportation should be accomplished.”[39] Regardless of where narcotics violators ranked

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[37] *Hearings on H.R. 11118*, at 541-42.
[38] Salyer, *Laws Harsh as Tigers*, 220-21.
[39] Salyer, *Laws Harsh as Tigers*, 220-21; *Hearings on H.R. 11118*, at 550; *Report of the Commissioner General of Immigration for the Fiscal Year Ended June 30, 1922* (Washington: Government Printing Office, 1922), 17.

among the "more extreme cases," the Bureau may have viewed it as unwise to use its time and money to proceed against offenders when it retained any doubts about its authority to do so.

Though no court had assessed the Bureau's view that narcotics offenses did not qualify as crimes of moral turpitude, immigration officials continued to persist in that belief even after Representative Siegel made clear his take on the issue. In what may be the only remaining case file from the mid-1920s in which a Harrison Act violation was put forward as the basis for deportation, an official of the Bureau of Immigration's Honolulu branch forwarded information concerning Pang Koon You to the office of the Commissioner General of Immigration. Federal agents had arrested Pang in January 1925 in Lahaina and charged him with being an opium peddler. The Honolulu official recommended that Washington issue a warrant for Pang's arrest and removal, incorrectly identifying another narcotic act as the basis for deporting Pang. When the Commissioner General's office noted the mistake and indicated that a Harrison Act count would not support deportation, officials in Honolulu recommended the deportation proceedings be abandoned. The official in charge of the case promptly followed the directive.[40]

Nevertheless, and despite its skepticism as to the deportability of narcotics violators under the Immigration Act of 1917, the Bureau made limited use of the Act to deport a handful of narcotics offenders beginning in 1923. In his annual reports during the decade, the U.S. attorney general compiled a list of the pardons the president had granted in the previous year. In August 1923, the attorney general recommended that President Coolidge commute the sentence of Leopoldo Barrientos, convicted in federal court in West Texas in November 1921 for dealing

[40] Letter from John Sheo to A. E. Burnett, dated February 26, 1925, Immigration File 4280/223, Records of the Immigration and Naturalization Service, Case Files of Arrest Warrants and Deportation Orders (4280), 1913-1942, National Archives at San Francisco [hereinafter Honolulu Office Deportation Case Files]; Application for Warrant of Arrest of Pang Koon You Under Section 19 of the Act of February 5, 1917, Immigration File 4280/223, Honolulu Office Deportation Case Files; Letter from G. E. Tolman to District Director of Immigration, Honolulu, Territory of Hawaii, dated April 28, 1925, Immigration File 4280/223, Honolulu Office Deportation Case Files; Letter from District Director of Immigration to Commissioner of Immigration, dated May 19, 1925, Immigration File 4280/223, Honolulu Office Deportation Case Files.

in narcotics without having registered under the Harrison Act. Coolidge did so on the condition that Barrientos, who had already served twenty-one months of the two-year sentence he initially received, be "promptly deported" upon release. A year and a half later, Coolidge commuted the sentence of Joseph Timineri, convicted in the Northern District of Ohio of violating the Harrison Act by having morphine in his possession and selling it, on the same condition.[41]

Federal immigration officials thus made some use of the Immigration Act of 1917 to deport narcotic violators even as they argued, in other contexts, that the law did not provide a sufficient basis to do so. The fragmented record that remains of the Bureau's early narcotics-related deportations offers little in the way of explanation for this disjuncture. The Bureau of Immigration certainly grew and consolidated additional power and prominence in the 1920s.[42] That it began in 1923 to make limited use of the moral turpitude clause may reflect growing confidence in its authority. Immigration officials may have also simply decided to exploit an ambiguity in the scope of their power to expel and, unless and until a federal judge said otherwise, use the 1917 law to deport narcotics offenders.

The Bureau's decision to pursue deportation against Basil Andreacchi would prove the end of that practice. Andreacchi, a native of Italy, had first come to the United States in 1905 as a two-year old. At 15, he went to the New York Reformatory for carrying a concealed weapon; as an 18 year-old, he received a two-year sentence in the U.S. Penitentiary in Atlanta for violating

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[41] *Annual Report of the Attorney General of the United States for the Fiscal Year 1924* (Washington: Government Printing Office, 1924), 371; *Annual Report of the Attorney General of the United States for the Fiscal Year 1925* (Washington: Government Printing Office, 1925), 418. Note that, because Barrientos and Timineri were deported subject to commutation of their sentences, they may have agreed not to oppose their expulsion.

[42] As Mae Ngai has noted, though "deportation was not invented in the 1920s," it "was then that it came of age." By 1924, in fact, the Bureau had accreted significantly more power than it had at the decade's beginning. In the Immigration Act of 1924, Congress made deportation a more central part of the country's immigration apparatus by permitting the Bureau to deport non-citizens who entered the country without a visa or appropriate inspection at any time after their entry. A time limitation had previously applied. Congress also amplified the Bureau's power in 1924 by creating the U.S. Border Patrol as a division of the Bureau of Immigration. Ngai, *Impossible Subjects*, 58-60. For more on the Border Patrol and the strengthening of the Bureau of Immigration during the 1920s, see Hernández, *Migra!*.

the Harrison Act. At 20, he received a four-year prison sentence on a charge of third-degree burglary. The Bureau of Immigration decided to deport Andreacchi for having twice been convicted of a crime of moral turpitude, relying on his Harrison Act and burglary convictions.[43]

If the Commissioner General hoped that the case against Andreacchi would clarify the Bureau's authority to deport non-citizen drug offenders under the moral turpitude clause, the court's decision came as a disappointment. The federal judge who heard *Andreacchi* held that Harrison Act violations did not involve moral turpitude. His decision did not turn, though, on his view of whether narcotics violations offended the public's sense of morality. The judge acknowledged, in fact, that by trafficking in narcotics, Andreacchi "very likely" had committed "acts which did involve moral turpitude." Instead, that Congress had chosen to frame the act as a revenue measure proved determinative. Because a Harrison Act violation encompassed only failing to register and pay a tax, no moral turpitude attached to such an infraction.[44] Despite a perception that narcotics convictions revealed a violator's baseness and depravity, the basis of power on which Congress had enacted the Harrison Act prevented violations of that law from supporting deportations.[45] The federal government's broad authority over immigration depended on its constrained powers over internal affairs. The Harrison Act may have targeted acts of moral turpitude but it offered no basis for deportation.[46]

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[43] *Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926). The Bureau had to rely on the two-violation provision of the Immigration Act because Andreacchi had committed no crimes between the ages of two and seven, when the five-year period expired during which a single crime could have supported deportation.
[44] Ibid., 498-99.
[45] Six months later, officials confronted a federal judge in Atlanta with the question of whether prohibition offenses involved moral turpitude and could thus support deportation. In answering in the negative, the court defined moral turpitude as "serious delinquency;" more "than the civic delinquency manifested by breaking a known law." *Skrmetta*, 16 F.2d at 784, *aff'd* 22 F.2d 120 (5th Cir. 1927).
[46] The court in *Andreacchi* did not address the question of whether state drug law violations might serve as a basis for deportation. The Bureau of Immigration appears to have decided in the negative on this question. See, e.g., letter from J. P. Flanner to Acting Commissioner of Immigration, dated January 10, 1933, Immigration File 12020/18319, Records of the Immigration and Naturalization Service, Deportation Investigation Case Files (12020), 1930-1950, National Archives at San Francisco [hereinafter San Francisco Office Deportation Case Files]; Transcript of

In the eyes of federal judges, Congress's framing of the Harrison Act as a revenue measure decided the matter. Before *Andreacchi*, immigration officials had vacillated between proclaiming Harrison Act violators not deportable and making occasional use of the law to deport that very class of offenders. In the aftermath of the decision, though, Bureau claims that the Act did not offer a basis for deportation grew stronger. Five weeks after the decision, the Commissioner General's office directed correspondence to its branch offices throughout the country, informing them that "a conviction under the Harrison Anti-Narcotic Act…is not sufficient in itself to render an alien deportable." Officials from the Commissioner General's office referenced a recent opinion by the Bureau Solicitor to this effect.[47] The Bureau continued to adhere to the *Andreacchi* decision in the years that followed.[48]

III. The Jones-Miller Act and Judicial Discretion

Deportation advocates' campaign to expel drug violators did not focus only on the moral turpitude clause. In 1922, Congress passed the Jones-Miller Act, also known as the Import and Export Act, which applied to opium, coca leaves, and their derivatives and preparations. It prohibited importation of these substances in excess of federally-determined amounts and outside of approved channels. The Act set penalties for violations and, crucially, it also provided

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Statement Taken from Chin Fong, October 21, 1931, Immigration File 12020/18325, San Francisco Office Deportation Case Files.

[47] Letter from G. E. Tolman to District Director, Immigration Service, Helena Montana, dated May 1, 1926, Case File 53244/1E, General File—Handling of Warrants & Arrest Cases, 1925-1926, Records of the INS, National Archives, Washington, DC [hereinafter Warrants & Arrest Cases]; Letter from G. E. Tolman to Commissioner of Immigration, Philadelphia Immigration Station, dated May 1, 1926, Warrants & Arrest Cases; Letter from G. E. Tolman to Commissioner of Immigration, Philadelphia Immigration Station, dated July 16, 1926, Warrants & Arrest Cases.

[48] Letter from Acting District Director of Immigration, Honolulu District, to Commissioner General of Immigration, Washington, DC, dated January 6, 1931, Immigration File 4280/531, Honolulu Office Deportation Case Files; Letter from District Director of Immigration, Honolulu District, to Commissioner General of Immigration, Washington, DC, dated February 8, 1931, Immigration File 4280/542, Honolulu Office Deportation Case Files; Letter from George J. Harris to District Director, Immigration Service, Honolulu, T.H., dated March 7, 1931, Immigration File 4280/542, Honolulu Office Deportation Case Files.

for the deportation of non-citizen offenders “in accordance with the provisions of sections 19 and 20” of the Immigration Act of 1917.[49] Yet despite clear authority to act, immigration officials found a second limitation constrained them in their push to expel drug violators: the judges who read the new law as incorporating several limits on deportation and who made use of these limits to punish offenders without making them vulnerable to deportation.

Even as Congress considered the bill that would become the Jones-Miller Act, some lawmakers claimed it gave the government only a very weak power to deport. One congressman pointed out that the bill made it unlawful to receive, conceal, buy, or sell drugs only when a suspect knew “the same to have been imported contrary to law.” That clause offered a potential defense for suspects not directly involved in importation. Moreover, the bill did not include state narcotic law violations as bases for deportation, and thus would capture a narrower band of behavior than other bills before Congress at the time.[50] Some congressmen, then, raised doubts about the breadth of the Bureau’s authority to deport under the Jones-Miller bill.

Regardless of how capacious a grant of authority Congress meant for the new law to represent, immigration officials quickly learned that judicial decisions would circumscribe their power to expel. Non-citizens threatened with deportation under the Jones-Miller Act raised a number of challenges to the proceedings against them, all arising from the Act’s incorporation of sections 19 and 20 of the Immigration Act of 1917. In particular, they turned to the “moral turpitude” clause of section 19, the only section of the immigration law that had anything to do with post-conviction removal, which placed several limitations on the Bureau of Immigration’s power to expel.[51] By advancing specific understandings of how the courts should read the Jones-

[49] 42 Stat. 596 (1922), §§ 2(c), 2(e).
[50] 42 Stat. 596 (1922), at Section 2(c); 67 H.R. 2193; “Deportation of Aliens Convicted of Violation of Narcotic and Prohibition Acts” at 540.
[51] 42 Stat. 596 (1922), at Section 2(e); 39 Stat. 874 (1917), at Section 19.

Miller Act alongside the Immigration Act of 1917, non-citizens threatened with deportation hoped to find gaps in the Bureau's authority to deport. They offered three arguments.

First, defendants argued that the Jones-Miller Act incorporated the so-called "recommendation" clause of the Immigration Act. The 1917 statute provided that no deportation would follow a criminal conviction if the court that sentenced the defendant "recommended" against deportation.[52] The question of the clause's applicability to Jones-Miller violations came to a head when, in May 1923, officials tried to deport two Chinese citizens convicted of Jones-Miller violations in Spokane. Wong Ging and Wong Dick, 78 and 76 years old, respectively, confessed to having had smoking opium in their possession. Both had lived in the U.S. 40 years by the time of their arrests. Their attorney characterized them as "well[-]known characters" whose "delinquencies" local authorities "overlooked." The judge who heard the cases against the two sentenced them to 90 days in county jail and ordered that they not be deported. Despite the instruction, immigration officials began deportation proceedings against both defendants.[53]

The two men were tried together, and their case once again raised the question of whether narcotics violations involved "moral turpitude." The trial court ordered the government to release the men on the ground that deportation conflicted with the sentencing judge's recommendation. On appeal, and unlike what it would claim in *Andreacchi*, the government argued that drug offenses did *not* qualify as crimes of moral turpitude. Its reason for so alleging was straightforward: The 1917 law only permitted a judge to recommend against deportation when sentencing a defendant for a crime of moral turpitude. Excepting drug violations stripped judges of this discretion. To support its claim, the Bureau returned to the common law distinction several congressmen had raised in earlier hearings. The Bureau also argued that Jones-Miller

[52] Ibid. Despite their name, judicial recommendations were, in fact, binding on the Bureau of Immigration.
[53] Brief of Respondents, *Hampton v. Wong Ging*, 299 F. 289 (9th Cir. 1924), 1-2; Transcript of Record, *Hampton v. Wong Ging*, 299 F. 289 (9th Cir. 1924), 2-4.

made deportation mandatory, such that Congress could not have meant to give judges discretion in these cases. In response, the two men's attorney argued the opposite. He contended that conviction under the Act assuredly involved moral turpitude, especially in light of the "severe punishment" available under the law and the widespread recognition that the "drug habit" was "debasing, degrading, [and] contrary to good morals."[54]

The appeals court that heard the case found that the Jones-Miller Act did indeed incorporate the "recommendation" clause. It took no position, though, as to whether a violation of that law involved moral turpitude. Instead, it found that the government had failed to offer sufficient evidence that the offense charged did *not* involve moral turpitude. Because the government had not demonstrated that a judicial recommendation was unwarranted, the trial court's decision stood. After *Wong Ging*, judicial discretion to recommend against deportation became a fixture of Jones-Miller cases.[55]

When they exercised that discretion, judged took into account a variety of factors, including a convict's age, health, and duration of time in the U.S.[56] A 1930 case before Judge Frank Norcross in Carson City, Nevada, provides a window into what persuaded judges to block deportation. In May, Norcross sentenced Lai Nun, the owner of a local dry goods store since 1892, to 18 months in the state penitentiary for violating the Jones-Miller Act. By the time officials moved to deport Lai, the following summer, he was 83 years old and had lived in the

[54] Brief of Appellant, *Hampton v. Wong Ging*, 299 F. 289 (9th Cir. 1924), 10-18; Brief of Respondents, *Hampton v. Wong Ging*, 299 F. 289 (9th Cir. 1924), 3.
[55] See, e.g., *U.S. v. Wing*, 6 F.2d 896 (D. Nevada 1925) (holding that Jones-Miller cases permit recommendations against deportation even with respect to violations of that law that did not involve moral turpitude).
[56] While some non-citizens offered these arguments before judges, others raised these concerns in discussions with Bureau officials. In his 1930 interview with an inspector in Honolulu, for instance, Gau Mun Hoon asked for leniency on the ground that he had a large family in the U.S. He claimed that his "only plea to the immigration officials" was that he had "a family of five children and a wife living here" and thus wished for the Bureau to "waive this deportation." Transcript of Hearing of Gau Mun Hoon, dated August 6, 1930, Immigration File 4280/515, Honolulu Office Deportation Case Files. The following year, Yong Chee pointed to his many years as a law-abiding resident to argue against deportation. He asked not to be deported and reminded the inspector that the charge against him was his first "for any crime at all in [his] thirty-four years in Hawaii." Transcript of Hearing of Yong Chee, dated March 13, 1931, Immigration File 4280/535, Honolulu Office Deportation Case Files.

country for 60 years. He also had three sons and a wife, all in the U.S. His family, age, and time in the U.S. aroused the sympathies of several Nevadans. The Governor, for one, wrote to the Bureau to give his good opinion of Lai and encourage the Bureau to drop the case. Norcross also spoke on Lai's behalf, explaining that he had not understood that it lay within his power to recommend against deportation. Had he known of this provision of law, he claimed, he would have made such a recommendation. He singled out Lai's long residence in the U.S. and his reputation among the people of Carson City as two factors that would have led him to do so.[57]

Second, defendants who received short prison sentences also invoked the Immigration Act's minimum sentence provisions to argue against removal. In January 1925, for instance, immigration officials in Seattle began deportation proceedings against Moy Fat, a 63-year-old immigrant from China who had moved to the United States forty-three years earlier. A federal court in Juneau had convicted Moy, and it sentenced him to two months in prison. The trial court ordered Moy released on the ground that the Bureau's petition failed to charge that Moy "knew the drug" with which he was found had been imported contrary to law. The lower court, in other words, held that immigration officials had neglected to prove that Moy had acted "knowingly," as the Jones-Miller Act required. The appellate court that heard the appeal, though, affirmed the trial court's decision on another ground. It noted that the Immigration Act of 1917 provided for deportation only on conviction and sentence for a term of one year or more. Because Moy had received only a two-month sentence, it held that he was ineligible for deportation.[58]

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[57] Lai passed away before his case was fully resolved. Application for Warrant of Arrest, dated July 3, 1931, Immigration File 12020/17204, San Francisco Office Deportation Case Files; Transcript of Testimony of Lai Nun, dated June 11, 1931, Immigration File 12020/17204, San Francisco Office Deportation Case Files; Letter from F. B. Balzar to Bureau of Immigration, Department of Labor, dated January 11, 1932, Immigration File 12020/17204, San Francisco Office Deportation Case Files; Brief to Accompany Record of Hearing, dated January 12, 1932, Immigration File 12020/18812, San Francisco Office Deportation Case Files.

[58] Brief of Appellant, *Weedin v. Moy Fat*, 8 F.2d 488 (9th Cir. 1925), 1-3; Transcript of Record, *Weedin v. Moy Fat*, 8 F.2d 488 (9th Cir. 1925), 19-20; *Weedin v. Moy Fat*, 8 F.2d 488, 489 (9th Cir. 1925).

In reading the Immigration Act's length-of-sentence requirement into the Jones-Miller Act, federal courts found another way to prevent the Bureau from deporting defendants for narcotics violations. While judges continued to have the recommendation clause at their disposal, a 1932 proceeding against thirty-year-old Sam Sing Dai reveals that they may have acted strategically when sentencing defendants to take advantage of this requirement.[59] When immigration officials in San Francisco moved to deport Sam, his attorney filed a memorandum with the Immigration Service. He noted that the trial judge, Frank Kerrigan, had sentenced Sam to only six months at the San Francisco County Jail. "Judge Kerrigan stated in open court," Sam's attorney explained, "that he did not wish this man deported, and consequently gave him a sentence of six months." At least according to Sam's attorney, Kerrigan gave Sam a relatively short sentence precisely because he wished not to see Sam deported. Sam's attorney suggested that Kerrigan routinely made similar calculations.[60]

If concerns like a non-citizen's age or family occasionally led judges to recommend against deportation, non-citizens' ability to secure legal representation must have also played some role in the successes they recorded in avoiding expulsion. As other historians have already demonstrated, Chinese subjects threatened with exclusion or deportation proved remarkably

[59] One can only speculate as to why a judge would use sentencing, instead of a recommendation, to prohibit deportation. Several explanations are possible. First, following *Wong Ging*, judges may have thought the recommendation power subject to further attack and opted to rely on sentencing limitations instead. Second, judges may have believed sentence length, which typically increased for crimes considered more serious, represented a good proxy for the importance of deporting specific defendants. Third, relying on sentence length allowed judges to escape being cast as too conspicuously pro-immigrant. Fourth, the recommendation clause required an additional step be taken to effect a judge's wish, in the form of a letter to the Bureau of Immigration; judges may have opted to use sentencing for its relative administrative ease.

[60] Memorandum on Behalf of Alien, In the Matter of Sam Sing Dai, undated, Immigration File 12020/20382, San Francisco Office Deportation Case Files. Sam's attorney suggested that Judge Kerrigan had an established, well-known sentencing practice, by which he gave offenders he did not wish to see deported short sentences but gave specific groups of violators relatively longer sentences. "It is a well known fact that in cases of persons who are suspected or who are known to be dealers," he wrote, "that Judge Kerrigan invariably gives them a sentence of from eighteen months to three years, and especially so where it is a Chinaman if he is dealing in morphine or cocaine."

capable of retaining counsel and navigating the U.S. legal system.[61] Chinese immigrants facing deportation for Jones-Miller violations, in similar fashion, retained counsel and used U.S. courts to blunt the power of immigration officials. Wong Ging, Wong Dick, Lai Nun, Moy Fat, and Sam Sing Dai were just five of the many Chinese nationals threatened with deportation for Jones-Miller violations who appeared before either Bureau officials or federal judges—or both—with an attorney at their sides.[62]

Neither the availability of counsel nor invoking their long residence in the U.S. would help the non-citizen offenders who offered a third, related challenge. Unlike the Immigration Act of 1917, which limited the time after initial entry during which immigrants remained vulnerable to deportation, the Jones-Miller Act expressly permitted deportation for infractions "at any time after entry." Two non-citizens facing deportation for Jones-Miller violations in 1926 argued that the statute's use of that phrase must be limited by the temporal provisions in the 1917 law. The first such case involved an Italian national, Fred Grimaldi, who had come to the United States 20 years earlier, as a 17 year-old, and settled in Chicago. Originally from Bracigliano, a town near Naples, Grimaldi pled guilty in 1923 to having imported 50 ounces of raw opium into the U.S. The second arose when 33-year-old Chung Que Fong, a Chinese native who had first moved to San Francisco in 1909, pled guilty to opium possession in 1922. Among other arguments they

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[61] For arguments that Chinese Americans and Chinese-descended residents often used the U.S. court system, or for examples of instances when they did so, see Salyer, *Laws Harsh as Tigers*, 184-85; Lee, *At America's Gates*, 47, 138, 225; Charles McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994), 3.

[62] Though my use of legal sources certainly makes it more likely that I would come across instances in which a non-citizen had secured counsel, I discovered several of these cases while glimpsing through a non-citizen's immigration case file and not through my review of a published case.

made, both Grimaldi and Chung contended that the 1917 law's five-year limitation constrained the Bureau of Immigration in its efforts to deport.[63]

The appeals courts that heard the two challenges, though, agreed that violations of the Jones-Miller Act represented deportable offenses regardless of how long after a non-citizen's entry he or she committed the underlying acts. Both courts rested their decisions on the statute's plain language authorizing deportation for convictions that occurred at "any time after entry." The court in the challenge brought by Chung claimed that Congress had declared "that violators of the Narcotic Act were … a class not to be entitled to any sort of prescriptive right to remain in this country."[64] Though the courts had interpreted officials' authority to deport under the Jones-Miller Act as constrained in the same fashion as their power to deport for other criminal acts, they took Congress at its word when it made drug crimes deportable offenses regardless of when after entry committed. By 1926, then, it was settled that persons convicted of a Jones-Miller violation could be deported, even if such violations occurred decades after they first came to the United States.[65] If judges had intervened to obstruct some Bureau efforts to deport, they would not be able to do so in every case.

By the mid-1920s, it was clear that Harrison Act violations offered officials no ground to deport non-citizens but Jones-Miller infractions did. The consequences that attached to the two statutes, coupled with the fact that federal prosecutors often alleged violations of both laws, offered another mechanism by which judges might punish drug offenders but prevent their deportation: They could find them guilty of violating the Harrison Act but dismiss the Jones-

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[63] Record on Appeal, *Grimaldi v. Ebey*, 12 F.2d 922 (7th Cir. 1926), 2-3, 10-15; Brief for Appellant, *Chung Que Fong v. Nagle*, 15 F.2d 789 (9th Cir. 1926), 2-3, 5-9; Brief and Argument of Appellant, Fred Grimaldi, *Grimaldi v. Ebey*, 12 F.2d 922 (7th Cir. 1926), 24.
[64] *Grimaldi v. Ebey*, 12 F.2d 922, 923 (7th Cir. 1926); *Chung Que Fong v. Nagle*, 15 F.2d 789, 790 (9th Cir. 1926).
[65] For other federal courts reaching the same conclusion, see *Todaro v. Munster*, 62 F.2d 963 (10th Cir. 1933); and *Shibata v. Tillinghast*, 31 F.2d 801 (D. Mass. 1929).

Miller count. They could also rely on the minimum sentence requirement and send a defendant to prison for a Harrison Act violation while suspending sentence on the Jones-Miller count. When Chun Fun appeared in federal court in Honolulu in January 1931, the judge who heard his case took the latter approach. Chun was found guilty of violating both laws. The judge sentenced him to two years in prison for his Harrison Act violation but gave him a suspended sentence and probation for his Jones-Miller conviction. The Honolulu office determined that, as a result, Chun was not eligible for deportation.[66]

Judges were not alone in seeing opportunity in the ability to exploit the two laws' differences. Prosecutors used the threat of deportation for a Jones-Miller violation to extract guilty pleas on Harrison Act counts. In March 1931, the Commissioner General's office in Washington instructed the Honolulu district office to secure a warrant of deportation against Lum Sut, a 58 year-old native of China who had first come to the United States more than forty years earlier. Lum had twice been convicted of Harrison Act violations. The Washington office repeated its position that Harrison Act convictions did not support deportation but noted that the indictment also included a Jones-Miller count. In response, the District Director of Immigration in Honolulu explained that it had "long been" prosecutorial practice in Hawaii to draft indictments that included alleged violations of both drug laws. "Upon a plea of guilty to the count not carrying deportation," he claimed, "the deportation count is dismissed."[67] Prosecutors,

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[66] Letter from George J. Harris to District Director, dated January 12, 1931, Immigration File 4280/539, Honolulu Office Deportation Case Files; Letter from District Director of Immigration to Commissioner General of Immigration, dated May 11, 1931, Immigration File 4280/539, Honolulu Office Deportation Case Files; Letter from George J. Harris to District Director, dated May 29, 1931, Immigration File 4280/539, Honolulu Office Deportation Case Files; Letter from District Director of Immigration to Commissioner General of Immigration, dated June 10, 1931, Immigration File 4280/539, Honolulu Office Deportation Case Files. The Bureau took the position that, when a judge imposed a sentence but suspended it such that no imprisonment attached to conviction for the charge, such conviction did not support deportation. Letter from A. R. Archibald to District Director, Immigration Service, dated June 20, 1933, Immigration File 4280/531, Honolulu Office Deportation Case Files.

[67] Letter from District Director of Immigration to Commissioner General of Immigration, dated February 8, 1931, Immigration File 4280/542, Honolulu Office Deportation Case Files; Letter from George J. Harris to District

too, saw value in the coexistence of the two federal drug crimes and used the threat of deportation under the Jones-Miller Act to secure plea deals.

Whatever hope Congress placed in the Jones-Miller Act to facilitate the deportation of drug offenders met with mixed results for much of the decade that followed. Though the law was open to a number of interpretations, federal judges read it to incorporate several of the limitations on deportation found in existing immigration law.[68] That move opened the Act to challenges by non-citizens. Prospective deportees successfully argued that the Bureau could not deport over a judge's recommendation or for a sentence of less than one year. Immigration officials also found their efforts frustrated by judges and prosecutors, who sometimes exchanged a light sentence on an otherwise deportable offense for a guilty plea on a non-deportable crime. Despite these setbacks, though, the plain language of the Jones-Miller Act left courts unable to prevent deportations on the basis that the alleged violation occurred more than five years after the non-citizen first entered the U.S. Henceforth, the Jones-Miller Act might not allow deportation for minor offenses and might be subject to judicial recommendations against expulsion; if a judge were not inclined to offer such a recommendation, though, the Act would allow officials to expel non-citizens for crimes committed decades after they arrived in the country.

Director, dated March 7, 1931, Immigration File 4280/542, Honolulu Office Deportation Case Files; Letter from District Director of Immigration to Commissioner General of Immigration, dated March 31, 1931, Immigration File 4280/542, Honolulu Office Deportation Case Files.

[68] Lower courts' interpretation of the Jones-Miller Act as incorporating these protections for non-citizens may be an early instance of a tendency, described by immigration law scholars, among federal courts to read Congress's immigration statutes narrowly. That is, after given Congress plenary power over immigration, the federal courts, "because of deportation's harsh consequences," required Congress to state "clearly when noncitizens [were] deportable." See Thomas Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, and Maryellen Fullerton, *Immigration and Citizenship: Process and Policy*, 7th ed. (St. Paul, West Publishing Co., 2012), 667-69.

IV. Expanding Narcotics Deportations and the Persistence of Judicial Discretion

Deportation proponents in Congress remained unhappy with the results obtained under the Jones-Miller Act. They viewed officials' authority to expel narcotics offenders as anemic and offered a number of bills in the middle and late 1920s to expand this power. The bills shared several features: All would have made Harrison Act violations deportable offenses and all would have excised the five-year limitation found in the Immigration Act of 1917.[69] Congress, in 1931, passed a law that adopted both changes. It made violation of any federal narcotics law a deportable offense no matter how long after entry the suspect committed the forbidden act.[70] The law thus eliminated several arguments non-citizens had offered to challenge expulsion under the Jones-Miller Act and allowed officials to deport a greater number of narcotics violators

It did not, though, end the dispute between immigration officials and federal judges as to the scope of the Bureau of Immigration's power to deport. Instead, it reframed the terms of that debate. The Bureau argued that the 1931 law had stripped all discretion from federal judges and bureaucrats to prevent the deportation of a non-citizen convicted of a narcotics violation. The Bureau claimed, in other words, that a non-citizen's narcotics conviction mandated his or her deportation. Federal judges, much to the Bureau's consternation, saw the matter differently. They continued to insist they had discretion to recommend against deportation even under Congress's new law. They viewed their ability to inject moderation into the deportation process as an important check on the Bureau. Ultimately, judges succeeded in preserving their power to recommend against deportation.

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[69] The deportability of narcotics offenders generated much talk in the second half of the decade; I have located at least 18 bills proposed between the time Congress approved the Jones-Miller Act and the end of the 1920s. I have in mind here a series of bills proposed between 1925 and 1929 in the 68th, 69th, and 70th Congresses, including 68 H.R. 11796, 69 H.R. 344, 69 H.R. 3774, 69 H.R. 11489, 69 H.R. 12444, 70 H.R. 10078, and 70 H.R. 16850.

[70] 46 Stat. 1171 (1931). Like in the Jones-Miller Act, Congress did not predicate deportation under its 1931 law on any minimum sentence.

During the second half of the 1920s, congressmen who wished to expand immigration officials' authority to deport drug offenders set their sights on one goal: making Harrison Act violations a basis to expel non-citizens. A 1926 letter from the office of the Commissioner General made clear why federal legislators focused on that change. While Jones-Miller violations represented deportable offenses, an official explained, "prosecuting attorneys almost universally" proceeded under the Harrison Act. They did so because the latter act permitted "conviction merely upon possession," while the former required "proof of importation." The same official intoned: "Possession and sale of narcotics are not a crime involving moral turpitude," and thus did not support deportation.[71] Many legislators saw only one solution to this impasse: making Harrison Act violations deportable offenses regardless of whether they involved moral turpitude.

Congressmen introduced a handful of bills in the second half of the 1920s to accomplish this end. Many represented considerable expansions of the Bureau's power to expel, of which narcotics violations represented only one component. In January 1925, for one example, William Holaday, a Republican congressman from Illinois, introduced a bill to amend the Immigration Acts of 1917 and 1924. The bill removed nearly all of the time restrictions in the 1917 law, permitting non-citizens to be deported whenever after entry a ground for expulsion emerged. It also augmented the criminal acts that rendered a non-citizen eligible for deportation by making conviction for "any offense," not only crimes of moral turpitude, a basis for expulsion. And it made conviction of state and federal prohibition statutes, as well as any federal anti-narcotics law, into deportable offenses. In its report recommending the House pass the bill, the Committee

[71] Letter from G. E. Tolman to District Director, Immigration Service, Helena Montana, dated May 1, 1926, Case File 53244/1E, Warrants & Arrest Cases.

on Immigration explained that the "primary purpose" of the narcotics paragraph was "to catch the large number of alien violators of the so-called Harrison Antinarcotic Act."[72]

Resistance to strengthening the Bureau's hand—particularly to allowing it to deport non-citizens no matter how long they had been in the country—stood at the center of lawmakers' opposition to Holaday's bill and to several others during the decade. A Minority Report from the Committee on Immigration charged that the purpose of Holaday's bill was the "removal of the five-year limitation" that prohibited the expulsion of immigrants convicted of crimes more than five years after their entry into the country. The Report called attention to the hardship the provision would visit on those who it would make liable for deportation many years after entry because, after "years of hard and hazardous employment" they "became a temporary public charge." It did not shy away, though, from criticizing the bill for its expansion of the persons deportable for their commission of crimes. The Report's authors claimed, "We deprecate the removal of time limit in all causes." Second, these same congressmen lamented the attempt to deport for crimes that involved no moral turpitude. With this limitation excised from federal immigration law, they warned, "high-grade misdemeanor[s]," "offense[s] of a technical character," and "first offense[s]" would suffice to support expulsion.[73]

Similar concerns reemerged a year later, when the House Committee on Immigration heard testimony on another pair of bills to expand the Bureau's power to deport. Ernst Freund, by then long a professor at the University of Chicago, appeared as a member of the Board of Directors of the American Civil Liberties Union. He expressed concerns about several provisions

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[72] 68 H.R. 11796; Ibid., §§19(a)(1)-(8), 10; 68 H.R. Rep. 1292 (1925), 9-10. The Committee's report also noted that the Solicitor of the Labor Department had taken the position that Harrison Act violations did not involve moral turpitude and that the courts had not resolved that question because, in view of the Solicitor's opinion, the Bureau of Immigration had made no effort to deport for violations of that law.
[73] 68 H.R. Rep. 1292, Part 2 (1925), 3-4, 7. The Report made specific mention of the injustice of deporting first offenders whose crime involved no moral turpitude.

in the bills, including the burdens of proof they placed on those who became public charges or who fell ill to prove that the causes of their poverty or sickness occurred only after they came to the United States. He also repeated his "general impression that after a person ha[d] been" in the country "10 or 15 years, the presumption" should be "that he ought not to be deported." The ACLU submitted a memo to the Committee in which it recommended the bills be amended to fix a "time limit of three or five years" from entry, after which period "no alien resident may be deported." It explained that, in the absence of such a limitation, the laws worked a "grave injustice." It suggested that, in many instances, the removal of this limitation would "break[] up families long established in this country, return[] the deported alien to a country whose language and customs he may no longer know, and leave[] his family public charges."[74]

The second half of the 1920s, then, saw congressmen propose more than a dozen bills that would have made Harrison Act violations into deportable offenses, none of which became law.[75] Opposition to the expulsion of drug violators played little part, if any, in the bills' failure. As they lambasted other provisions in the bills, congressmen expressed support for anti-narcotics law. The Minority Report to Holaday's 1925 bill, for instance, listed objection after objection to the bill. Specific to its narcotics provisions, the Report criticized the bill's effort to make drug offenders deportable even in the absence of a conviction for violating the law. In so arguing, though, the Report's authors invoked the "importance" of the Harrison Act, and they raised no

[74] 69 H.R. 344; 69 H.R. 3774; *Deportation of Alien Criminals, Gunmen, Narcotic Dealers, Defectives, Etc.: Hearings on H.R. 344 and 3774 Before the Committee on Immigration and Naturalization*, 69th Cong. (1926), 18-9, 86-9. Allen Olmstead, a Philadelphia lawyer who volunteered to represent the ACLU's witnesses before the Committee, remarked that an "alien narcotic peddler" who debauched children but had nonetheless been in the U.S. for a number of years is "deserving of the same treatment as an American citizen guilty of the same crime." While it opined that all bases for deportation should be subject to a time limitation, the ACLU does not appear to have taken issue with making all federal narcotics offenses into deportable crimes.

[75] See, for examples, 68 H.R. 11796; 69 H.R. 344; 69 H.R. 3774; 69 H.R. 5698; 69 H.R. 11250; 69 H.R. 11489; 69 H.R. 11945; 69 H.R. 12444; 70 H.R. 3; 70 H.R. 5673; 70 H.R. 6069; 70 H.R. 10078; 70 H.R. 16567; and 70 H.R. 16850. Most of these bills stalled after the House Committee on Immigration recommended their passage.

argument to making a Harrison Act conviction a basis for deportation.[76] The ACLU's memo on the bills before the House a year later took even less issue with the effort to make Harrison Act violations deportable offenses. While specifically noting the change the law would work, it offered no objection to the expulsion of drug violators. This in a memo detailing numerous, specific shortcomings the ACLU saw in the proposed legislation.[77]

Instead, what seems to have kept Congress from making Harrison Act violations into a basis of deportation was legislators' insistence on doing so through broader amendments to federal immigration law. During the 1920s, each of the bills that proposed making Harrison Act violations into deportable offenses also made other acts into bases for expulsion. Many of the bills, for example, made violations of state and federal prohibition statutes into grounds for removal. They often also attempted to excise protections against deportation that non-citizens had hitherto enjoyed. Congressional efforts to remove time limitations on deportation, making offenses grounds for expulsion no matter how long after entry non-citizens committed them, stood as but one example of the kinds of protections some congressmen wished to strip from federal immigration law. It was the bills' determination to make other acts into deportable offenses, or to remove protections against deportation for non-citizens, that fomented lawmakers' opposition to them.[78]

When they finally introduced a bill that concerned only Harrison Act convictions, congressmen advocating strong deportation policies succeeded in making such violations into deportable offenses. In February 1931, Congress passed a bill that did precisely this. First

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[76] 68 H.R. Rep. 1292, Part 2 (1925), 8. The bill allowed immigration inspectors to make a determination as to whether a non-citizen had violated the law, which determination need not be supported by a guilty verdict from a court.

[77] *Deportation of Alien Criminals, Gunmen, Narcotic Dealers, Defectives, Etc.: Hearings on H.R. 344 and 3774 Before the Committee on Immigration and Naturalization*, 69th Cong. (1926), 90-2.

[78] The Minority Report on 68 H.R. Rep. 1292 and the ACLU's memo are but two pieces of evidence that policymaker and public opposition to the immigration bills before Congress during the period had little to do with opposition to making Harrison Act violations into deportable offenses.

introduced nearly two years earlier, in May 1929, the new law made violations of any federal anti-narcotics statute into a deportable offense. Though the bill's language suggested Congress may have had broader use in mind for the law, Congress passed it to make Harrison Act infractions grounds for expelling non-citizens. In May 1930, Congressman Johnson submitted a report on the bill that made its objective clear. Its purpose, the Committee noted, was "to provide for the deportation of an alien convicted in violation of the Harrison narcotic law." As for the government's need to deport Harrison Act violators, the Committee posited a recent rise in crime and connected it to a "number of large international dope rings operating in the United States." They hoped the bill would allow the government to expel the "alien smugglers and those aliens higher up in the big international rings who are worse than murderers."[79]

The Committee's language condemning narcotics traffickers reflected a consensus in Congress concerning the desirability of deporting Harrison Act violators. Committee reports, hearing transcripts, and records of debate on the House and Senate floor are rife with expressions of support for expelling such offenders. In a July 1930 discussion on the House floor, for one example, a representative from Missouri asked the bill's author whether the bill provided for the deportation of non-citizen Harrison Act violators. Receiving a response in the affirmative, he posited that "every law-abiding citizen favors that." In a sign some Congressmen viewed the importance of expelling drug offenders as self-evident, some—echoing Representative Siegel's claims eight years earlier—expressed astonishment that doing so required legislation separate from the Immigration Act of 1917. Hiram Johnson, the former governor of California who represented the state in the Senate for nearly 30 years, responded in bafflement when informed that then-present law did not support expulsion. "Do you mean to tell me," he asked, "that if you

[79] 71 H.R. 3394; 71 H.R. Rep. 1373, 1-2. The report continued: "The flow of dangerous habit-forming illicit narcotics from the factories of Europe continues to seep into the life blood of the American people, bringing misery, disease, and crime in its wake."

have convicted an alien under the narcotic act that you can not deport him?" He later exclaimed that he could not conceive "a judicial decision that the peddling of narcotics, secretly and clandestinely, in violation of the statute, does not involve moral turpitude."[80]

Despite such statements of support, a handful of congressmen insisted on treating addicts and peddlers differently. They ultimately succeeded in securing an important concession in the bill as passed. When the bill went before the House for a vote, Representative Stafford, who had argued so forcefully against Johnson's 1922 bill to make narcotics violations into deportable offenses, took issue with its breadth. "Do I understand," he asked the bill's author, "it is the purpose of the gentleman from New York to deport every narcotic addict or every user of opium in case he happens to be an alien?" When the bill's author responded in the affirmative, Stafford bemoaned once again that the "language of the bill is broad enough to deport every unfortunate addict of opium in case he is an alien."[81] Stafford's objection led the bill's author to reconsider his purpose in offering the bill. On reflection, he noted that the bill's goal was to "deport aliens, violators of the Harrison narcotic law and particularly the peddlers of these evil habit-forming drugs." He offered an amendment to his own bill to except addicts who neither dealt nor peddled narcotics from its coverage. The bill passed the House after that amendment.[82]

The Act of February 18, 1931, as courts and federal officials referred to it, offered immigration officials a potent weapon to secure additional deportations of narcotic offenders.

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[80] 1930 Cong. Rec. 12453; *Deportation of Aliens Convicted of Violation of Narcotic Law: Hearing Before the Committee on Immigration, United States Senate, Seventy-First Congress, Third Session, on H.R. 3394* (Washington: Government Printing Office, 1931) [hereinafter 1931Senate Immigration Committee Hearing], 2-3.
[81] 1930 Cong. Rec. 10325. In a later discussion on the House floor, Stafford explained that, to the extent it permitted for the deportation of drug users, as opposed to peddlers, the bill "outrage[d his] sense of justice to an unfortunate user of opium who chance[d] to be an alien." 1930 Cong. Rec. 12367.
[82] 1930 Cong. Rec. 10325, 12367, 12453. The bill's author agreed to another amendment recommended on the House floor. In 1918, Congress made possession of narcotics not bearing the appropriate stamp indicating payment of all taxes prima facie evidence of a violation of the Harrison Act. See Chapter 3, n. 51. Another congressman, noting that the deportation bill allowed for the expulsion of non-citizens found guilty of possessing narcotics, suggested removing the reference to possession in the bill. Otherwise, he warned, the bill worked a rather unusual injustice: it shielded addicts, but not casual users, from deportation.

Importantly, unlike the Jones-Miller Act, it did not require that a defendant have received a prison sentence of one year or longer. Moreover, Harrison Act convictions did not require prosecutors to demonstrate that a defendant knew the narcotics in which he dealt had been imported unlawfully into the country. The new law, though, shared one important feature with the Jones-Miller Act: It permitted deportation no matter how long after a non-citizen's entry into the United States he or she was convicted.[83] In sum, the 1931 law allowed the Bureau of Immigration to deport non-citizen violators sentenced even to very short prison stays and regardless of how long the non-citizens had been resident in the country.

Federal officials expressed hope that the new law would make it much easier for the Bureau to deport narcotic offenders. A 1931 annual report from Harry Anslinger, the newly-named Commissioner of Narcotics, explained that, during the twelve-month period that ended June 30, 1931, immigration officials had deported but 44 non-citizens for violation of the Jones-Miller Act. Anslinger's report noted the recent passage of the Act of February 18, 1931, and explained that congestion in the courts had kept immigration officials from using the new law to deport non-citizen drug offenders. Anslinger noted enthusiastically, though, that the "cases of 197 aliens" for Harrison Act offenses "were pending at the close of the fiscal year."[84] After a decade of effort, federal narcotic and immigration officials believed that, in the Act of February 18, 1931, they had at long last secured legislation that would allow them to expel non-citizen drug offenders from the country.

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[83] Pub. L. 71-683; *Magri v. Wixon*, 53 F.2d 475 (S.D.N.Y. 1931) (permitting immigration officials to deport Harrison Act violator resident in the U.S. for 18 years over an objection premised on the defendant's length of residence in the country on the ground that the Act of February 18, 1931 incorporated only the "manner" of deportation provisions in the Immigration Act of 1917).

[84] *Annual Report of the Commissioner of Narcotics for the Fiscal Year Ended June 30, 1931* (Washington: GPO, 1931), 25. The Bureau of Immigration appears to have deported two non-citizens under the Act of February 18, 1931 in the four-plus months between that law's passage and the end of the fiscal year.

Despite apparently broad authority to deport, immigration officials faced new arguments against expulsion under the 1931 law. Predictably, non-citizens took advantage of the law's exception for addicts who had neither peddled nor dealt in narcotics. Non-citizens claimed, in other words, to be drug addicts who had never engaged in narcotics commerce. When officials investigated Fong Shee, a 44-year old woman from Hong Kong, for example, she offered precisely this argument.[85] Arrested alongside 13 others, all caught smoking opium in Fresno's Chinatown, Fong pled guilty to violating the Jones-Miller Act.[86] The agent who testified at her trial noted that she did not stand accused of selling or dispensing opium.[87] Nonetheless, the government's lawyers insisted that a guilty plea to a Jones-Miller count was "conclusive as to the facts of the case." It instructed its inspector to begin deportation proceedings.[88] Fong's attorney submitted a brief in which he argued that she should be excepted from deportation. "The best that could be said for her on the part of the case for the Government," he explained, "is that she

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[85] Transcript of Statement Taken from Fung Shee, November 24, 1931, Immigration File 12020/20296, San Francisco Office Deportation Case Files.

[86] Prosecutors charged defendants with violating one or both of the Harrison Act or the Jones-Miller Act, and the Bureau of Immigration filed warrants for deportation under Congress's 1931 law. Fong's case makes clear that immigration officials used the Act of February 18, 1931 to deport Jones-Miller Act violators as well as Harrison Act violators. While the Jones-Miller Act already permitted deportation, it required that defendants be sentenced to a prison term of one year or longer. The Act of February 18, 1931 included no such length of sentence requirement. Thus Fong, who had been sentenced to only six months in jail, would not be amenable to deportation under the Jones-Miller Act but was amenable to deportation under the Act of February 18, 1931 on the basis of her Jones-Miller conviction. Argument on Behalf of Alien, Fong Shee, Immigration File 12020/20296, San Francisco Office Deportation Case Files.

[87] Reporter's Transcript of Testimony and Proceedings on Judgment, Immigration File 12020/20296, San Francisco Office Deportation Case Files. The judge before whom Fung appeared noted that cases charging opium were usually tried in state court and expressed some concern that subjecting defendants accused only of use to trial in federal court would leave federal court calendars "more deluged" than was then true. Ibid.

[88] Letter from James P. Butler to Commissioner of Immigration, San Francisco, California, dated April 15, 1932, Immigration File 12020/20296, San Francisco Office Deportation Case Files; letter from Arthur J. Phelan to City Office, dated May 10, 1932, Immigration File 12020/20296, San Francisco Office Deportation Case Files. Immigration officials from the San Francisco office of the Bureau of Immigration took this position because Jones-Miller counts charged defendants with having engaged in unlawful commerce.

was an addict and was smoking at the time the place was raided." Such evidence, he claimed, did not support deportation.[89] Fong's case file does not make clear the disposition of her case.

Bureau inspectors saw the exception as offering narcotics suspects a means to escape deportation. An exchange between an immigration inspector working in Sacramento and the Commissioner of Immigration in San Francisco illuminates the challenges some saw with the "addict" exception. Investigating Chin Tong, tried in Nevada for violating federal narcotic laws, Inspector F. O. Seidle wrote to explain that the single count to which Chin pled guilty did not allow his office to determine "whether the alien is an 'addict and not a dealer or peddler.'" Seidle asked whether the accused had the burden of proving he or she qualified for this exception; if not, he posited, the mere "word of the accused" would bind in many cases and render the new immigration law "ineffectual." The Commissioner's office responded that, to support deportation, inspectors must either secure an admission of peddling or dealing from the accused or collect "evidence of this as the basis for" expulsion.[90] As the Bureau interpreted the Act of February 18, 1931, then, deportation required more than a conviction under the Harrison Act, violations of which required no evidence of commerce. If, as the Commissioner claimed, the Bureau had the burden of demonstrating that the accused had either peddled or dealt, many of the cases developed by narcotic inspectors might support conviction but not deportation.

The "addict" exception proved not to be suspects' only recourse against deportation under the new law. As before, defendants continued to rely on a number of personal details to convince immigration officials not to expel them. These included their length of residence in the U.S., their age, the presence of their family in the country, and a professed lack of support in

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[89] Argument on Behalf of Alien, Fong Shee, Immigration File 12020/20296, San Francisco Office Deportation Case Files.

[90] Letter from F. O. Seidle to Commissioner of Immigration, dated January 22, 1932, Immigration File 12020/20175, San Francisco Office Deportation Case Files; letter from W. E. Walsh to F. O. Seidle, dated January 25, 1932, Immigration File 12020/20175, San Francisco Office Deportation Case Files.

China. Ching Sam King, for one example, a 74 year-old who first came to the United States in 1881, received a sentence of six years in Oahu Prison in February 1933 for violations of the Harrison Act and the Jones-Miller Act. Ching was arrested, along with his 16 year-old son, as the two walked to sell an informer a can of opium for $50. In a brief submitted on Ching's behalf, his attorney admitted that Ching's conviction for two narcotics offenses "settle[d] conclusively the right of this department to deport this alien." He claimed that there remained, however, a "certain discretion in the department" as to whether to deport a non-citizen. On the basis of Ching's 52 years in Hawaii, the fact that his wife and six children all lived in Hawaii, and his age and health, Ching's attorney asked immigration officials to exercise that discretion and order that Ching not be deported to China—where, in the words of Ching's attorney, "nothing but swift and miserable death awaits him." Despite these arguments, the Bureau deported Ching to China after he served two years in Oahu Prison.[91]

More contentious after February 1931 was the question of whether the new law allowed judges to continue to recommend against deportation when they sentenced narcotics defendants. The Act of February 18, 1931, like the Jones-Miller Act, contained no express provision for judges to exercise that authority. Judges maintained that the 1931 law's requirement that deportation take place in the "manner" provided in the Immigration Act of 1917 incorporated the 1917 law's provision permitting judicial recommendations against deportation. The Bureau of Immigration viewed the matter differently. As an Assistant Commissioner General explained, the Bureau took "the position that the provisions of the Act of February 18, 1931, [were] mandatory and that the Department [was] without discretion as to the institution of deportation proceedings

[91] Letter from Assistant Secretary to the Secretary of Labor, dated March 11, 1933, Immigration File 4280/317, Honolulu Office Deportation Case Files; Statement of Alien Charged with Violations of Federal Narcotic Laws, dated October 30, 1932, Immigration File 4280/317, Honolulu Office Deportation Case Files; Brief on Behalf of Ching Sam King, Immigration File 4280/317, Honolulu Office Deportation Case Files; Description of Person Deported, Immigration File 4280/317, Honolulu Office Deportation Case Files.

in the case of an alien who [had] been convicted under the provisions of" that act. If the Bureau lacked any discretion over deporting non-citizen drug offenders, so too did judges. The Bureau insisted that federal courts were "without authority to recommend against the deportation of an alien so convicted."[92]

Immigration officials determined to press their case when Dang Nam, a Chinese citizen who had lived in Hawaii for 36 years, was found in possession of smoking opium and pled guilty to violating both the Harrison Act and the Jones-Miller Act. According to Dang, he pled guilty and received a six-month sentence in the city and county jail in Honolulu on agreement with the federal prosecutor who handled the case that the judge would recommend against deportation. His attorney corroborated Dang's claim. At the insistence of the District Director of Immigration in Hawaii, the same judge who recommended against deportation later held at Dang's habeas proceeding that his recommendation had "no binding effect upon the Department of Labor."[93]

On appeal, Dang offered two claims to support his contention that judges continued to wield the power to recommend against deportation. First, he insisted that, because the Act of February 18, 1931 incorporated two sections of the Immigration Act, the law should be read as including all referenced provisions not inconsistent with its terms. Second, he claimed that, had Congress wished to end judicial discretion to stay deportation, it would have done so expressly. Since it had not done so, Congress must have "realized the humane and beneficial use courts from time to time have made of this power in preventing essential miscarriages of justice."[94]

Immigration officials offered two counterarguments. They cited *Andreacchi* for the proposition that narcotics offenses involved no moral turpitude and then contended that the

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[92] Letter from Edward J. Shaughnessy to Commissioner of Immigration, dated March 17, 1933, San Francisco, California, Immigration File 12020/20878, San Francisco Office Deportation Case Files.
[93] Transcript of Record in *Dang Nam v. Bryan*, 74 F.2d 379 (9th Cir. 1934), 4-5, 8, 32, 56-7; Brief on Behalf of Appeallate, *Dang Nam v. Bryan*, 74 F.2d 379 (1934), 2.
[94] Brief on Behalf of Appeallate, *Dang Nam v. Bryan*, 74 F.2d 379 (9th Cir. 1934), 5-7.

Immigration Act's judicial recommendation clause only applied to defendants facing deportation for having been convicted of a crime of moral turpitude. They also argued that, because the Act of February 18, 1931 expressly referenced only the "manner" of deportation outlined in the Immigration Act of 1917, it incorporated fewer of the older law's provisions. The judicial recommendation clause, according to immigration officials' reading of the new law, did not qualify as having to do with the "manner" of deportation.[95]

The federal appellate court that heard Dang's appeal found in his favor and described the judicial discretion to prevent deportation as an important check on an increasingly powerful Bureau of Immigration. In its decision, it claimed that Congress could not have meant to strip judges of the power to recommend against deportation merely by using the phrase "in the manner" rather than "in accordance with" in the new law. More critically, however, it described a court's sentencing of a defendant as an "essential element" of any deportation effected under the Immigration Act of 1917. Congress, it concluded, must have shared this view of deportation when it imbued the Bureau with greater power in the Act of February 18, 1931. Congress's "broadening" of the bases of deportation "to include every type of infraction of laws for the regulation of narcotics" would have, the court opined, made clear to lawmakers the need to preserve "the authority of the trial judge in cases of minor importance in the right and duty of making such a recommendation."[96] While federal immigration officials viewed judicial discretion as an impediment to the swift justice they wished to mete out to non-citizen drug offenders, in other words, the court viewed Congress's expansion of deportation as making

[95] Brief for Appellee, *Dang Nam v. Bryan*, 74 F.2d 379 (9th Cir. 1934), 4-11.
[96] *Dang Nam v. Bryan*, 74 F.2d 379, 381 (9th Cir. 1934).

judicial discretion even more essential to justice. *Dang Nam* ensured that judges would continue to exercise this authority for years to come.[97]

As the court's opinion in *Dang Nam* had suggested, federal judges may have succeeded in preserving their power to prevent deportations, but they wielded this power against a Bureau of Immigration that had consolidated considerable authority in the years since Congress passed the Jones-Miller Act. By a number of different measures, the Bureau had become a much more coercive force by the early 1930s. The Act of February 18, 1931 had, after all, given the Bureau yet another basis on which to deport non-citizens. Its statutory authorization to deport had thus increased, and so too had the use it made of its power to expel. Though the Bureau deported 4,000 non-citizens in 1922, it expelled more than 19,000 in 1932, which figure included 1,709 criminals—138 of which were narcotics violators. Congress had also tripled the Bureau's budget appropriation between 1923 and 1932 so that, by the latter date, the Bureau had a workforce of more than 2,700.[98] At the same time that federal judges may have believed the authority to recommend against deportation all the more important in light of the Bureau's increasing force, these figures make clear that the courts' persistence did act as a check—if a small one—on an otherwise quite powerful agency.

V. Conclusion

After the *Dang Nam* court issued its opinion, the contours of federal power to deport narcotics offenders had become clear. Immigration officials could deport non-citizens who violated either the Harrison Act or the Jones-Miller Act regardless of how long the non-citizen

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[97] For others protected against expulsion by a judge's recommendation, see the case files of: Chun Pak Kui (Immigration File 4280/1122, Honolulu Office Deportation Case Files); Chun Nam (Immigration File 4280/1208, Honolulu Office Deportation Case Files); and Yee Dock (Immigration File 12020/18812, San Francisco Office Deportation Case Files).

[98] *Report of the Commissioner General of Immigration for the Fiscal Year Ended June 30, 1932* (Washington: Government Printing Office, 1932), 28-9, 39-40.

had lived in the U.S. or how short a prison sentence he or she received for violating federal drug law. By the mid-1930s, the judges who presided over narcotics trials and made sentencing decisions remained the only constraint on the Bureau of Immigration's ability to expel drug violators. And judges had only preserved their ability to weigh in on a narcotic suspect's deportation by refusing to abide the Bureau's position that Congress had intended to make the deportation of drug violators mandatory.

Unlike when Congress determined to criminalize narcotics, and had to turn to inventive uses of its enumerated powers, the national legislature should have encountered few problems in expanding the Bureau of Immigration's authority to deport drug convicts. Congress had plenary power over immigration, after all, and it wished to use it, in this instance, to target a vulnerable and disliked racial group. Federalism had forced Congress to pass the Harrison Act as a tax measure, and that decision had, in turn excepted Harrison Act violations from the list of "crimes of moral turpitude" deportable under the Immigration Act of 1917. Even after Congress passed specific legislation to make all drug violations into deportable offenses, the division of federal power into three separate branches constrained policymakers in their efforts to expel. Despite a strengthening penal state and a growing immigration apparatus, in other words, both liberalism and federalism—the former represented here by the founders' decision to divide federal power and the latter appearing here in the central state's lack of a police power and its need to tie its acts to an enumerated power—continued to exert limiting pressure on the federal government. Although the story of federal officials' efforts to make narcotics violations into deportable offenses is ultimately a tale of the central state's success in consolidating authority and sharpening the edges of the penal state, it is also a testament to the enduring power of Americans' ideological commitment to a bounded federal state.

EPILOGUE

On January 6, 2016, Maine Governor Paul LePage appeared at a town hall meeting in Bridgton, Maine, a town of 5,200 in the western part of the state. The meeting was the latest in a series of events LePage had convened to discuss his legislative agenda. Asked at the meeting about the problem of substance abuse in the state, LePage began his answer by lamenting what he perceived as the out-of-state source of many of the drugs Mainers consumed:

> The traffickers — these aren't people who take drugs. These are guys by the name D-Money, Smoothie, Shifty. These type of guys that come from Connecticut and New York. They come up here, they sell their heroin, then they go back home. Incidentally, half the time they impregnate a young, white girl before they leave. Which is the real sad thing, because then we have another issue that we have to deal with down the road.

According to the *Portland Press Herald,* chuckles followed the first half of the governor's comments. "The room fell quiet and there was little discernible reaction," though, "when he finished his remark with the reference to impregnated young white girls."[1]

Media outlets from across the country seized on LePage's statement, many soundly condemning his words.[2] The governor's comments also made their way into presidential politics. The Hillary Clinton campaign criticized LePage's "racist rant[]," and the National Democratic Party called on New Jersey Governor Chris Christie, then seeking the Republican nomination, to

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[1] *Portland Press Herald*, January 7, 2016. "Smoothie" appears to have been a reference to Dionhaywood "Smooth" Blackwell, a 31-year old African American from New Haven, Connecticut, whom state police arrested in September, along with four white Mainers, on suspicion of trafficking heroin. *Portland Press Herald*, September 11, 2015. The other names appear to have been entirely fictitious.

[2] See, for examples, David A. Graham, "Paul LePage's Racist Fearmongering on Drugs," *The Atlantic*, January 8, 2016, available at http://www.theatlantic.com/politics/archive/2016/01/racial-dogwhistling-with-paul-lepage-still-americas-most-outlandish-governor/423246/ (last accessed March 16, 2016); Mollie Reilly, "Paul LePage Makes Racist Claim about Drug Dealers Named D-Money Getting White Girls Pregnant, *Huffington Post*, January 7, 2016, available at http://www.huffingtonpost.com/entry/paul-lepageheroin_us_568ef013e4b0cad15e643549 (last accessed March 16, 2016).

renounce LePage's recent endorsement.[3] Despite this attention from political figures and the press, and after accusing the media of injecting race into his comments, within a month LePage repeated his assertion that "black dealers" were responsible for much of the state's drug problem. In the weeks that followed, he announced his support for reinstating the death penalty in Maine, abolished by the legislature in 1887, as a punishment for drug dealers. He also called on Maine gun-owners to take advantage of the state's open-carry laws to "load up and get rid of the drug dealers."[4]

LePage's comments illustrate that racialized ideas about trafficking and use continue to play a role in contemporary discussions about narcotics. More than that, they also demonstrate that such ideas persist as central considerations for lawmakers as they formulate state responses to narcotics. LePage invoked men of color as prototypical drug dealers in a bid to consolidate public support for harsher narcotics laws. He also drew a direct link between drugs, African Americans, and miscegenation—in case the image of black drug traffickers, on its own, failed to arouse public anxieties. Then, having called public attention to the alleged problem of black drug sales in Maine, he recommended that private citizens and the state enhance the punitive nature of their responses to this supposed crisis. According to LePage, an enhanced state-level criminal justice apparatus and a more vigilant and participatory population might together solve the menace of African-American-distributed narcotics.

If LePage's comments struck many as wrongheaded, they followed on well more than a century of lawmakers using the racialized threat of narcotics to secure support for an expansion of criminal justice and the state that enforces (or, in some instances, the states that enforce) it.

[3] *Portland Press Herald*, January 7, 2016.

[4] *Portland Press Herald*, January 26, 2016; January 27, 2016; February 9, 2016. LePage's office claimed that his discussion of the death penalty for drug trafficking crimes—or at least his suggestion that the state should use the guillotine and have public execution—had been a joke, meant to illustrate his support for tougher laws.

From the outset of San Francisco municipal leaders' attention to opium, in the 1870s, lawmakers' move to develop the state's penal arm in and through their efforts to police narcotics commerce and use—as well as their desire to use their coercive power against racial and ethnic minorities—has been a regular feature of American criminal justice. Georgia legislators' efforts against cocaine, the national government's determination to augment state legislation with federal law, and federal officials' work to punish violators of the country's anti-narcotic laws all shared this motivation. The history of anti-narcotics law in the turn-of-the-twentieth-century United States, then, is a story of state and federal governments expanding their coercive power for the purpose of containing racial minorities and immigrants. LePage's comments unwittingly called on this history, giving voice to a once-commonly expressed view of the relationship between and among state power, race, and anti-narcotics laws.

The parallels between LePage's twenty-first-century anti-narcotics campaign and policymakers' efforts to criminalize drugs in the late nineteenth and early twentieth centuries extend beyond the governor's invocation of race. LePage, like policymakers a century before him, found his ability to respond to the state's narcotics problem constrained by the limits of his authority. His comments followed months of wrangling with the Maine Legislature to secure funding for a build-up of the state's criminal justice apparatus. In November 2015, he asked lawmakers to open a special session of the legislature to allocate resources that would allow the Maine Drug Enforcement Agency to hire 10 additional agents. He also wanted to add an unspecified number of new prosecutors and judges to the state's enforcement apparatus. Exasperated by the legislature's failure to act, LePage threatened that he would "use the executive branch" to address drug trafficking in the state. "If need be," he explained, "as commander in chief, I have access to the National Guard." Though LePage never clarified how

he would use the National Guard, and despite commentator analysis detailing the constraints that existed on his authority to call the National Guard into service, the threat nevertheless conveyed his sense of frustration at legislators' refusal to approve his criminal justice agenda.[5]

As lawmakers in the U.S. turned their attention to narcotics in the decades before and after the turn of the twentieth century, they, too, encountered limits to their authority that constrained their effort to erect a penal state. Municipal and state lawmakers moved against narcotics first, enacting criminal statutes and constituting new and larger enforcement bodies to surveil and prosecute their populations—especially racial minorities and immigrants. These lawmakers came up against a limit on their power in the form of Americans' traditional preference for limited government. Shifts in how lawmakers and jurists understood the states' police power, though, allowed municipal and state governments to pass anti-narcotics laws that, but a generation earlier, had fared poorly in state courts. Federal courts assisted in expanding states' power, limiting the Fourteenth Amendment through their embrace of the "state action" doctrine and their interpretation of the amendment as only reaching the prerogatives of national citizenship.

After the turn of the twentieth century, then, lawmakers at the local and state levels wielded strong authority in part through their efforts against narcotics. Their leaders' attachment to limited government, though, kept some states from claiming the full measure of that authority. Legislators in Georgia passed a number of anti-narcotic laws in the first decade of the new century, for instance, but they persisted in focusing their efforts on druggists and physicians. They did not pass laws that directly targeted use or possession, though they had models in the anti-narcotics laws of states near and far. Instead, they continued to rely on local officers to use minor crimes like vagrancy and public intoxication to arrest and punish users and addicts. They

[5] *Portland Press Herald*, August 11, 2015; November 5, 2015.

found this approach satisfactory for a number of reasons, including fear that laws targeting possession might be on weak constitutional footing, suspicion that increasing state power might offer a justification for a later expansion of federal power, and, after 1914, an assumption that the central state had taken the lead in policing illicit acts involving narcotics. If local and state governments had more expansive power over criminal justice by the twentieth century's second decade, their preexisting ideological commitments to limited government and bounded federal power continued to determine how aggressively they would claim that power.

Those same ideological commitments also limited and shaped the federal government's contribution to the American penal state in the early decades of the twentieth century. As Congress debated its first comprehensive anti-narcotics statute, the Harrison Narcotic Act, a number of its members voiced arguments founded on liberalism and federalism. They contended that the central state lacked the power to criminalize narcotics and called the statute that resulted an unconstitutional exercise of a police-like power. The national legislature's approval of federal drug control legislation did not end the question of its power to pass such a law. For 15 years after Congress passed the Harrison Act, a number of justices of the U.S. Supreme Court openly expressed their view of that law. To those jurists, Congress had drastically overstepped its enumerated powers in using its taxing authority to make drug commerce and possession unlawful. They invited a challenge to the law, which they lambasted as part of a then-recent trend of the federal government encroaching on areas of state power. This vocal minority of federal policymakers resisted growth in central state power even though, debates in Congress and references in some judicial opinions made clear, they knew full well that Congress meant to increase the power of the federal government to police the actions of vulnerable racial minorities.

Neither that purpose, nor the federal government's perhaps-surprising challenge in using anti-narcotics law to achieve it, proved isolated to the corridors of power in Washington. When federal narcotics agents worked to enforce Congress's anti-narcotics law against the U.S. public and when officers of the Labor Department's Bureau of Immigration attempted to deport non-citizens for violating the Harrison Act, they learned that concerns other than federalism and liberalism constrained central state action. After narcotic agents began using their authority to pursue suspects across the country, a handful of those suspects argued that the Narcotics Division had violated their Fourth Amendment guarantee against unreasonable searches and seizures. In so doing, they helped transform the Fourth Amendment from one of the least-referenced provisions of the Constitution into one of its most litigated, and they won a number of cases by contending that the government had unlawfully intruded into their homes. When Congress and the Bureau of Immigration endeavored to make narcotics convictions into deportable offenses, they found in the balance of powers among three branches of government another roadblock. Specifically, they discovered that the federal judiciary would demand that immigration officials meet every prerequisite for deportation before authorizing removal and would, at least occasionally, use the discretion lodged in them to prevent the expulsion of non-citizens who were aged, who had family connections in the U.S., or who had been in the country for many years. Immigration officials also learned that federal judges would guard their discretion over deportation jealously.

This mix of legal and political views did more than constrain central state action. It also required local, state, and federal officials to take an array of measures to address drug commerce and use. The overlapping efforts of policymakers at all levels of government gave rise to a penal state that reached its most coercive point in part through drawing on its multi-jurisdictional

character. Three points of convergence between and among local, state, and federal anti-narcotics efforts helped strengthen the penal state that emerged. First, lawmaking occurred at several levels of government simultaneously, creating overlap in the substances targeted and acts proscribed. The coexistence of numerous laws, enforcement bodies, court systems, and carceral institutions rendered the American public susceptible to punishment from multiple sources. Second, state and federal legislators received input from officials at other levels as they formulated anti-narcotics laws. Some states passed laws the federal government could not have enacted, while other states held off legislating once the federal government entered the field. Debates in state legislatures and the activities of state law enforcement officers, moreover, made their way into congressional discussions. Third, enforcement agents at the local and federal levels cooperated in investigations, amplifying the state's ability to apprehend suspects. This collaboration heightened the consequences of minor criminal activity and allowed local and federal officers to make decisions about where to focus resources. Government creativity and cooperation to meet the racialized ends for which legislatures first passed anti-narcotics laws, then, yielded a state of incredible, but also bounded, power.

The early history of anti-narcotics laws in the United States, in short, reveals that policymakers at the local, state, and federal levels consolidated considerable power by criminalizing narcotics. To do so, they stoked the white public's fear of racial minorities—African Americans and persons of Chinese descent, prominent among them. Yet, despite the groups at whose expense this increase in authority purportedly came, ideological commitments and constitutional safeguards prevented lawmakers from pushing their anti-narcotics agenda through legislatures and courts unimpeded. Several decades of debate about how best to address narcotics proved one result of the continuing preference among some Americans for limited

government. A penal state comprised of overlapping legislation, enforcement bodies, and punishments proved a second, perhaps unintended, result. The story of anti-narcotics law between 1875 and 1930 is, in other words, one in which local, state, and federal policymakers confronted the white public's insistence on limited government, on the one hand, and its call for state responses to racial minorities and immigrants, on the other. In reconciling these two demands, lawmakers gave rise to a penal state with power both dispersed and shared.

In part through criminalizing narcotics, then, lawmakers constructed the American penal state in the years before and after the turn of the twentieth century. That state did not, however, achieve its full, coercive potential in the century's first three decades. That would come later. The ingredients of a more potent penal state, with its gaze squarely on narcotics trafficking and use, though, emerged from policymakers' discussions and actions in the early twentieth century. Most importantly, state and federal lawmakers consolidated new authority to use the criminal law during this period. They would continue to put that power to use later. Though their success appeared uncertain at moments, lawmakers at the state level expanded their authority to police behaviors that Americans had hitherto believed beyond government reach. Federal authorities, in turn, confirmed their authority to use their enumerated powers in creative ways, paving the way for further growth of the federal criminal law. Moreover, the association of specific drugs with vulnerable minority groups continued to have traction even as the 1920s ended. Anti-narcotics law had also proven a flexible proxy through which lawmakers could achieve racialized ends without having to invoke race directly. Finally, a nascent cooperative federalism had developed, in which lawmakers and law enforcement personnel at all levels of government had learned to work collaboratively to augment their coercive power. In concert, these ingredients presaged a significant expansion of the penal state and its response to drugs in the coming decades.

One such expansion came in 1937, when Congress, for the first time, subjected marijuana to federal control. The elements that policymakers had combined to respond to opiates and cocaine—expanding government power, relying on an association between narcotics and a vulnerable minority to justify that expansion, and coordinating the efforts of local, state, and federal officials—also appeared as lawmakers considered whether and how best to address marijuana. Adding a new substance to the list of regulated drugs, at whatever level of government, necessarily entailed giving the state greater power over its residents. As lawmakers had invoked the images of Chinese opium smokers and African American cocaine users to consolidate support for earlier anti-narcotics laws, they described marijuana as a substance used primarily by persons of Mexican descent and particularly in the American Southwest. By 1931, such discussions had led 21 states to adopt provisions controlling marijuana. Rather than push for a federal law to regulate marijuana, though, the leaders of the newly-formed Bureau of Narcotics spent the first half of the 1930s advocating for all state legislatures to add provisions to their anti-narcotics laws to criminalize marijuana possession and sales. By 1937, when political pressure finally led the Bureau of Narcotics to advance, and Congress to pass, the Marihuana Tax Act, every state had followed the Bureau's recommendation. The result was a litany of state laws that prohibited both possession and sales and a federal law that controlled commerce and put burdens on suspects who possessed marijuana to prove its licit source.[6]

Another, arguably more consequential, expansion began more than three decades later, when President Richard Nixon first announced a federal "war on drugs"—a policy Ronald

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[6] 50 Stat. 551 (1937); Richard J. Bonnie and Charles H. Whitebread, II, "The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition," *Virginia Law Review* 56, no. 6 (Oct. 1970): 971-1203, 1010-63; David Musto, *The American Disease: Origins of Narcotic Control* (New Haven: Yale University Press, 1973), 210-29. From a review of contemporary newspaper accounts, Bonnie and Whitebread concluded that the most prominent reason that these 21 states moved to criminalize marijuana before 1931 was "racial prejudice."

Reagan would extend in the 1980s and which would persist into the twenty-first century.[7] As legal scholars, social scientists, and historians interested in the postwar "carceral state" have demonstrated, the late-twentieth-century drug war helped usher in an era of mass incarceration unprecedented in U.S. history.[8] By the end of the twenty-first century's first decade, for one measure of the drug war's scope, around a half a million people were in prison or jail for a narcotics offense; only 41,100 were incarcerated for drug offenses in 1980. Reviewing these statistics, legal scholar Michelle Alexander has opined that "convictions for drug offenses [were] the single most important cause of the" turn-of-the-twenty-first-century "explosion in incarceration rates in the United States."[9]

The late-century war on drugs was, of course, an historically-contingent product of its time—as was the longer, more comprehensive "war on crime" of which it was a constituent part. A number of scholars have described the war on crime that began in the 1960s as a political tool used by conservatives to incite white anxieties and consolidate electoral support. By stoking fear of black criminals, Nixon and others turned blue-collar white workers, once reliable members of

[7] In a recent article about how white suburban drug use figured into criminalization efforts, Matthew Lassiter suggests yet another expansion worthy of mention. As he explains it, "the cultural and political script of racialized pushers and white middle-class victims informed the enactment of mandatory-minimum laws in the federal war on narcotics during the 1950s, two decades before the development of the Nixon-Nelson Rockefeller era." Federal policymakers, including Bureau of Narcotics Commissioner Harry Ansligner, played on fears of African American and Puerto Rican "dope pushers" preying on "pretty blonde" girls to secure passage of the Boggs Act of 1951. They used a similar strategy five years later to secure the enactment of yet harsher minimum sentences. Matthew D. Lassiter, "Impossible Criminals: The Suburban Imperatives of America's War on Drugs," *Journal of American History* 102, no. 2 (June 2015): 126-40.

[8] William Stuntz has called the late-century American criminal justice system the "harshest in the history of democratic government." William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Belknap, 2011), 3.

[9] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 59. For other discussions of the connection between drug crimes and mass incarceration, see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (New York: Oxford University Press, 2001); Marie Gottschalk, *The Prison and the Gallows*: The Politics of Mass Incarceration in America (New York: Cambridge University Press, 2006); Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *Journal of American History* 98, no. 3 (December 2010): 703-758. For an argument that the effect of the War on Drugs on the size of the U.S. prison population has been exaggerated, see John F. Pfaff, "The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options," Harvard Journal on Legislation 52 (Winter 2015): 173-220.

the New Deal coalition, into swing voters.[10] Recent scholarship has also made clear that mid-century white liberals contributed to the growth of the carceral state. Naomi Murakawa, for one, has argued that liberals elevated their own image of "law and order" in which they described inequality as the root cause of black criminality. In so doing, they cast African Americans as victims who would benefit from white contact. Elizabeth Hinton, too, sees liberals as key participants in the growth of the carceral state. She argues that Johnson Administration officials, in particular, came to view federal anti-poverty measures as preemptive strikes against urban crime. In so doing, they devised some of the key technologies and rhetoric that Nixon, Ford, and Reagan would later build on with devastating results.[11]

While it thus clear that a complex of political, economic, social, and cultural forces combined in the 1960s to set the stage for the federal wars on crime and drugs, it nonetheless remains true that policymakers sowed some of the seeds of the war on drugs' success in their early-twentieth-century campaign against narcotics. First and foremost, turn-of-the-twentieth-century lawmakers established anti-narcotics law as the province of good government and overcame objections to government exercises of power to regulate drugs. When Stockton, California, first attempted to punish opium possession, the California Supreme Court struck down the ordinance as extending beyond what the state's police power would allow. By 1911, the court found the state's possession statute to be well within the legislature's power, and it referred to California's battle against opium as "among the objects of all enlightened

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[10] See, for examples, Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2006); and Stuntz, *The Collapse of American Criminal Justice*, 236-43.

[11] Naomi Murakawa, *First Civil Right* (New York: Oxford University Press, 2014); Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016). Other scholars have detailed the contribution of local and state authorities in the making of the carceral state. See Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007); Michael Javen Fortner, *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment* (Cambridge: Harvard University Press, 2015).

government."[12] State lawmakers, then, developed at least one of the legal technologies—possession laws—on which the late-century war on drugs would rely, and they secured judicial approval for its use.

Early-twentieth-century lawmakers also succeeded in securing authority to regulate narcotics for the federal government. When the federal government formulated its first anti-opium statute, it did so in response to a call from some corners for legislation to keep the U.S. from becoming an "opium-eating country." Though congressional and judicial debate as to whether Congress had the authority to restrict narcotics persisted for the two decades that followed, the wisdom of federal prohibition appears to have been widely accepted. The U.S. Supreme Court ultimately endorsed a capacious view of federal power in upholding Congress's anti-narcotics laws, finding that the act's "moral purpose" did not invalidate it so long as it related in some way to revenue collection.[13] Federal lawmakers, in other words, developed the justification that allowed central state legislators to regulate narcotics use and commerce aggressively—a development that the architects of the late-century wars on crime and drugs used to their advantage.[14]

Second, lawmakers at the turn of the twentieth century pioneered the political use of associations between narcotics and vulnerable minority groups. They also discovered they could

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[12] *In the Matter of Sic,* 73 Cal. 142, 145 (1887); *In the Matter of Yun Quong*, 159 Cal. 508, 513 (1911) (internal quotation marks omitted).

[13] Hamilton Wright to President Theodore Roosevelt, September 2, 1908, Records of the U.S. Delegations to the International Opium Commission and Conferences, Records of Delegate Hamilton Wright, Record Group 43.2.9, National Archives, College Park, Maryland. For the purposes behind the comprehensive Harrison Narcotics Act, among which revenue collection could not be counted, see "Registration of Producers and Importers of Opium, Etc.," H.R. Rep. No. 63-23, at 1-3 (1913). For Supreme Court decisions upholding the Harrison Act on these grounds, see *United States v. Doremus*, 249 U.S. 86 (1919); *Webb v. United States*, 249 U.S. 96 (1919); *Nigro v. United States*, 276 U.S. 332 (1928); and *Casey v. United States*, 276 U.S. 413, 420 (1928).

[14] As Elizabeth Hinton has recently noted, the Republican Committee on Planning and Research's Task Force prepared a memo in 1968 for the Nixon Administration which gave Nixon a way to increase his role in local and state law enforcement. "The federal government has abundant jurisdiction in the narcotics field," that memo indicated. Hinton elaborates: "While law enforcement was always considered a state and local matter, drug enforcement was an issue squarely under the purview of the federal government." Hinton, *From the War on Poverty to the War on Crime*, 203. Lawmakers in the early-twentieth century ensured this was so.

disguise the racialized purposes of anti-narcotics laws. After state and federal courts invalidated a considerable number of municipal and state laws targeting Chinese Californians, for instance, lawmakers achieved in anti-opium restriction one of their earliest successes in passing formally race-neutral legislation that they could use in racialized ways. Forty years later, as federal narcotic agents enforced the national government's Harrison Act, they disguised their racially-inflected enforcement behind discussions of a suspect's "willful violations" or poor fit for citizenship.[15] The architects of the war on drugs thus had an early-century model for the racialized policing they might accomplish through passing anti-narcotics laws. In a 1994 interview, John Ehrlichman, who had served as Nixon's domestic policy advisor, explained that the Nixon administration had used its war on drugs in much the same way policymakers used their early-century campaign against drugs. The Administration, he explained, "had two enemies: the antiwar left and black people." While Nixon and his advisors understood they "couldn't make it illegal to be either against the war or black," they believed they could get "the public to associate the hippies with marijuana and blacks with heroin." By "criminalizing both heavily," they could "disrupt those communities." "We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news."[16]

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[15] For cases invalidating other local and state anti-Chinese ordinances in California, see *People v. Downer*, 7 Cal. 170 (1856); *Lin Sing v. Washburn*, 20 Cal. 534 (1862); *People v. S. S. Constitution*, 42 Cal. 578 (1872); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546); *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880); and *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). For instances of federal narcotic agents opposing parole for non-white convicts on a ground they never deployed against white drug convicts, see Letter from R. A. Haynes to President, Board of Parole, re: Ming, July 30, 1924; Letter from R. A. Haynes to President, Board of Parole, re: Quong, July 30, 1924; Letter from R. A. Haynes to President, Board of Parole, re: Fong, July 30, 1924; Letter from R. A. Haynes to President, Board of Parole, re: Ko, July 30, 1924; Letter from R. A. Haynes to President, Board of Parole, re: Fung, August 9, 1924, Record Group 170.2, Records of the Narcotic Division, 1918-35, "Letters sent by the Commissioner of the Bureau of Prohibition, 07/1924-12/1924," HMS/MLR Entry Number: NC-50 3, National Archives, College Park, Maryland.

[16] Dan Baum, "Legalize it All: How to Win the War on Drugs," *Harper's Magazine* (April 2016): 22-32, 22. For arguments about the importance of race in the federal government's Reagan-era assault on crack cocaine, see Doris Marie Provine, *Unequal Under Law: Race in the War on Drugs* (Chicago: University of Chicago Press, 2007), 107-19; David A. Sklansky, "Cocaine, Race, and Equal Protection," *Stanford Law Review* 47 (1995): 1283-1322.

Third, turn-of-the-twentieth-century policymakers built a penal state comprised of local, state, and federal criminal laws and law enforcement apparatuses. Federal officials occasionally encouraged state lawmakers to pass new laws, and Americans became subject to an overlapping assemblage of criminal prohibitions. Law enforcement personnel at all levels of government, furthermore, shared intelligence, cooperated in investigations, and made strategic decisions about which laws and court systems should decide the fates of specific categories of suspects.[17] The penal state's policing of behaviors, its ability to apprehend suspects, and the harshness of the punishments it meted out all increased as a result. The architects of later-century campaigns against drugs, too, relied on intergovernmental cooperation to achieve their ends. As numerous legal scholars have pointed out, the federal government always relied on local and state law enforcement personnel to carry out the vast majority of the war on drugs. With only a small enforcement apparatus at its disposal, the central state could not have hoped to prosecute the drug war without a significant financial outlay and a steep build-up in manpower. Further, the wars on crime and drugs saw the federal government involved in local communities in a variety of new ways, including, beginning in the 1960s, in its provision of additional resources to local law enforcement officers.[18] The nascent cooperative federalism of the early twentieth century

[17] The California Board of Pharmacy, for one example, appears to have recommended a law criminalizing narcotics possession at the urging of federal officials. See Minutes of the State Board of Pharmacy, October 26, 1908, Department of Consumer Affairs - Board of Pharmacy Records, R126.1, California State Archives. For but one example of local and federal officials making strategic decisions about which laws and court systems should handle specific offenders, L.G. Nutt, then-head of the Narcotic Division, explained his position in 1924 that low-level offenses that occurred in states with sufficiently strong anti-narcotics laws should be tried in state court under state law. Letter from L.G. Nutt to Honorable Delos G. Smith, September 3, 1924, Record Group 170.2, Records of the Narcotic Division, 1918-35, "Letters sent by the Commissioner of the Bureau of Prohibition, 07/1924-12/1924," HMS/MLR Entry Number: NC-50 3, National Archives, College Park, Maryland.

[18] For a discussion of the federal government's relatively limited role in narcotics enforcement vis-à-vis the states, especially concerning marijuana, see Robert A. Mikos, "On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime," *Vanderbilt Law Review* 62 (October 2009): 1421-82, 1424. For a discussion of the interpenetration of local, state, and federal crime-fighting efforts in the 1960s and beyond, see Hinton, *From the War on Poverty to the War on Crime*, 153-54, 202-04.

became a key tool in the arsenal of lawmakers and law enforcement personnel a few decades later.

The build-up of the penal state that occurred as a part of the late-twentieth-century war on drugs may, after four decades, have begun to slow. By a number of different measures, from the vantage point of 2016, the U.S. appears to have turned the page on the war on drugs. After a century of federal leadership, state governments began in the 1990s once again to take the lead in driving national drug policy. Voters in California took the first step away from narcotics criminalization in 1996, when they approved the use of medical marijuana. Many states, the list of which continues to grow, have followed suit.[19] In November 2012, voters in Colorado and Washington went one step further. Referenda there resulted in both states legalizing marijuana for recreational purposes, and voters in Alaska and Oregon returned similar results two years later.[20] Though marijuana remains a Schedule I drug under the Controlled Substances Act, the Obama Administration has signaled a willingness to allow state governments to implement their new medical and recreational marijuana laws.[21] And members of Congress from both sides of the

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[19] Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 (Deering 2000); National Conference of State Legislatures, "State Medical Marijuana Laws," available at http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last accessed June 16, 2015) (noting that 23 states "allow for comprehensive public medical marijuana and cannabis programs," while "15 states allow use of 'low THC, high cannabidiol (CBD)' products for medical reasons in limited situations or as a legal defense.").

[20] Colo. Const. Art. 18, § 16; Wash. Rev. Code Ann. §§ 69.50.101; Alaska Stats. Ch. 38; Oregon Liquor Control Commission, News Release, "OLCC's Statement on Passage of Measure 91," available at http://www.oregon.gov/olcc/marijuana/Documents/nr_11_05_14_Measure91_News Release_Statement.pdf (last accessed June 16, 2015).

[21] 21 U.S.C. § 812; U.S. Department of Justice, Office of the Deputy Attorney General, Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," available at http://www.justice.gov/sites/ default/files/opa/legacy/2009/10/19/medical-marijuana.pdf. (directing U.S. Attorneys not to "focus federal resources" on individuals "whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana"); U.S. Department of Justice, Office of the Deputy Attorney General, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement 1-2," available at http://www.justice.gov/iso/opa/resources/ 3052013829132756857467.pdf (directing federal prosecutors, under certain conditions, to allow local and state officers to take the lead in "addressing marijuana-related activity," even in jurisdictions legalizing recreational marijuana). Notably, some scholars have begun referring to the combination of state legalization and federal nonenforcement as the "new marijuana federalism." William Baude, "State Regulation and the Necessary and Proper Clause," *Case Western Reserve Law Review* 65, no. 3 (2015): 513-39.

aisle have publicly expressed their support for rolling back some of the harshest provisions of the war on drugs.[22]

As Governor LePage's comments make clear, however, the political utility of longstanding associations between and among racial minorities and narcotics persists even in an era with growing support for decriminalization.[23] Calls for arming the penal state with additional power—or, at a minimum, maintaining the status quo—to fight this racialized problem, too, remain.[24] And the overlap between and among local, state, and federal laws and law enforcement continues to provide police, federal agents, and prosecutors with a litany of grounds on which to detain, arrest, and try drug suspects. Even with growing public knowledge of the racialized consequences of the war on drugs and its costs, then, and despite some sign that the political will

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[22] Senator Rand Paul has been particularly vocal about his opposition to federal narcotics laws, explaining that he thinks individual states should decide whether and how to criminalize narcotics. He is also a co-sponsor of a bipartisan bill introduced by Senator Cory Booker in March 2015 that would remove marijuana from Schedule I and expressly permit the use of medical marijuana where authorized under state law. In addition to budding opposition to federal drug criminalization, other members of Congress have taken aim at the police technologies that have given the war on drugs such a particularly harsh edge. Congressman Darrell Issa, for one, recently authored an op-ed for the *Los Angeles Times* in which he called for an amendment to the federal law that permits local law enforcement to bypass state laws limiting civil asset forfeiture. Jacob Sullum, "Would President Rand Legalize All Drugs?" *Newsweek*, January 22, 2016, available at http://www.newsweek.com/would-president-rand-paul-legalize-all-drugs-418651; 114 S.B. 683 (2015); Darrell Issa, "Close the Federal Loophole that Lets Cops Go Treasure Hunting," *Los Angeles Times*, May 4, 2016.

[23] It is worth noting that some commentators have seen race as a key driver of the decriminalization movement. Michelle Alexander made this point in a March 6, 2014 interview. Discussing the "imagery" of legal marijuana, she intoned: "Here are white men poised to run big marijuana businesses, dreaming of cashing in big—big money, big businesses selling weed—after 40 years of impoverished black kids getting prison time for selling weed, and their families and futures destroyed." Drug Policy Alliance, *The New Jim Crow: What's Next? A Talk with Michelle Alexander and DPA's asha bandele*, *available at* http://www.drugpolicy.org/resource/new-jim-crow-whats-next-talk-michelle-alexander-and-dpas-asha-bandele (Mar. 6, 2014). For recent claims that white drug use and addiction have led some to call for softer approaches to drug laws, *see* Katharine Q. Seelye, "In Heroin Crisis, White Families Seek Gentler War on Drugs," *New York Times*, October 30, 2015; and Ekow N. Yankah, "When Addiction Has a White Face," *New York Times*, February 9, 2016.

[24] In addition to LePage's call to grow the size of the state's drug enforcement agency and reinstitute the death penalty for drug offenders, consider a hearing called by U.S. Senators Chuck Grassley and Diane Feinstein, of the Senate Caucus on International Narcotics Control, in April 2016. The two called the hearing to investigate whether the Justice Department had, in allowing states to experiment with legal (and regulated) marijuana, derogated its legal duty to enforce federal anti-narcotics law. Legalization advocates derided the hearing as a "sham," noting that the speakers included only anti-marijuana activists. In a telling moment, one member of the Caucus explained the importance of sending the "message with clarity that good people don't smoke marijuana." Christopher Ingraham, "Senators Held a Hearing to Remind You that 'Good People don't Smoke Marijuana' (Yes, Really)," *Washington Post*, April 5, 2014, available at https://www.washingtonpost.com/news/wonk/wp/2016/04/05/senators-one-sided-marijuana-hearing-is-heavy-on-anecdote-light-on-data/.

exists to address the drug war's most unjust consequences, we still must contend today with the residue of what transpired between 1875 and 1930. When local, state, and federal policymakers reconciled the white public's demand for state responses to racial minorities and immigrants with their preexisting ideological commitment to limited government, the result was a penal state armed with considerable, though dispersed, power—ready and willing to deploy it against some of the most vulnerable Americans.

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