

# “The Mellow Pot-Smoker”: White Individualism in Marijuana Legalization Campaigns

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*Recreational marijuana is now legal in several states as a result of ballot initiative campaigns. A number of campaigns have framed marijuana legalization using what this Note calls “white individualism.” They have put forth messages and images to implicitly suggest that white, hardworking, middle-class marijuana consumers are deserving beneficiaries of legalized marijuana. This Note examines the appearance of white individualism in the Colorado, Washington, Oregon, and Alaska campaigns. It also explores the appearance of racial justice appeals in the California, Ohio, Washington, D.C., and Massachusetts campaigns.*

*A whitewashed framing of legal marijuana omits and implicitly reinforces marijuana prohibition’s troubled legacy. Marijuana prohibition first came about through the proliferation of racist stereotypes. Its expansion during the “war on drugs” rested on coded racial appeals, and its enforcement has disproportionately affected black and brown people. This Note explores the varying degrees to which successful and failed marijuana legalization campaigns have addressed these issues.*

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*White individualist framing has tended to correlate with post-legalization policies that favor white marijuana entrepreneurs, such as those prohibiting people with marijuana convictions from receiving business licenses, rather than policies that redress harms from prohibition, such as the expungement of criminal records. As many people continue to experience criminalization and racial myths go relatively unchallenged, largely white marijuana entrepreneurs reap legal marijuana's profits. Marijuana policy should address past harms, this Note argues, because marijuana prohibition was founded and implemented on an unjust basis.*

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#### INTRODUCTION

In recent years, advocates of legalizing recreational marijuana in the United States have achieved their first victories, as ballot initiative campaigns succeeded in Colorado and Washington in 2012 and in Oregon, Alaska, and the District of Columbia in 2014.<sup>1</sup> Many of these campaigns devoted little or no

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1. See John Cox, *How D.C. Pot Legalization Has Become 'The Dealer-Protection Act of 2015,'* WASH. POST (May 17, 2015), <https://www.washingtonpost.com/local/how-dc-pot-legalization-has-become-the-dealer-protection-act-of-2015/2015/05/17/5cbcd730-f28d-11e4-b2f3->

attention to the harms of marijuana prohibition, which propagated destructive racial myths linking people of color with “illicit” drugs and enabled the criminalization of millions of people—disproportionately black and brown people.<sup>2</sup> Instead, campaigners have generally promoted marijuana legalization with messages that depict marijuana consumers who are white, middle-class, and “responsible” as worthy beneficiaries of legalized marijuana.<sup>3</sup>

For instance, on May 10, 2012, the group leading the campaign to legalize marijuana in Colorado launched its first television ad, entitled “Dear Mom,” just a few days before Mother’s Day.<sup>4</sup> The group, Campaign to Regulate Marijuana Like Alcohol, described its goals for this inaugural ad on their website as follows: “We need our supporters to help other Coloradans appreciate that marijuana is not ‘bad;’ it is simply a less harmful and acceptable alternative to alcohol.”<sup>5</sup> In the ad, a blonde, white millennial sits in a sunny, grassy park.<sup>6</sup> She types on a MacBook as a voice-over narrates:

Dear Mom, when I was in college, I used to drink a lot. It was kind of crazy. But now that I’m older, I prefer to use marijuana. It’s less harmful to my body, I don’t get hung over, and honestly, I feel safer around marijuana users. I hope this makes sense, but if not, let’s talk. I love you.<sup>7</sup>

Explicitly, the ad says marijuana is not so “bad” from a health perspective. But implicitly, it signals to white audiences that marijuana is not so “bad” from a racial perspective. The woman stresses that she feels safer around marijuana users, which reads as an effort to assuage white anxiety about racialized “bad” others associated with marijuana. In November 2012, after extensive campaigning and debate, Colorado and Washington became the first two states to legalize recreational marijuana.<sup>8</sup> In 2014, Oregon, Alaska, and Washington,

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af5479e6bbdd\_story.html [https://perma.cc/J8KL-EHWF]; Liz Rowley, *Where Is Marijuana Legal in the United States? List of Recreational and Medicinal States*, MIC (Oct. 5, 2015), <http://mic.com/articles/126303/where-is-marijuana-legal-in-the-united-states-list-of-recreational-and-medicinal-states> [https://perma.cc/3DJM-3Z42].

2. *See infra* Part I.B.

3. *See infra* Part II.

4. Eric W. Dolan, *Colorado Marijuana Legalization Campaign Runs First TV Ad*, RAW STORY (May 10, 2012), <http://www.rawstory.com/2012/05/colorado-marijuana-legalization-campaign-runs-first-tv-ad> [https://perma.cc/49HT-RC7E].

5. *Id.*

6. Colorado Marijuana Initiative 2012, *YES on 64 TV Ad - “Dear Mom,”* YOUTUBE (May 10, 2012), [https://www.youtube.com/watch?v=rCVc\\_kLfmMg](https://www.youtube.com/watch?v=rCVc_kLfmMg) [https://perma.cc/82ES-B9QE].

7. *Id.*

8. David Mitchell, *Colorado Passes Proposal to Legalize Marijuana*, FOX31 DENVER (Nov. 6, 2012 12:02 PM), <http://kdvr.com/2012/11/06/colorado-passes-proposal-to-legalize-marijuana> [https://perma.cc/X9H8-SV87]; Rowley, *supra* note 1.

D.C. followed suit.<sup>9</sup> In 2016, four more states, California, Nevada, Massachusetts, and Maine, legalized recreational marijuana.<sup>10</sup>

From its start, marijuana prohibition was premised on racist stereotypes. For most of the nineteenth century through the early twentieth century, marijuana was widely available from pharmacists for medicinal use and grocers for use as a recreational “food accessory.”<sup>11</sup> From the 1910s to 1930s, dozens of states began to ban non-medicinal marijuana based on white anxieties about nonwhite groups. These anxieties included claims that marijuana use was inciting Mexican immigrants in the Southwest to commit violent crimes; California Hindus were using it and spreading it to whites; and blacks, jazz musicians, prostitutes, and white criminals were commingling and using it in the South.<sup>12</sup> Soon, Southwestern states began to push for federal marijuana prohibition to facilitate the deportation of “job-stealing” Mexicans.<sup>13</sup>

In the 1930s, Henry Anslinger, commissioner of the Federal Bureau of Narcotics,<sup>14</sup> went on a public crusade to outlaw marijuana, arguing that Mexicans and blacks were engaging in marijuana-induced acts of sexual promiscuity and violence that threatened the nation’s stability.<sup>15</sup> Temperance groups, who had deployed similar rhetoric in opposition to alcohol, supported his efforts.<sup>16</sup> In 1937, following Anslinger’s congressional testimony, Congress enacted a federal statute effectively criminalizing the possession and sale of marijuana.<sup>17</sup>

In the decades following marijuana prohibition, the rhetoric around marijuana shifted, leading to enforcement methods that have disproportionately harmed people of color. After marijuana became a drug of choice for hippies in the 1960s, some anticipated legalization.<sup>18</sup> But in the years after President Richard Nixon declared the “war on drugs” in 1971 and President Ronald Reagan re-launched the war in the 1980s, the United States became

9. *Legalization*, NORML, <http://norml.org/legalization> [<https://perma.cc/9QWE-S7PF>] (last visited Feb. 24, 2017).

10. *Id.*

11. MARTIN BOOTH, *CANNABIS: A HISTORY* 115 (2003).

12. *See id.* at 163–65; RUDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS* 2–4 (2004); Thomas J. Moran, Note, *Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and How it Might Affect Racial and Ethnic Minorities*, 17 WASH. & LEE J.C.R. & SOC. JUST. 557, 561 (2015).

13. Moran, *supra* note 12, at 563.

14. The Federal Bureau of Narcotics preceded the current Drug Enforcement Administration. John McWilliams, *Unsung Partner Against Crime: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930–1962*, 113 PA. MAG. HIST. & BIOGRAPHY 207, 208 (1989).

15. GERBER, *supra* note 12, at 4–9; McWilliams, *supra* note 14, at 231 (“Anslinger manipulated annual addiction figures . . . distorted the ‘problem’ of drug use among the juvenile population, and advanced unproven links between drugs (especially marijuana) and crime.”).

16. BOOTH, *supra* note 11, at 181–82.

17. Although technically a tax, the statute created exorbitant tax assessments that were in practice impossible to meet. *See* Moran, *supra* note 12, at 561, 565.

18. *See id.* at 566–69.

increasingly hostile toward the drug.<sup>19</sup> In the 1960s and 1970s, the civil rights movement had succeeded in removing openly racist rhetoric from polite society, including from drug policy.<sup>20</sup> Nonetheless, President Nixon and other drug warriors realized they could use “color-blind” language, including “law and order” and “tough on crime,” to reference and exploit white anxieties about racial minorities, social movements, and perceived disorder through the lens of drug crimes.<sup>21</sup> Punitive drug enforcement became politically expedient for gaining white support; politicians from both parties competed over who was toughest on crime.<sup>22</sup> A massive expansion in marijuana criminalization followed, with tremendous racial disparities in enforcement.<sup>23</sup>

In the last several years, marijuana prohibition has faced serious public criticism. As a result of scientific developments as well as activism, efforts to legalize medicinal marijuana have gained traction.<sup>24</sup> In addition, as states sought new sources of tax revenue after the 2007–2008 financial crisis, some pointed to the possibility of taxing legalized recreational marijuana.<sup>25</sup> Campaigns to legalize recreational marijuana have argued that policies could produce a number of benefits, including not only the production of new tax revenue but also the redirection of law enforcement resources to violent crime, the prevention of access to minors, and public health benefits.<sup>26</sup> At the same time, many campaigns, exemplified by the campaign in Colorado, put forth messages and images that implicitly suggested that marijuana consumers who are white, hardworking, middle-class, and responsible are deserving beneficiaries of legalized marijuana.<sup>27</sup> This Note refers to such a framing of marijuana legalization as “white individualism.”<sup>28</sup>

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19. See *id.* at 567–70; NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 119 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

20. See DORIS MARIE PROVINE, UNEQUAL UNDER THE LAW: RACE IN THE WAR ON DRUGS 93–94 (2007).

21. See *id.*; IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 23–24 (2013); NAT’L RESEARCH COUNCIL, *supra* note 19, at 116.

22. See NAT’L RESEARCH COUNCIL, *supra* note 19, at 119–21.

23. *Infra* Part I.B.

24. *Infra* Part II. The legalization of medical marijuana is beyond the scope of this Note.

25. See Marcelo Ballve, *The Financial Crisis Just Might Lead to Legal Pot*, ALTERNET (Mar. 13 2009), [http://www.alternet.org/story/131522/the\\_financial\\_crisis\\_just\\_might\\_lead\\_to\\_legal\\_pot](http://www.alternet.org/story/131522/the_financial_crisis_just_might_lead_to_legal_pot) [<https://perma.cc/G4GY-6U5G>] (quoting Ethan Nadelmann, executive director of the Drug Policy Alliance, as saying, “the economic crisis is the single most important factor’ in this new shift in perceptions [of marijuana]”).

26. See *infra* Part II.

27. See *infra* Part II.A.1.

28. This term derives from the work of John A. Powell, who has used the phrase “white middle-class individualism” to describe the emergence of a post-New Deal white middle-class identity organized around the idea of individual merit. The term also encompasses the belief that economic outcomes result from individual sacrifice, in spite of the significant influence of government programs, such as those for housing financing, that tended to exclude nonwhites. John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 394–95 (2007). That narrative

The whitewashed framing of marijuana legalization deserves attention in light of the racialized propaganda of marijuana prohibition. The framing links whites with legitimate work and responsible recreation and, implicitly, people of color with black markets and illicit narcotics.<sup>29</sup> This framing, despite its anti-prohibition orientation, is a further evolution of the “color-blind” sublimated racial messaging of the war on drugs.

In addition, this framing has tended to correlate with policies that favor white marijuana entrepreneurs, such as those prohibiting people with marijuana convictions from receiving business licenses, rather than policies that redress harms from prohibition, such as the expungement of criminal records.<sup>30</sup> Marijuana policy should address past harms because marijuana prohibition was founded and implemented on an unjust basis.

Part I of this Note examines the history of racial stereotypes and discriminatory enforcement in alcohol prohibition, marijuana criminalization, and the war on drugs. Part II analyzes a number of marijuana legalization campaigns, arguing that many of the successful campaigns were framed in terms of white individualism. Part III suggests that such campaigns tend to correlate with policies that favor white entrepreneurs rather than address the harms of prohibition and argues that policymakers should address such harms, particularly past criminal convictions. Part IV provides possibilities for more inclusive framing of marijuana legalization.

## I.

### CRIMINALIZING SUBSTANCES AND RACIALIZED GROUPS

Since the European colonial settlement of America, politicians, activists, and law enforcement officials have engaged in sustained efforts to criminalize the use and distribution of certain mind-altering substances like alcohol, marijuana, and opiates, and to link such substances to “feared minorities and the underclass.”<sup>31</sup> Doris Provine argued that prohibition efforts have constructed symbolic associations and enforcement tactics that link nonwhite

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rendered invisible “racially discriminatory public policy and private discrimination” and furthered conceptions of black irresponsibility as the implied inverse of white responsibility. *See id.* at 393. Just as post-New Deal middle-class narratives naturalized the effects of discriminatory housing policy, white individualism in marijuana legalization campaigns naturalizes racial stereotypes and social harms resulting from marijuana prohibition and the drug war. *See infra* notes 159–164 and accompanying text.

29. Surveys of representative samples of the U.S. population indicate that blacks are not more involved in selling drugs than whites. Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 *CRIME & JUST.* 1, 25–26 (2008).

30. *See infra* Part III.

31. *See* PROVINE, *supra* note 20, at 32, 29–33; *see also id.* at 60 (“Native-born prejudice against immigrants and African Americans constituted an important, perhaps essential, feature of the campaign to criminalize alcohol.”); BOOTH, *supra* note 11, at 155–60 (describing the use of anti-opium laws to suppress Chinese immigrants in the latter half of the nineteenth century).

people with drug crimes.<sup>32</sup> These efforts have sometimes purported to diminish public health risks, conceptualized as the physical and mental effects of mind-altering substances, but were more often positioned against nonwhite people.<sup>33</sup> Prohibition proponents—politicians, activists, and law enforcement officials—built political power and deployed it to further not only prohibition efforts, but also white superiority and the criminalization of nonwhites.<sup>34</sup> This phenomenon is evident in alcohol prohibition, marijuana criminalization, and the war on drugs.

### A. Alcohol Prohibition

Alcohol prohibition—perhaps America’s most iconic war on drugs—was marked by anxieties about race and class that resonate with and presage the politics of marijuana prohibition.<sup>35</sup> As early as the colonial period, officials enacted laws to restrict alcohol sales to certain groups. These laws generally did not apply to European settlers, who often drank heavily. Instead, these laws reflected anxieties of European settlers that alcohol use by Native Americans, slaves, servants, and other subordinated groups could threaten the social order.<sup>36</sup> Such colonial alcohol laws, while relatively ineffective, initiated a tradition of racialized substance regulation.<sup>37</sup>

This tradition persisted during the temperance movement, a century-long push to restrict alcohol based on the idea that it is harmful to individuals, families, and society. A variety of interest groups led the temperance movement, which culminated in national alcohol prohibition from 1920 to 1933.<sup>38</sup> In the 1820s and 1830s, Protestant ministers promoted temperance with

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32. PROVINE, *supra* note 20, at 3 (“[T]he moral entrepreneurs of drug legislation, have relied on racial slurs and allusions to bolster their arguments for criminal controls. . . . The public image of crack as an inner-city drug has been strengthened by the way police and prosecutors have enforced the law . . . overwhelmingly concentrated on poor minority neighborhoods.”).

33. *See, e.g.*, Moran, *supra* note 12, at 562 (“[T]his country’s original and immediate disdain for marijuana [in the 1910s–1930s] was not positioned against its mental or physical effects, but towards the ones using it—minority groups.”).

34. *See, e.g.*, PROVINE, *supra* note 20, at 5 (citing William J. Chambliss, *Drug War Politics: Racism, Corruption, and Alienation*, in *CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE* 315 (Darnell F. Hawkins, Samuel L. Meyers, Jr. & Randolph N. Stone eds., 2003) (“The war on drugs is a failure by any objective measure. . . . It has been successful, however, in legitimating the creation of a virtual police state in the ghettos of our cities.”)); *cf.* SASKIA SASSEN, *EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY*, 65–75 (2014) (arguing that mass incarceration facilitates the treatment of incarcerated individuals as commodities and the proliferation of for-profit prison services).

35. *See* PROVINE, *supra* note 20, at 37–62; DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 42–49 (2010). Admittedly, the criminalization of opiates is also closely related to that of marijuana. Nonetheless, alcohol, which has undergone both criminalization and legalization, offers a useful comparison to marijuana. *See, e.g.*, PROVINE, *supra* note 20, at 86–87.

36. PROVINE, *supra* note 20, at 37.

37. *See id.*

38. *See generally id.* at 37–62 (chronicling the history of the alcohol prohibition movement in the United States).

moralistic sermons; by the 1850s, temperance political activists had achieved laws partially restricting alcohol in eight states and their moralistic rhetoric had become associated with anti-slavery abolitionism.<sup>39</sup> After the Civil War, the Woman's Christian Temperance Union (WCTU), founded in 1874, took up the cause of temperance in conjunction with women's suffrage, anti-immigration measures, workers' rights, and other reforms.<sup>40</sup>

The Anti-Saloon League (ASL), an Ohio-based prohibitionist organization founded in 1895, became the leading temperance organization at the turn of the century.<sup>41</sup> The ASL was deeply white supremacist in its aims: "Anglo-Saxon stock is the best improved, hardiest and fittest . . . if we are to preserve this nation and the Anglo-Saxon type, we must abolish saloons."<sup>42</sup> The ASL came to dominate politics by mobilizing a fundraising network of more than thirty thousand protestant churches, securing one-tenth of the votes in close political races, and intimidating politicians into supporting anti-alcohol policies.<sup>43</sup> Around 1906, after a wave of states passed prohibition laws, the ASL shifted towards national prohibition.<sup>44</sup> The ASL effectively united distinct but overlapping groups like Southerners, suffragists, nativists, populists, progressives, and socialists, which often used temperance to advance other goals.<sup>45</sup>

For instance, after Reconstruction,<sup>46</sup> white Southern politicians allied with temperance activists, turning their rhetoric against black citizens. During the

39. *Id.* at 39–40.

40. *See, e.g., id.* at 39, 47 (describing how the WCTU, joined by the Ku Klux Klan—an advocate of prohibition—supported legislation to limit immigration); OKRENT, *supra* note 35, at 17 (noting that the WCTU embraced the suffrage cause because it thought women should have the right to vote on matters pertaining to alcohol); *id.* at 18–19 (describing the WCTU campaigning for “prison reform, free kindergartens, and vocational schools . . . the eight-hour day, workers’ rights, and government ownership of utilities, railroads, factories, and . . . theaters”); *id.* at 26 (“As early as 1876 [WCTU President] Frances Willard had referred in a speech to the ‘infidel foreign population of our country.’ Near the end of her career, Willard called on Congress to pass immigration restrictions to keep out ‘the scum of the Old World.’”).

41. *See* OKRENT, *supra* note 35, at 37.

42. JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 100 (1986) (internal modifications omitted).

43. OKRENT, *supra* note 35, at 36–37.

44. PROVINE, *supra* note 20, at 42.

45. OKRENT, *supra* note 35, at 42.

46. Reconstruction was a period following the Civil War, 1865–1877, during which American political institutions, particularly the Republican Party, sought to remedy inequities resulting from slavery. Eric Foner, *Reconstruction*, *ENCYCLOPAEDIA BRITANNICA* (May 5, 2015), <https://www.britannica.com/event/Reconstruction-United-States-history> [<https://perma.cc/92MF-74KY>]. New federal laws granted rights to black people and established a broad conception of federal power. *Id.* Black southerners gained access to the political system and joined with white allies to bring the Republican Party into office. *Id.* However, over the course of the 1870s, many Republicans withdrew support for racial equality and federal enforcement. *Id.* Reconstruction ended in 1877 when Republican Presidential candidate Rutherford Hayes reached a compromise with Democrats: they would not block the certification of his disputed electoral victory and he would withdraw federal troops from the South. *Id.* Following Reconstruction, Southern Democrats established a political order



antebellum period, Southern political actors largely resisted temperance because many temperance advocates were abolitionists.<sup>47</sup> But after Reconstruction failed, Northern temperance attitudes became more anti-black and thus more suitable to Southern interests. Consider comments by Frances Willard, national president of the WCTU from 1879 to 1898: "[T]he grogshop is the Negro's center of power. Better whiskey and more of it is the rallying cry of great dark faced mobs."<sup>48</sup> After black voters defeated a no-liquor amendment to the Tennessee constitution in 1887, proponents of prohibition began to disseminate the image of "the waking nightmare of a black man with a bottle of whiskey in one hand and a ballot in another."<sup>49</sup> In 1906, a Georgia politician won the gubernatorial election by persuading white voters that liquor interests controlled the black vote and that his candidacy would challenge both.<sup>50</sup> Following his victory, he pushed through Jim Crow disenfranchisement and alcohol prohibition laws in quick succession; in the following months, legislatures in North Carolina, Oklahoma, Mississippi, and Alabama followed suit.<sup>51</sup> A Baptist publication in Alabama exclaimed, "The stronghold of the whiskey power in the state has been eliminated by the disenfranchisement of the Negro, and others like him."<sup>52</sup> The ASL worked with Southern political machines and churches, shaping its messages to support disenfranchisement.<sup>53</sup>

Temperance organizers prominently deployed racial stereotypes in magazines, newspapers, and journals to promote prohibition laws in state and national campaigns. They constructed alcohol and racial groups—and the relationship between the two—as health and safety threats: "fears of 'infection' by nonwhite elements were openly deployed to justify criminal controls."<sup>54</sup> In the South, the movement propagated images of sexually threatening and violent drunk black men unable to work efficiently due to alcoholic excess; in the West, caricatures of Native Americans as drunkards were rallying points for legal change; and in the North, working-class European immigrants were depicted as insular drunks and scorned with anti-Catholic and anti-Semitic epithets.<sup>55</sup> The messaging campaign was successful. In 1920, national alcohol

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based on segregation, violent repression of dissent, and disenfranchisement and economic exploitation of black people. *Id.*

47. OKRENT, *supra* note 35, at 42.

48. *Id.*

49. *Id.* at 43.

50. *Id.*

51. *Id.* at 43–44.

52. *Id.* at 44.

53. PROVINE, *supra* note 20, at 57. This episode could be considered an illustration of white reconciliation, a term David Blight used to describe a romanticized memory of the Civil War held by Northern and Southern whites around the turn of the century. This memory emphasized what the North and South shared in common, romanticized the valor of soldiers, and omitted the failures of emancipation in favor of white unity. *See generally* DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2011).

54. PROVINE, *supra* note 20, at 39, 38–58.

55. *Id.* at 38, 48–50, 45–48, 57.

prohibition was authorized with the ratification of the Eighteenth Amendment.<sup>56</sup>

Prohibition lasted until 1933.<sup>57</sup> Its demise was largely a result of opposition from forces concerned about economic issues.<sup>58</sup> Business interests were troubled, particularly after the arrival of the Great Depression, that the liquor industry did not pay its share of the tax burden.<sup>59</sup> Widespread disregard for the ban suggested public discontent.<sup>60</sup> During the Depression, the argument for tax revenue and growing concern over the violence connected to bootlegging provided momentum for repeal.<sup>61</sup> Legalization groups led by wealthy, well-educated leaders pushed for repeal, arguing to the public that the increased tax revenue from legal alcohol would enable lower income taxes on individuals and provide a new source of government revenue.<sup>62</sup> In 1932, President Franklin Roosevelt grudgingly added repeal to his platform; in that election, eleven states had referendums on alcohol issues and the pro-repeal position won in all of them.<sup>63</sup> After the election, Congress passed a resolution to void the Eighteenth Amendment, which the states ratified in less than a year.<sup>64</sup>

Contemporary American memory of Prohibition omits its origins in racial fearmongering, imagining alcohol prohibition as a well-intentioned but futile effort to criminalize a popular drink—an era of clandestine moonshine consumption, bootlegging, and illicit cocktails at speakeasies.<sup>65</sup> In reality, racial strategies of temperance, like “portray[ing] drug users as dangerous and contemptible, a threat to the implicitly white, middle-class social fabric,” were pivotal to the movement that brought about prohibition.<sup>66</sup> They used racial strategies to not only limit alcohol consumption, but also gain political capital

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56. *Prohibition*, ENCYCLOPAEDIA BRITANNICA (Aug. 11, 2016), <https://www.britannica.com/event/Prohibition-United-States-history-1920-1933> [<https://perma.cc/7RC2-MPBM>].

57. *Id.*

58. PROVINE, *supra* note 20, at 58–60.

59. *See id.* at 59.

60. *Id.* at 58.

61. *Id.* at 59.

62. OKRENT, *supra* note 35, at 333 (“The [Association Against the Prohibition Amendment’s] publicity campaign was centered on pamphlets with such titles as *What Price Prohibition?* (answer: with the return of legal alcohol, ‘the necessity of levying income taxes would be eliminated’), *Does Prohibition Pay?* and *The Cost of Prohibition and Your Income Tax* [the APPA’s] most widely distributed [publication.]”); PROVINE, *supra* note 20, at 59.

63. PROVINE, *supra* note 20, at 60.

64. *Id.*

65. *See, e.g.*, Steven Mintz & Sara McNeil, *Prohibition*, DIGITAL HIST., [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=2&psid=3383](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3383) [<https://perma.cc/8ZP8-RBSL>] (last visited Mar. 22, 2017) (“Led by the Anti-Saloon League and the Women’s Christian Temperance Union, the dry forces had triumphed by linking Prohibition to a variety of Progressive era social causes. . . . Prohibition quickly produced bootleggers, speakeasies, moonshine, bathtub gin, and rum runners smuggling supplies of alcohol across state lines.”).

66. *See* PROVINE, *supra* note 20, at 60–61.

and achieve other agendas, as evident in Jim Crow disenfranchisement laws closely linked to temperance legislation.<sup>67</sup> The temperance strategy of eliciting racial anxiety and deploying it to strip people of color of their rights has remarkable parallels in other drug prohibitions, including that of marijuana.

*B. Marijuana Prohibition and the War on Drugs*

During marijuana prohibition and the war on drugs, political actors constructed symbolic associations between people of color and drug crimes. In the early years of marijuana prohibition, the associations were openly racist.<sup>68</sup> Later, drug warriors shifted to subtle, coded racial rhetoric.<sup>69</sup> Racist propaganda and targeted law enforcement led to disproportionate prosecution of drug crimes against people of color, which produced images and crime statistics to support the racist propaganda that people of color are particularly connected with drug crimes.<sup>70</sup> This feedback loop not only built support for prohibition, but has also been mobilized to support other political agendas, like sustaining the careers of individual politicians and law enforcement officials<sup>71</sup> and feeding "the convenient fiction that racial minorities are responsible for their own victimization" in America.<sup>72</sup>

Early efforts to prohibit marijuana, contemporaneous with temperance, relied on openly racist messaging. As early as 1840, American physicians had identified medical uses for marijuana (or cannabis); until the 1940s, it was commonly used to treat migraines, rheumatism, and insomnia, and was also used recreationally as a stimulant.<sup>73</sup> Beginning in the 1910s, a push for marijuana criminalization, intertwined with xenophobic sentiment and likely furthered by temperance, played into white anxieties about nonwhite immigrants and blacks.<sup>74</sup> A wave of Mexican immigrants came to the Southwest following the Mexican Revolution of 1910. Soon Texas police officers and California officials were claiming that marijuana use among Mexican immigrants led them to commit violent crimes.<sup>75</sup> At the time, rumors

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67. *See supra* Part I.A.

68. *See supra* Part I.B.

69. *See id.*

70. *Cf.* PROVINE, *supra* note 20, at 32 ("Dangerous drugs and dangerous minorities, particularly in combination, are what Murray Edelman . . . labels 'condensation symbols,' providing images that powerfully concentrate public anxieties."); *id.* at 101 ("Crude racial labels have been replaced by a race- and class-specific geography that pinpoints the source of dangerous drugs in the (minority/poor) ghetto and speaks of contagion spreading to (white/middle-class) suburban areas.").

71. *Id.* at 30.

72. *Id.* at 32.

73. GERBER, *supra* note 12, at 2; BOOTH, *supra* note 11, at 70, 115.

74. GERBER, *supra* note 12, at 2.

75. *Id.* at 2–4. Isaac Campos challenged this narrative that American xenophobia drove prohibition. Campos used Mexican archival materials to argue that elites in Mexico, which banned marijuana in 1920, promoted prohibition to control what they viewed as outbursts from Mexico's lower class and indigenous peoples. ISAAC CAMPOS, HOME GROWN: MARIJUANA AND THE ORIGINS OF MEXICO'S WAR ON DRUGS 1–5 (2014). *But see* Andrae M. Marak, Book Review, 118 AM. HIST.

spread of Mexicans distributing “killer weed” to schoolchildren.<sup>76</sup> During the Great Depression, states in the Southwest advocated for federal marijuana prohibition as a way to deport “job-stealing” immigrants from Mexico.<sup>77</sup> California officials associated the drug with Hindus and expressed a fear that they would spread it to whites.<sup>78</sup> In the South, as sailors and West Indian immigrants brought marijuana to cities along the Gulf of Mexico, newspapers began to associate the drug with blacks, jazz musicians, prostitutes, and white criminals.<sup>79</sup> Some have argued that powerful business interests who had economic incentives to suppress the production of hemp drove this racialized sentiment and sowed fear in whites by spreading tales in the media of violent Mexican immigrants consuming marijuana.<sup>80</sup> By 1933, thirty-four states had passed laws banning the non-medicinal and non-industrial use of marijuana.<sup>81</sup>

Racist marijuana messaging is epitomized in the career of Federal Bureau of Narcotics Commissioner Henry Anslinger, who was instrumental in passing federal prohibition. Anslinger waged a public campaign to demonize and outlaw marijuana, and advocated for state and national prohibition.<sup>82</sup> Anslinger kept files titled “Marijuana and Mexicans” and “Marijuana and Jazz.”<sup>83</sup> He argued in books, articles, pamphlets, and speeches that pot users—particularly jazz musicians—became homicidal, suicidal, and insane, and that Mexicans’ and blacks’ pot-induced sexual promiscuity and violence threatened the nation’s stability.<sup>84</sup> His agency published—as alleged scientific evidence—fictional stories about marijuana, stating that black college students were partying and smoking pot with white female students while earning their sympathies with stories about racism.<sup>85</sup> Temperance groups like the WCTU supported Anslinger’s efforts and offered to help spread his message.<sup>86</sup>

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REV. 558, 558-59 (2013) (reviewing CAMPOS, *supra*, to suggest that Campos’ argument is not necessarily inconsistent with American xenophobia because it underplays the role of Progressive Era American moral entrepreneurs, who crossed borders to Mexico to push for restrictions on alcohol, drugs, and gambling using socially and racially stigmatizing messaging).

76. GERBER, *supra* note 12, at 2-4.

77. Moran, *supra* note 12, at 563.

78. Dale H. Gieringer, *The Origins of Cannabis Prohibition in California* 18 (Jun. 2006) (unpublished manuscript), <http://www.canorml.org/background/caloriginsmjproh.pdf> [<https://perma.cc/JN4H-RY53>] (describing xenophobic attitudes in California against East Indian immigrants of predominately Sikh religion and Punjabi origin, referred to at the time as “Hindus,” who had arrived in San Francisco in 1910).

79. GERBER, *supra* note 12, at 3.

80. Moran, *supra* note 12, at 565.

81. ALYSON MARTIN & NUSHIN RASHIDIAN, *A NEW LEAF: THE END OF CANNABIS PROHIBITION* 38 (2014).

82. *Id.* at 40.

83. GERBER, *supra* note 12, at 4-9.

84. *Id.* at 4-9, 9 (“Prior to [the Marijuana Tax Act of 1937’s] enactment, no reliable scientific research had shown any statistical connection between marijuana and criminal behavior.”).

85. *Id.* at 6.

86. PROVINE, *supra* note 20, at 84.

In congressional hearings for the proposed Marihuana Tax Act of 1937, Anslinger was the advocate for prohibition.<sup>87</sup> His testimony essentially consisted of racist anecdotes focused on sex and violence. He stated that “[m]ost marijuana smokers are Negroes, Hispanics, Filipinos and entertainers. Their satanic music, jazz and swing result from marijuana usage. This marijuana causes white women to seek sexual relations with Negroes.”<sup>88</sup> He told a fictional story about pot-crazed black college men impregnating white coeds, said that two boys in Chicago murdered a police officer after using marijuana, and asserted that habitual marijuana users enter a “delirious rage” and quickly turn to heroin.<sup>89</sup>

A physician representing the American Medical Association testified that in “medical circles, marijuana was considered harmless medicine.”<sup>90</sup> He noted that the use of “‘marihuana’ in the name of the act instead of the scientifically correct ‘cannabis,’ led to misconceptions.”<sup>91</sup> He also expressed concern that the anxiety surrounding the act was based on unverified media reports. There was an absence of “competent primary evidence,” including a lack of any evidence from the Bureau of Prisons that marijuana is connected with crime, from the Children’s Bureau that children are using marijuana, or from the Bureau of the Public Health Service as to marijuana’s pharmacology.<sup>92</sup> Such “competent primary evidence” did not exist. Nonetheless, the doctor faced hostility from members of Congress, who made no attempt to verify Anslinger’s stories or claims.<sup>93</sup>

Shortly thereafter, Congress passed the Marihuana Tax Act, creating exorbitant tax assessments on marijuana that were practically impossible to meet, which effectively criminalized marijuana and set the stage for further criminal statutes.<sup>94</sup> By 1942, cannabis had been removed from the U.S. Pharmacopeia, a compendium of medical drugs founded in 1820 that had included cannabis in its listings for over one hundred years.<sup>95</sup> In the 1950s, Anslinger successfully pushed for two federal statutes, the 1951 Boggs Act and the 1956 Narcotics Control Act, which together imposed increased criminal penalties and mandatory minimum sentences for marijuana crimes. Under the two laws, a conviction for first-time possession, for example, carried a two-year mandatory minimum.<sup>96</sup>

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87. GERBER, *supra* note 12, at 9–10.

88. *Id.* at 9.

89. *Id.* at 10–11.

90. *Id.* at 9–10.

91. MARTIN & RASHIDIAN, *supra* note 81, at 41.

92. *Id.* at 42.

93. GERBER, *supra* note 12, at 9–11.

94. See Moran, *supra* note 12, at 561.

95. MARTIN & RASHIDIAN, *supra* note 81, at 14, 42; *Frequently Asked Questions: USP and Its Standards*, U.S. PHARMACOPEIAL CONVENTION, <http://www.usp.org/frequently-asked-questions/usp-and-its-standards> [https://perma.cc/LBA5-DNDG] (last visited Feb. 24, 2017).

96. MARTIN & RASHIDIAN, *supra* note 81, at 42–43.

In the 1960s and 1970s, political opposition to marijuana softened as white youth adopted it as a form of countercultural expression, but this was not enough to overcome President Nixon's "silent majority."<sup>97</sup> In the 1960s, marijuana started to be viewed as a form of cultural rebellion and had become the drug of choice for white youth, in a phenomenon that a *Life* writer called "[t]he greatest mass flouting of the law since prohibition."<sup>98</sup> President Nixon attacked marijuana use, playing off an implicit understanding that his silent majority, was "angry at hippies, women's liberation activists, pot smokers, Black nationalists, and other rebellious elements."<sup>99</sup> Simultaneously, President Nixon was under pressure to reduce the risk of incarceration facing white college students—the children of his political base—and supported measures in the 1970 Comprehensive Drug Abuse Prevention and Control Act to reduce first-time marijuana possession to a misdemeanor and eliminate mandatory minimum sentences.<sup>100</sup> Yet that Act also placed cannabis on Schedule I, in the same category as heroin, where it remains today.<sup>101</sup> When President Jimmy Carter later proposed decriminalizing small amounts of marijuana in the late 1970s, in a play to the "whitening" of marijuana that had begun in the 1960s, his proposal was defeated by members of what had been President Nixon's silent majority, including "newly formed white, middle-class parents' groups like the Parents' Resource Institute for Drug Education . . . and the National Federation of Parents for Drug-Free Youth."<sup>102</sup>

President Nixon declared the war on drugs in the White House Press Briefing Room on June 17, 1971: "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."<sup>103</sup> Openly racist language began to disappear from polite society after the civil rights movement, and thus the rhetoric surrounding drug prohibition shifted away from outright racism and toward color-blind, coded-racial appeals.<sup>104</sup> Drug warriors, beginning with President Nixon, used race-neutral language—including the language of law and order—to reference white anxieties about race, civil rights, and perceived disorder without appearing to.<sup>105</sup> A top Nixon aide explained that the president

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97. See Moran, *supra* note 12, at 568.

98. MARTIN & RASHIDIAN, *supra* note 81, at 43; see Moran, *supra* note 12, at 566–67.

99. Moran, *supra* note 12, at 568, 567–68.

100. *Id.* at 568.

101. MARTIN & RASHIDIAN, *supra* note 81, at 46.

102. PROVINE, *supra* note 20, at 99; Moran, *supra* note 12, at 568–69.

103. President Richard M. Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control (Jun. 17, 1971), AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=3047> [<https://perma.cc/LN43-HTYV>]. A White House poll in May 1969 showed only 3 percent of Americans believed drugs were an important national issue. PROVINE, *supra* note 20, at 93.

104. See PROVINE, *supra* note 20, at 93–94.

105. See *id.* at 93; HANEY LÓPEZ, *supra* note 21, at 23–24 ("Dismissing [civil rights] protesters as criminals shifted the issue from a defense of white supremacy to a more neutral-seeming concern with 'order,' while simultaneously stripping the activists of moral stature.")

"emphasized that you have to face the fact that the *whole* problem is really the blacks. The key is to devise a system that recognizes this while appearing not to."<sup>106</sup>

Tough law-and-order campaigns appealed to white anxieties about crime, which were "entangled with other anxieties about their 'loss of stature and privileges as economic opportunities narrowed and traditionally marginalized groups gained new rights.'"<sup>107</sup> Professor Ian Haney López described this sort of post-civil rights era racism as "dog whistle politics," which involves "coded racial appeals that carefully manipulate hostility towards nonwhites" and "studied ambiguity, where the lack of a smoking-gun racial epithet allows for proclamations of innocence."<sup>108</sup> When the operator is accused of racism, this ambiguity allows the operator to criticize the accuser for "injecting race into the conversation."<sup>109</sup>

In the 1980s and 1990s, politicians of both parties, "using 'crime' as code for dangerous nonwhites," competed over who could appear tougher on crime.<sup>110</sup> President Ronald Reagan re-launched and ratcheted up the drug war, increasing penalties for drug and related crimes and massively scaling up funding for drug enforcement while slashing funds for drug treatment and education.<sup>111</sup> President Bill Clinton followed suit. Embracing the language of dog whistle politics, he escalated the drug war to an unprecedented level by

106. NAT'L RESEARCH COUNCIL, *supra* note 19, at 116 (citation omitted).

107. *Id.* (citation omitted).

108. HANEY LÓPEZ, *supra* note 21, at ix, 130.

109. *Id.* at 133. In addition, Jonathon Simon wrote that the period beginning in the 1960s represents the emergence of a new form of American governance that he called "governing through crime," in which "crime became a model problem for government . . . [and] often it is crime through which other problems are recognized, defined, and acted upon." JONATHAN SIMON, GOVERNING THROUGH CRIME 14 (2007). This form of governance emerged, in part, because some, "especially white southern politicians, found crime a convenient line of retreat from explicit support for legal racial segregation in education and other public accommodations. Others . . . were liberals looking for social problems against which to form innovative government strategies that would be less tied to centralized bureaucracies than traditional New Deal governance." *Id.* at 25 (internal citation omitted). Simon analyzed the war on drugs through the lens of "governing through crime": "The war's roots are clear in Nixon's law-and-order message during the campaign of 1968, and in the growing confrontation between the president and the antiwar movement . . . . The war on drugs offered great political potential to Nixon because it linked the New Left political base to its broader youth culture penumbra and, through that, to classic themes of organized crime and corruption. Drugs would also offer a striking metaphoric bridge between the growing political clout of environmentalism and Nixon's center-right majority. Drugs were easily analogized to other 'toxic' chemicals placed in water and airways. . . . Nixon also used the war on drugs to build a new political network, linking the highest levels of national government with local government through law enforcement . . . establishing links that bypassed the traditional structures of congressional representation and party machines." *Id.* at 262.

110. HANEY LÓPEZ, *supra* note 21, at 51–52; NAT'L RESEARCH COUNCIL, *supra* note 19, at 119–21.

111. HANEY LÓPEZ, *supra* note 21, at 51–52 (describing, during the first term of the Reagan administration, an increase in anti-drug funds at the FBI from \$38 million to \$181 million; an increase in DEA spending from \$86 million to \$1 billion; and decreases in funding for the National Institute on Drug Abuse from \$274 million to \$57 million and for anti-drug education at the Department of Education from \$14 million to \$3 million); NAT'L RESEARCH COUNCIL, *supra* note 19, at 119–20.

pushing “‘three strikes’ laws” and securing a \$30 billion funding bill for police agencies and prisons.<sup>112</sup>

As documented in recent scholarship, the war on drugs—especially in its deployment of dog whistles to shape policy—has contributed to the rise of mass incarceration.<sup>113</sup> While the war’s beginning focused on heroin and crack cocaine enforcement, police departments have shifted resources to marijuana in the past two decades, although they have targeted people of color throughout.<sup>114</sup> Even as overall drug arrests began to decline in 2006, marijuana arrests increased, constituting more than half of drug arrests by 2010.<sup>115</sup> The marijuana war has imposed arrests, prosecutions, and convictions on individuals and communities, separated families, and deprived people of child custody, immigration status, voting rights, eligibility for public housing, financial aid for education, and access to employment.<sup>116</sup> Even where arrests don’t lead to convictions or incarceration, they drag people into the criminal justice system: “A simple arrest for marijuana possession can show up on criminal databases as ‘a drug arrest’ without specifying the substance or the charge . . . [or] whether the person was convicted.”<sup>117</sup> These databases, used by prosecutors, police, employers, and landlords, “will haunt many for life.”<sup>118</sup>

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112. HANEY LÓPEZ, *supra* note 21, at 52; NAT’L RESEARCH COUNCIL, *supra* note 19, at 120.

113. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2d ed. 2011) (arguing that the war on drugs is a key aspect of a racial caste system that enacts traditional and new modes of repression through the criminal justice system); HANEY LÓPEZ, *supra* note 21, at 51 (“Recently, sociologists and political scientists studying the rise of mass incarceration have pointed to its origins in dog whistle politics and the use of crime as a proxy language for race.”); PROVINÉ, *supra* note 20, at 1–14 (describing the war on drugs as a phenomenon of color-blind racism, where implicit negative stereotypes and images of nonwhite Americans shape policy); Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 346–50 (2012) (arguing that the war on drugs facilitated a broader architecture of mass incarceration linked to “racialized anti-state, anti-judge, anti-welfare” sentiment that drug reforms will have limited ability to reverse). *But cf.* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 23, 36, 46, 47–48 (2012) (examining the sentencing policy in Washington, D.C., the nation’s only majority-black jurisdiction, to argue that New Jim Crow scholars fail to account—in analyzing mass incarceration—for violent crime (of which people of color are disproportionately victims) as well as the extent to which many whites and Hispanics are incarcerated: “Considering all forms of penal institutions together, more prisoners are locked up for violent offenses than for any other type, and just under 25% (550,000) of our nation’s 2.3 million prisoners are drug offenders. This is still an extraordinary and appalling number. But even if every single one of these drug offenders were released tomorrow, the United States would still have the world’s largest prison system. Moreover, our prison system has grown so large in part because we have changed our sentencing policies for *all* offenders, not just drug offenders” (citation omitted)).

114. AM. C.L. UNION (ACLU), *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 8–9 (2013).

115. *Id.* at 36–37.

116. *Id.* at 11; NAT’L RESEARCH COUNCIL, *supra* note 19, at 304–09.

117. ALEXANDER, *supra* note 113, at 136.

118. *Id.*



Criminal drug laws built on racial rhetoric are correlated with large racial disparities in enforcement.<sup>119</sup> The American Civil Liberties Union (ACLU) conducted a major study of marijuana possession arrests from 2001 to 2010 in all fifty states and Washington, D.C., with all arrestees categorized as white or black.<sup>120</sup> In that decade, there were 8,244,943 total marijuana arrests, 88 percent of which were for possession.<sup>121</sup> A black person was 3.73 times more likely to be arrested for marijuana possession than a white person.<sup>122</sup> Between 2001 and 2010, the disparity between black and white arrests increased by 32.7 percent.<sup>123</sup> In that decade, the white arrest rate remained at 192 whites arrested per 100,000 individuals, while the black arrest rate increased from 537 blacks arrested per 100,000 individuals in 2001 to 716 blacks arrested per 100,000 individuals in 2010.<sup>124</sup> In some states, black people were more than six times as likely as whites to be arrested for possession; in some counties, the magnitude of disparity reached ten, fifteen, and even thirty.<sup>125</sup> Wide disparities between black and white arrest rates occurred consistently across the north, south, east, and western areas of the country; in large and small counties; in cities and rural areas; in counties with low and high median income; and in counties with small and large percentages of black populations.<sup>126</sup>

Georgetown law professor and former federal prosecutor Paul Butler, when considering the ACLU study's findings with respect to Washington, D.C., confirmed that this disparity is a product of racism: "[T]here's really no good explanation for [the racial disparities] other than kind of round up the usual suspects: this idea that what a drug criminal looks like is a young black man."<sup>127</sup> In D.C., black people were eight times more likely than whites to be

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119. See, e.g., NAT'L RESEARCH COUNCIL, *supra* note 19, at 60 (finding that drug-related arrest rates for blacks have been three to four times higher than those for whites in recent years and were six times higher in the late 1980s).

120. ACLU, *supra* note 114, at 4. The dataset used by the study did not identify Latinos as a distinct racial group. Therefore, in the study, an arrest of a Latino person is overwhelmingly categorized as an arrest of a white person. To the extent Latino persons are categorized as white, the study underestimated racial disparities between arrests of black and white persons. Also, based on limited data from New York and California, it appears Latinos are arrested at rates higher than whites and lower than blacks. Other racial groups were not included. *Id.* at 31–32.

121. *Id.* at 39.

122. *Id.* at 4.

123. *Id.* at 9.

124. *Id.* at 48.

125. *Id.* at 9.

126. *Id.* at 9. While no multivariate regression analysis was possible based on available data, the study's authors concluded, "[G]iven the pervasiveness of . . . racially disparate arrests, existing, as our data reveals, in counties of different sizes, population densities, demographics, and economic well-being, it is not immediately clear just what variable, if not race itself, could in fact be the true driving causal force behind the consistent and widespread racial disparities in marijuana possession arrest rates in the vast majority of counties in this country. This report . . . presents the opportunity for future research on this fertile topic." *Id.* at 29.

127. Rebecca Sheir, *An Uncomfortable Link Between Race and Marijuana Arrests in D.C.*, WAMU (May 1, 2015),

arrested for marijuana possession and constituted over 90 percent of those prosecuted for marijuana crimes generally.<sup>128</sup> Yet, when the D.C. Department of Health surveyed city residents in 2011, asking if they ever used marijuana, 60 percent of white respondents said yes, compared to 46 percent of black respondents.<sup>129</sup> Butler argued, “It’s hard to find a reason . . . other than bias” to square those results with arrest rates.<sup>130</sup>

Despite recent scholarship, many white people, including criminal justice scholars, view claims of racial discrimination in the criminal justice system with skepticism. Ian Haney López has suggested that many whites are skeptical of racial discrimination claims in the criminal justice context because they accept the connections drawn between minorities and crime as part of the natural order, and thus perceive disparities in criminal consequences as non-discriminatory.<sup>131</sup> To illustrate this, López highlighted a study that found that white support for the death penalty increases dramatically if whites are told that the death penalty is unfair because most of those executed are black.<sup>132</sup> Considering the study, López wrote,

Because many whites believe that major social institutions are racially fair *and* include vast racial disparities, simply informing them about dramatic race-correlated differences will not change their beliefs. Instead, and perversely, among those who accept dramatic racial inequalities as a normal and legitimate feature of society, hearing about discrepancies alone tends to solidify their beliefs regarding minority failings and society’s basic fairness.<sup>133</sup>

Many social scientists share these attitudes, subscribing to a conventional wisdom that “overrepresentation of blacks and other minorities in the criminal justice system is not *primarily* due to discrimination in law enforcement, but rather to high levels of minority involvement in those crimes that the criminal

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[http://wamu.org/programs/metro\\_connection/15/04/30/an\\_uncomfortable\\_link\\_between\\_race\\_and\\_marijuana\\_arrests\\_in\\_dc](http://wamu.org/programs/metro_connection/15/04/30/an_uncomfortable_link_between_race_and_marijuana_arrests_in_dc) [https://perma.cc/A7JM-9MT8].

128. *Id.*

129. *Id.*

130. *Id.* But see Forman, *supra* note 113, at 46–47 (“There is overwhelming evidence that discriminatory practices in drug law enforcement contribute to racial disparities in arrests and prosecutions, and even for violent offenses there remain unexplained disparities between arrest rates and incarceration rates. . . . [But] framing mass incarceration as a new form of Jim Crow . . . leads proponents to search for disparities in the criminal justice system that resemble those of the Old Jim Crow, [and] they confine their attention to cases where blacks are like whites in all relevant respects, yet are treated worse by law. Such a search usefully exposes the abuses associated with racial profiling and the drug war. But it does not lead to a comprehensive understanding of mass incarceration.”).

131. HANEY LÓPEZ, *supra* note 21, at 35–37.

132. *Id.* (“[B]lacks are about 12 percent of the population and about 43 percent of those on death row.”). In the study, when whites were “first told that capital punishment ‘is unfair because most of the people who are executed are African Americans,’” the number of whites “favoring” the death penalty increased by 18 percent, and the number of whites “strongly favor[ing]” the death penalty increased by 44 percent. *Id.* at 35–36.

133. *Id.* at 37.

justice system regularly prosecutes.”<sup>134</sup> Sonja Starr critiqued the scholarly use of crime rates by racial group to assess whether disparities in law enforcement reflect racial discrimination:

Many scholars have argued that crime differences are the single most important explanation for race gaps in U.S. arrest and incarceration rates. But this does not really explain why so many analyses focus on crime exclusively. Some policing-to-crime comparisons (such as the common comparison of drug arrest rates to use rates) do *not* actually find that crime substantially explains policing disparities . . . . And even when it does, other factors [like racial discrimination or race-neutral criteria applied differentially across races] may also be important. Indeed, when other contributors to disparity are layered on top of substantial crime differences, it amplifies their consequences.<sup>135</sup>

Starr proposed that instead of searching for causal inferences about race and policing from enforcement data, scholars should employ field studies—often used for discrimination research in employment and housing contexts—that compare police treatment of paired “testers” who are similar but for race, the characteristic of interest.<sup>136</sup>

Moreover, empirical studies illustrate similar rates of drug usage and distribution among different racial groups, suggesting that crime rates across racial groups cannot explain marijuana enforcement disparities.<sup>137</sup> Drug use among whites is slightly higher than among blacks for some illegal drugs and slightly lower for others, but the differences are not substantial.<sup>138</sup> In addition,

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134. PROVINE, *supra* note 20, at 7 (quoting David Greenberg, “Justice” and Criminal Justice, in CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE, *supra* note 34, at 319–54); Sonja B. Starr, *Explaining Race Gaps in Policing: Normative and Empirical Challenges* 14–15 (Mich. Law & Econ. Research Paper Series, Paper No. 15-003, 2015), [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2550032](http://papers.ssm.com/sol3/papers.cfm?abstract_id=2550032) [<https://perma.cc/LTJ2-DU98>]. In addition, some scholars attribute a portion of enforcement disparities to the locations of drug activity: “Much white drug dealing occurs behind closed doors and in private. Much black drug dealing occurs in public or semipublic, on the streets and in open-air drug markets.” Tony & Melewski, *supra* note 29, at 27.

135. Starr, *supra* note 134, at 14; *id.* at 14 & n.65 (“For example, suppose crime could explain the vast majority of the 6-to-1 black-white incarceration gap, i.e., whites were only 10% less likely to be incarcerated than blacks with the same criminal conduct. Even then, that gap would be consequential: reducing black incarceration by 10% would mean restoring the liberty of more than 1% of all black men under 35 in the United States (1 in 9 of whom are now in prison).”).

136. *Id.* at 42–50.

137. See NAT’L RESEARCH COUNCIL, *supra* note 19, at 60–61.

138. *Id.* at 60 (citing MICHAEL TONRY, PUNISHING RACE: AN AMERICAN DILEMMA CONTINUES 53–76 (2011)). Consider, for example, the following statistics on the percentage of people using drugs based on representative sample surveys of the U.S. population in 2005:

	Ever used	Within last year
Marijuana:	White: 43.7%; Black: 39.0%	White: 10.6%; Black: 12.3%
Cocaine (all forms):	White: 15.5%; Black: 9.8%	White: 2.4%; Black: 2.0%
Crack Cocaine:	White: 3.2%; Black: 4.9%	White: 0.5%; Black: 1.2%
Hallucinogens:	White: 16.3%; Black: 6.5%	White: 1.8%; Black: 0.8%

Tonry & Melewski, *supra* note 29, at 25–26.

evidence suggests that whites are at least equally participatory in drug trafficking.<sup>139</sup> Surveys of representative samples of the U.S. population indicate blacks are not more involved in selling drugs than whites.<sup>140</sup> For twelve- to seventeen-year-olds in the years 2001–2006, rates of selling drugs among whites were slighter higher than among blacks on average.<sup>141</sup>

The skeptical reactions of many whites to claims of racial discrimination in the criminal justice system present a dilemma to those who seek to challenge the associations drawn between drug crimes and race. Discussing racial disparities may actually increase white support for drug prohibition, but avoiding race may reinforce the view that the connection between racial minorities and drug crimes is a naturalized feature of U.S. society.<sup>142</sup> Thus, marijuana legalization campaigns that avoid discussing racial inequities may increase white support, but at the cost of reinforcing racial stigmas.

## II.

### MARIJUANA LEGALIZATION CAMPAIGNS

This Part examines racially coded appeals in marijuana legalization campaigns in several states that recently passed or failed to pass ballot initiatives to legalize recreational marijuana. It focuses on the ways in which many of the successful marijuana legalization campaigns have used appeals to white middle-class sensibilities that assuage and reinforce white anxieties about people of color and drug crimes.

In the last several years, marijuana reform efforts have gained prominence and some success in local, state, and national politics. Marijuana prohibition has faced increased criticism, in part due to states seeking new sources of tax revenue to meet fiscal challenges after the late-2000s financial crisis—a situation that parallels the economic considerations that led to the repeal of Prohibition during the Great Depression.<sup>143</sup> Advances in the science of marijuana and the growing recognition of marijuana’s medical benefits have also provided fodder for criticism.<sup>144</sup> In November 2016, Florida, North Dakota, and Arkansas became the twenty-sixth, twenty-seventh, and twenty-

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139. Tonry & Melewski, *supra* note 29, at 25–26.

140. *Id.*

141. *Id.*

142. *See id.*

143. *See* Ballve, *supra* note 25.

144. While marijuana is difficult to study because it is a Schedule I drug, a recent systemic review of randomized clinical trials of cannabinoids (the psychoactive chemical in marijuana) found “moderate-quality evidence to support the use of cannabinoids for the treatment of chronic pain and spasticity . . . [and] low-quality evidence suggesting that cannabinoids were associated with improvements in nausea and vomiting due to chemotherapy, weight gain in HIV infection, sleep disorders, and Tourette syndrome.” Penny F. Whiting et al., *Cannabinoids for Medical Use: A Systematic Review and Meta-Analysis*, 313 J. AM. MED. ASS’N 2456, 2456 (2015).

eight states, respectively, along with D.C., to legalize medical marijuana.<sup>145</sup> In addition, decriminalization has enjoyed success, as at least twenty-one states have non-incarceration penalties for first-time marijuana possession offenses.<sup>146</sup> Finally, there have been numerous ballot initiative campaigns to legalize recreational marijuana. Though several recent measures failed, such as those in Nevada (2006), California (2010), Oregon (2012),<sup>147</sup> Ohio (2015),<sup>148</sup> and Arizona (2016),<sup>149</sup> voters in eight states have passed initiatives: Colorado (2012), Washington (2012), Alaska (2014), Oregon (2014), California (2016), Nevada (2016), Massachusetts (2016), and Maine (2016).<sup>150</sup> A few municipalities have legalized recreational marijuana, most notably the District of Columbia (2014).<sup>151</sup> Soon after, however, Congress passed a spending prohibition barring D.C. from allowing marijuana to be bought and sold.<sup>152</sup>

Successful pro-marijuana legalization campaigns have put forward a variety of policy arguments on websites, in debates, in media appearances, and in ads. Colorado, Alaska, Maine, and Nevada campaigners raised the common argument that because marijuana is less harmful than alcohol, states should regulate marijuana as they do alcohol.<sup>153</sup> In addition to the alcohol comparison,

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145. 28 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> [<https://perma.cc/QZ5G-CJ3J>] (last visited Feb. 24, 2017).

146. *State Decriminalization Laws*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/decriminalization/state-laws-with-alternatives-to-incarceration-for-marijuana-possession> [<https://perma.cc/MG9G-WUMP>] (last visited Feb. 24, 2017).

147. Kenneth Leon & Ronald Weitzer, *Legalizing Recreational Marijuana: Comparing Ballot Outcomes in Four States*, 2 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 193, 193 (2014).

148. Christopher Ingraham, *Why Ohio Voted Against Legal Marijuana —And What It Means for the Future of the Pot Debate*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/03/ohio-rejected-legalizing-marijuana-what-that-means-for-the-future-of-pot> [<https://perma.cc/8XGD-F4E2>].

149. Ray Stern, *Why Did Arizona Just Say No to Marijuana Legalization in 2016?*, PHX. NEW TIMES (Nov. 10, 2016, 8:00 AM), <http://www.phoenixnewtimes.com/news/why-did-arizona-just-say-no-to-marijuana-legalization-in-2016-8814965> [<https://perma.cc/KQF7-GZ57>].

150. NORML, *supra* note 9.

151. Cox, *supra* note 1. Also, in 2015, the Flandreau Santee Sioux Tribe of South Dakota became the first tribe to legalize recreational marijuana on tribal land in a state where it is illegal. London Swan, *Flandreau Santee Sioux Tribe Approves Using and Selling Marijuana on Tribal Lands*, KDLT (June 16, 2015, 6:23 PM), <http://www.kdlt.com/news/local-news/flandreau-santee-sioux-tribe-approves-using-selling-marijuana-on-tribal-lands/33616526> [<https://perma.cc/AN5N-YPLZ>].

152. Cox, *supra* note 1.

153. These campaigns were both called "Campaign to Regulate Marijuana Like Alcohol" and emphasized that marijuana is less harmful than alcohol. COLO. CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, <http://www.regulatemarijuana.org> [<https://perma.cc/3WRB-9HWY>] (last visited Feb. 25, 2017); *Colorado Amendment 64*, OMNICANNA HEALTH SOLUTIONS, <http://www.omnicanna.com/index.php/store/27-research/laws-passed/107-colorado-amend-64> (last visited Feb. 25, 2017) [<https://perma.cc/5N4C-23LK>] ("Stop the arrest and prosecution of adults who are simply choosing to use a substance that is objectively less harmful than alcohol."); CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL IN ALASKA, <http://regulatemarijuanainalaska.org> [<https://perma.cc/9VS6-56HY>] (last visited Feb. 25, 2017) ("Responsible adults 21 and older should not be punished for simply choosing to use a substance that is objectively safer than alcohol."); *About*, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, <https://www.regulatemaine.org/about>

some of the most prominent policy arguments for marijuana legalization in successful campaigns were that legalization would (1) reroute profits from black markets to state tax proceeds,<sup>154</sup> (2) redirect law enforcement resources from unproductive marijuana enforcement to important violent crime investigations,<sup>155</sup> (3) inhibit minors from accessing marijuana,<sup>156</sup> (4) improve public health,<sup>157</sup> and (5) diminish racially disparate marijuana arrests that harm people's lives.<sup>158</sup>

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[<https://perma.cc/ND9F-VHCP>] (last visited Feb. 25, 2017) (Maine); *Why Vote Yes?*, REGULATE MARIJUANA LIKE ALCOHOL IN NEV., <https://www.regulatemarijuanainnevada.org/yeson2> [<https://perma.cc/K6S3-PDZB>] (last visited Feb. 25, 2017).

154. OMNICANNA HEALTH SOLUTIONS, *supra* note 153 (“Regulating marijuana like alcohol will take marijuana sales out of the hands of cartels and criminals, and redirect that money toward legitimate, taxpaying Colorado businesses.”); *id.* (“significant new tax revenue”); *Who We Are*, NEW APPROACH OR., <http://www.newapproachoregon.com/who-we-are> [<https://perma.cc/4BRV-A7CQ>] (last visited Feb. 25, 2017) (“Taking money and power away from the criminal market and drug cartels . . . [g]enerating tax revenue”); *About | Yes on I-502*, NEW APPROACH WASH., <http://www.newapproach.wa.org/about> [<https://perma.cc/A348-GUMZ>] (last visited Feb. 25, 2017) (“Washington should stop wasting law enforcement resources on adults who use marijuana, and instead create a tightly regulated system that takes money away from criminal organizations and generates tax revenue for our state and local governments.”); *Why Vote Yes?*, REGULATE MARIJUANA LIKE ALCOHOL IN NEV., <https://www.regulatemarijuanainnevada.org/yeson2> [<https://perma.cc/4F35-A8BK>] (last visited Feb. 25, 2017) (same).

155. OMNICANNA HEALTH SOLUTIONS, *supra* note 153 (“allow law enforcement to focus on violent and otherwise harmful crimes”); NEW APPROACH OR., *supra* note 154 (“Focusing law enforcement resources on violent crimes”); Campaign to Regulate Marijuana Like Alcohol in Alaska, *Yes on 2 TV Ad - “The Deputy Commissioner,”* YOUTUBE (Oct. 15, 2014), <https://www.youtube.com/watch?v=OEVRpeFGaU4> [<https://perma.cc/7GMU-33Q2>] (arguing that the state’s limited resources should be spent addressing serious crime); REGULATE MARIJUANA LIKE ALCOHOL IN NEV., *supra* note 154 (same); CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, *supra* note 153 (same argument for Maine); *Why Vote YES on Question 4?*, YES ON 4: REGULATE MASS., <https://www.regulatemassachusetts.org/yeson4> [<https://perma.cc/M3LV-89T3>] (last visited Feb. 25, 2017).

156. OMNICANNA HEALTH SOLUTIONS, *supra* note 153 (“reduce youth access”); NEW APPROACH OR., *supra* note 154 (“[p]rotecting children”); NEW APPROACH WASH., *supra* note 154, <http://www.newapproachwa.org/content/about-initiative> [<https://perma.cc/2424-WSJ6>] (“bans advertising in places frequented by youth.”); *About Prop 64—the Adult Use of Marijuana Act*, YES ON 64, <http://www.yeson64.org/about> [<https://perma.cc/MC23-AG66>] (last visited Feb. 25, 2017) (noting California’s Prop 64 has “toughest-in-the-nation protections for children”).

157. Campaigns put forward public health policy goals in addition to the argument that marijuana is less harmful than alcohol. *See* NEW APPROACH WASH., *supra* note 154 (“[P]rotecting for safety and public health: State agencies will regulate numbers of stores per county, operating hours, security, quality control, labeling, and other health and safety issues.”), <http://www.newapproachwa.org/content/about-initiative> [<https://perma.cc/E6AG-8272>] (last visited Feb. 25, 2017); REGULATE MARIJUANA LIKE ALCOHOL IN NEV., *supra* note 154 (“ensure marijuana is not contaminated”); YES ON 4: REGULATE MASS., *supra* note 155 (noting campaign will dramatically reduce cost for treating “chronic pain, opiate addiction, intense nausea” with marijuana); CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, *supra* note 153 (promoting easier access to marijuana for medicinal purposes in Maine).

158. The fifth argument listed—that marijuana legalization would diminish racially disparate marijuana arrests—was used in the D.C., California, Ohio, and Massachusetts legalization campaigns. *See infra* Part II.B.

### A. *White Individualism*

While campaigns asserted policy arguments, a number also deployed coded racial messages: depictions of hardworking, middle-class whites who exercise individual responsibility and use marijuana responsibly. These messages resonate with what scholars have termed "white middle-class individualism."<sup>159</sup>

John A. Powell has used this term to describe the post-New Deal emergence of a white middle-class identity organized around the idea of individual merit. In this conception, economic outcomes result only from individual sacrifice and dedication, which ignores government housing aid programs that tended to exclude nonwhites.<sup>160</sup> White workers, who achieved homeownership in segregated communities due to racially discriminatory government housing programs in the 1930s, 1940s, and 1950s, came to accept the narrative that they had earned their homes and the associated accumulation of wealth.<sup>161</sup> The narrative of individual merit rendered invisible "racially discriminatory public policy and private discrimination [that] produced entrenched patterns of residential segregation and resource disparities that continue today."<sup>162</sup> The seeming invisibility of discrimination, however, did not render discrimination nonexistent. In fact, middle-class identity helped reinforce stereotypes about black inferiority and irresponsibility, the implied flipside of white merit and hard work.<sup>163</sup>

Just as post-war middle-class narratives naturalized the effects of discriminatory housing policy, white middle-class individualism in marijuana legalization campaigns functions to naturalize the racial anxieties and social harms of marijuana prohibition and the drug war. It presents marijuana legalization as a recreational reward for individual hardworking middle-class whites. In the process, it reinforces by failing to challenge, and by naturalizing,

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159. Powell, *supra* note 28, at 395 (citing MICHAEL K. BROWN, RACE, MONEY AND THE AMERICAN WELFARE STATE 358 (1999)) (analyzing mid-twentieth-century housing policy through the lens of "white middle-class individualism" that rendered invisible the exclusion of nonwhites). Powell drew on the work of Michael Brown, who used the term "white middle class individualism" in his own study of race and welfare in America, writing, "White middle class individualism, thus, is defined in opposition to blacks, who are seen as an excluded but ominous group who do not share white middle class values." BROWN, *supra* at 351. Those values include "a consciousness of themselves as a group of beleaguered whites," "consider[ing] success the result of hard work and individual self-reliance[,] and reject[ing] policies they think benefit only blacks." *Id.* at 348. Brown's use of this term differs from Powell's; in Brown's welfare context, white individualism rejects programs perceived as benefiting blacks, *see* BROWN, *supra* at 351, whereas in Powell's discussion of housing policy, individualism tends to naturalize and render invisible programs excluding nonwhites and benefiting whites, *see* Powell, *supra* note 28, at 395. Here, Powell's usage is more pertinent, in that white individualism in marijuana legalization naturalizes and renders invisible a legacy of racially discriminatory harms. *See infra* notes 160–64 and accompanying text.

160. Powell, *supra* note 28, at 389–96.

161. *Id.*

162. *Id.* at 393.

163. *Id.* at 394.

existing racial stereotypes about drug criminals. Thus, white individualist framing of legal marijuana is a form of dog whistle politics, a coded racial rhetoric with plausible deniability that the speaker is invoking race.<sup>164</sup>

White individualism was especially prominent in Colorado, Washington, Oregon, and Alaska, the first four states to legalize marijuana between 2012 and 2014.<sup>165</sup> Campaigns that have veered off the script of white individualism have at times run into political obstacles, like those in Alaska and Washington, D.C.<sup>166</sup> While this Note focuses on the first wave of legalization campaigns, it will briefly address how 2016 campaigns in California and Massachusetts raised prominent racial justice arguments yet nonetheless succeeded at the ballot box.<sup>167</sup>

### 1. Colorado

Encoded messages of white individualism were most evident in Colorado's 2012 legalization campaign. Consider the first five in a series of televised and online video ads the campaign ran before the November ballot measure. The first ad, released on Mother's Day, was described in this Note's introduction.<sup>168</sup> It features a white millennial trying to convince her mother that using marijuana is acceptable and that she feels safe around marijuana users.

The second ad, "Dear Dad," released on Father's Day, depicts a young white man sitting in a bucolic nature setting and typing a message on his laptop. A voice-over begins, "Dear Dad . . . . You know how you enjoy a drink after work? Well, in many ways, I'm just like you, *I have a good job, I work hard*, but when I get home, I prefer to relax with marijuana."<sup>169</sup> This message signals notions of individual merit, hard work, individual responsibility, and the reward of middle-class values in the form of recreational marijuana.

The third ad featured a song set to the tune of a Beatles melody about taking marijuana off the streets, putting it into a store, making it harder for teens to buy, and creating jobs and tax revenue.<sup>170</sup>

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164. See HANEY LÓPEZ, *supra* note 21 and accompanying text.

165. In these states, the percentage of the population that is black—Colorado (4.3 percent), Washington (3.8 percent), Oregon (1.9 percent), Alaska (3.6 percent)—is low when compared with the national average (13 percent). ACLU, *supra* note 114, at 8 & n.7, 54. In addition, Alaska has a large nonblack/nonwhite population (15 percent American Indian or Alaska Native, 6 percent Asian, 6 percent Latino). *Id.* at 33 & n.29.

166. See *infra* Part II.B. Part II.B will further elaborate on how the appeals to end racial injustice impacted campaign effectiveness for marijuana legalization campaigns in Washington, D.C. and several states.

167. See *infra* Part II.B.2.

168. See *supra* notes 4–8 and the accompanying text.

169. Colorado Marijuana Initiative 2012, *Yes on 64 Web Ad - "Dear Dad,"* YOUTUBE (June 15, 2012), <https://www.youtube.com/watch?v=yb0HJR2dTR4> [<https://perma.cc/22MF-3DSQ>].

170. Colorado Marijuana Initiative 2012, *Yes on 64 Theme Song*, YOUTUBE (Aug. 21, 2012), <https://www.youtube.com/watch?v=5mW0jF2kw0> [<https://perma.cc/E687-MG3E>].



The fourth ad was a major buy that ran in September 2012 during fifteen prime-time slots on CNN and MSNBC across the state to coincide with the Democratic National Convention.<sup>171</sup> This ad told a very incomplete history of marijuana prohibition, omitting its racist origins. The goal of the ad, as stated on the campaign's website, was "to encourage thoughtful viewers to contemplate the differing ways in which we as a nation treat marijuana and alcohol consumers . . . [and] highlights the false pretenses under which the war on marijuana was established."<sup>172</sup> The ad opens with a shot of President Barack Obama, Henry Louis Gates, and James Crowley sharing a beer in the White House Rose Garden, as a voice-over says, "We're not looking to end beer summits at the White House."<sup>173</sup> Then, an image flashes of President Obama hoisting a beer in a bar, with Michelle Obama standing at his side, as the voice-over continues, "or change the way people behave on the campaign trail."<sup>174</sup> As the image shifts to a white couple sitting in front of a fireplace, the voice-over explains, "We just believe adults, in the privacy of their homes, should be allowed to use marijuana instead of alcohol."<sup>175</sup> The ad links the first black president to alcohol and, by contrast, links a white couple at home to marijuana consumption. The ad closes with a photo of President Nixon, as a voice-over says, "Forty years ago, our government launched an irrational war on marijuana for reasons unrelated to the actual and limited harms of the substance. It's time for a sensible approach."<sup>176</sup> The ad hints at—but never actually mentions—the "false pretenses" under which the war on marijuana began, as the campaigners promised it would. The viewer never learns the racist reasons for the war on marijuana.

The campaign's fifth ad, released in October 2012, shows a white teacher in front of a classroom of white school children, as a voice-over says, "Let's vote for the good guys and against the bad guys. Let's have marijuana tax money go to our schools rather than criminals in Mexico. Vote for Colorado."<sup>177</sup> The ad links good guys with whites and bad guys with criminals in Mexico, thus playing up white individualism and anti-Mexican anxieties among whites.

As shown above, some of the Colorado marijuana legalization campaign ads used white individualism as a selling point for legalization.

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171. Johnny Green, *Regulate Marijuana Like Alcohol Campaign Releases New Ad*, WEED BLOG (Aug. 31, 2012), <http://www.theweedblog.com/regulate-marijuana-like-alcohol-campaign-releases-new-ad> [<https://perma.cc/3JB4-XETR>]; Colorado Marijuana Initiative 2012, *Yes on 64 TV Ad - "It's Time,"* YOUTUBE (Aug. 31, 2012), <https://www.youtube.com/watch?v=ZjDMaNMjSIE> [<https://perma.cc/E3RA-7WKN>].

172. Green, *supra* note 171.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Colorado Marijuana Initiative 2012, *Yes on 64 TV Ad - "Vote for Colorado,"* YOUTUBE (Oct. 6, 2012), <https://www.youtube.com/watch?v=1KAOq7XX2OY> [<https://perma.cc/393M-29X4>].

## 2. *Washington and Oregon*

The 2012 Washington and 2014 Oregon campaigns also employed white individualism in their messaging. The Washington campaign sent Rick Steves, a white travel writer and TV host with “folksy charm,” on a traveling roadshow through Eastern Washington to sell a message that would bring together conservative and libertarian themes: spend less money on enforcement and respect adult privacy.<sup>178</sup> At one roadshow in Yakima, Washington, Steves got his biggest applause of the night when he said, “I’m a hardworking, churchgoing, child-raising, taxpaying citizen. If I want to go home and smoke a joint and stare at the fireplace for two hours, that’s my civil liberty.”<sup>179</sup> In this line, we see the features of white marijuana individualism: individual sacrifice, merit, responsibility, and freedom along with a legitimate, tax-paying citizenship and property-based privacy. The line implies that some people—with these values—deserve civil liberties and that perhaps other people do not. Shortly before Election Day in 2012, the National Organization for the Reform of Marijuana Laws (NORML), a leading reform organization in Washington, D.C., released a picture of Steves with the “hardworking, churchgoing” line quoted above for its supporters to share on Facebook, Pinterest, and Twitter as part of its “Smoke the Vote” campaign.<sup>180</sup>

Steves’ rhetoric indirectly echoed social pathology rhetoric, a form of public discourse that emerged from Daniel Patrick Moynihan’s influential 1965 Department of Labor report, *The Negro Family: The Case for National Action*. The Moynihan Report constructed the challenges facing poor black families as stemming from a “tangle of pathology” including “female-headed households, ‘illegitimate births,’ teen pregnancy, poverty and welfare dependency, delinquency and crime, and drug abuse.”<sup>181</sup> Social pathology constructs target populations in “either a positive or negative light through the use and management of public and political rhetoric.”<sup>182</sup> Such constructions “become so embedded in the public psyche that they can easily be deployed to justify otherwise unacceptable government actions.”<sup>183</sup> In some ways, Steves’s patriarchal and hardworking positioning inverted Moynihan’s pathologies of matriarchal, welfare-dependent blacks. By thus linking marijuana legalization

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178. Jonathan Martin, *Marijuana Initiative 502 a Tough Sell in Eastern Washington*, SEATTLE TIMES (Oct. 24, 2012 4:23 PM), <http://www.seattletimes.com/seattle-news/marijuana-initiative-502-a-tough-sell-in-eastern-washington> [<https://perma.cc/Q7QK-Q9SS>].

179. *Id.*

180. Erik Altieri, *7 Simple Ways YOU Can Help Legalize Marijuana*, NORML (Oct. 31, 2012), <http://blog.norml.org/2012/10/31/7-simple-ways-you-can-help-legalize-marijuana> [<https://perma.cc/2G88-7EAY>].

181. Kalynn Amundson, Anna M. Zajicek & Valerie H. Hunt, *Pathologies of the Poor: What Do the War on Drugs and Welfare Reform Have in Common?*, 41 J. SOC. & SOC. WELFARE 5, 6 (2014) (citing U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965)).

182. *Id.*

183. *Id.*

to certain notions of responsible white patriarchy, Steves perhaps reassured white voters that marijuana legalization is not a threat. Also, in emphasizing his work ethic and religiosity, Steves rebutted the hippie, anti-establishment, "turn on, tune in, drop out" image associated with marijuana.<sup>184</sup>

In 2014, the Oregon campaign sent Steves on a six-day, ten-city tour around the state.<sup>185</sup> In speeches, Steves acknowledged racism, calling marijuana laws racist for disproportionately impacting young, poor people of color.<sup>186</sup> Nonetheless, his message of hardworking, churchgoing citizenship and responsible freedom in the privacy of his own property, repeated in Washington and Oregon,<sup>187</sup> powerfully and succinctly conveyed white individualism.<sup>188</sup>

### 3. Alaska

While the 2014 Alaska campaign did not exemplify white individualist strategies as clearly as other states' campaigns, its relevance lies in the expressions of white individualism in the campaign's reception.<sup>189</sup> The Alaska campaign was marked by a central controversy: while reporting about medical marijuana businesses on the live evening broadcast of KTVA Anchorage news on September 21, 2014, reporter Charlo Greene went off script and said,

184. See BOOTH, *supra* note 11, at 253; see generally *id.* at 249–74 (discussing the role of marijuana in cultural upheaval, social activism, hippie movements, and government policy in the 1960s).

185. Yes on 91, *Rick Steves Tours Oregon for Marijuana Reform*, YOUTUBE (Oct. 24, 2014), <https://www.youtube.com/watch?v=DF1j6g5H2FA> [<https://perma.cc/B47W-MVJU>].

186. *Id.*

187. Noelle Crombie, *Rick Steves Campaigns for Marijuana Legalization in Oregon: Q&A*, OREGONLIVE (Oct. 8, 2014, 8:06 AM), [http://www.oregonlive.com/marijuana/index.ssf/2014/10/rick\\_steves\\_campaigns\\_for\\_mari.html](http://www.oregonlive.com/marijuana/index.ssf/2014/10/rick_steves_campaigns_for_mari.html) [<https://perma.cc/7D8W-LKBR>].

188. *But cf.* Gillian Graham, *Travel Guru Rick Steves Visits Maine to Stump for Legal Marijuana*, PORTLAND PRESS HERALD (Oct. 17, 2016), <http://www.pressherald.com/2016/10/17/travel-guru-rick-steves-visits-maine-to-stump-for-legal-marijuana> [<https://perma.cc/82YN-D65Y>]. In 2016, Steves traveled to Maine to support the legalization campaign (for which he was the largest individual donor); there, he seemed more attuned to the histories shaping marijuana policy. See *id.* Rather than returning to his "hardworking, churchgoing . . ." line, he focused on the racism and propaganda of marijuana policy, remarking in a newspaper interview, "I'm looking at the big picture. This is a racist, expensive, nonproductive law based on reefer madness propaganda. . . . This (initiative) is not pro-pot. This is smart policy." *Id.* Steves also traveled to Massachusetts in 2016 to support the campaign, with a similar sentiment: "Bans on marijuana are an 'excuse to lock up black people so they can't vote. . . . Rich white guys don't get arrested.'" Gintautas Dumcius, *Travel Writer Rick Steves Says Massachusetts Rejection of Marijuana Legalization Would Be Setback for Movement*, MASS LIVE (Oct. 13, 2016, 8:45 AM), [http://www.masslive.com/politics/index.ssf/2016/10/travel\\_writer\\_rick\\_steves\\_says.html](http://www.masslive.com/politics/index.ssf/2016/10/travel_writer_rick_steves_says.html) [<https://perma.cc/LFQ3-7UGM>].

189. In addition, a number of prominent Alaska Native leaders came out in opposition to legalization. See, e.g., Suzanna Caldwell, *Western Alaska Leaders Fret Over Marijuana Legalization in Rural Communities*, ALASKA DISPATCH NEWS (Apr. 22, 2014), <http://www.adn.com/cannabis-north/article/western-alaska-leaders-fret-over-marijuana-legalization-rural-communities/2014/04/23> [<https://perma.cc/A6K2-CXBQ>].

“[E]verything you’ve heard is why I, the actual owner of the Alaska Cannabis Club, will be dedicating all of my energy toward fighting for freedom and fairness, which begins with legalizing marijuana here in Alaska. And as for this job . . . fuck it, I quit.”<sup>190</sup> Two days later, Greene testified at a public discussion of the legalization measure, where some audience members hailed her as a hero.<sup>191</sup> Although the spectacle of the on-air resignation dominated reactions to Greene’s discussion of marijuana policy, public commentary suggests ways in which the event disrupted racialized expectations about the campaign. For example, in an opinion piece in Alaska’s biggest newspaper, *Alaska Dispatch News*, author Paul Jenkins explained, “Everybody was climbing aboard, from lawyers anxiously envisioning profitable new practices to businesses wanting a taste of Big Dope.”<sup>192</sup> That is, until Greene abandoned her KTVA job on air. According to an observer who spoke with Jenkins, proponents at the public discussion “yakked about their rights, heckled, interjected, shouted down the opposition,” and Greene shouted down an opponent, using an expletive and saying speaking out was her right.<sup>193</sup> The author concluded, “The dope dudes must be scratching their heads, wondering whether their campaign . . . is -- poof! -- going up in smoke. . . . So much for the image of the mellow pot smoker.”<sup>194</sup>

The editorial’s lament was subtly raced and gendered. Jenkins depicted the Nigerian-American Greene and others as hecklers and shouters who “yakked” and disrupted the formerly rational tenor of the Alaska campaign, which was designed by the “dope dudes” to serve the “mellow pot smoker.”<sup>195</sup> Jenkins dubbed the lawyers, politicians, businessmen, and legalization activists as “dope dudes” led by a white male politician—Alaska Lt. Gov. Mead Treadwell—who just tried “to keep things civil” and failed in the wake of the “meltdown” by pot “diva” Charlo Greene.<sup>196</sup> By characterizing the civil debate as populated by white men and the interference with that debate as initiated by a woman of color, the author, perhaps unwittingly, deployed the tired stereotype of the “angry black woman.” Melissa Harris-Perry has explained the damaging nature and nefarious uses of this stereotype, writing, “[W]hite policymakers and black patriarchs can dismiss gendered claims as the ranting

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190. Laurel Andrews, *KTVA Reporter Quits On-Air After Saying She Owns Alaska Cannabis Club*, ALASKA DISPATCH NEWS (Sept. 21, 2014), <http://www.adn.com/article/20140921/ktva-reporter-quits-air-after-saying-she-owns-alaska-cannabis-club> [https://perma.cc/BT42-JC8T].

191. Suzanna Caldwell, *Anchorage Hearing on Marijuana Ballot Measure Quickly Grows Heated*, ALASKA DISPATCH NEWS (Sept. 23, 2014), <http://www.adn.com/article/20140923/anchorage-hearing-marijuana-ballot-measure-quickly-grows-heated> [https://perma.cc/T8ZA-6H3E].

192. Paul Jenkins, *Sane Support for Pot Initiative Gone in a Puff of Smoke*, ALASKA DISPATCH NEWS (Sept. 27, 2014), <http://www.adn.com/article/20140927/paul-jenkins-sane-support-pot-initiative-gone-puff-smoke> [https://perma.cc/3ANT-KRFD].

193. *Id.*

194. *Id.*

195. *See id.*

196. *See id.*

of eye-rolling, neck-popping, ‘oh-no-you didn’t’ angry women. Black women’s concerns can be ignored and their voices silenced in the name of maintaining calm and rational conversation.”<sup>197</sup> Jenkins’ editorial criticism may have reflected an anxiety among legalization proponents and observers in Alaska that diverging from the image of the mellow pot smoker—a non-outspoken white “dope dude”—could harm the prospects for marijuana reform.

As discussed, campaign materials in the first wave of legalization relied on white individualism to successfully appeal to voters. These sentiments are rooted deeply in the historical forces traced in Part I, but they intersect with a variety of political variables. Their possible utility in swaying voters has varied: the four states above legalized marijuana; in November 2016, campaigns in Maine (where legalization succeeded) and Arizona (where legalization failed) revived the “Dear Mom” ad from Colorado’s 2012 campaign, to varying success.<sup>198</sup> Nonetheless, tracing white individualism in campaigns is vital to understanding viable paths to legalization and their relationships to histories of racial criminalization and prohibition.

### B. Racial Injustice

In general, racial injustice concerns played a less significant role in the first wave of successful marijuana legalization campaigns in Colorado, Washington, Oregon, and Alaska. The 2012 Colorado and 2014 Alaska campaign websites did not mention racial justice issues at all, whereas the 2012 Washington campaign noted racial justice concerns, but did not make them a focus. The campaign website’s sections that described its positions did not mention race. On the campaign’s FAQ page, the text, “Why is marijuana law reform a racial justice issue?” linked to a fact sheet with statistics about

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197. MELISSA HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 95–96 (2004). Harris-Perry summarized the literature on the angry black woman stereotype thusly:

The academic literature on stereotyping traces the popular representation of black women as uniquely and irrationally angry, obnoxious, and controlling to the 1930s *Amos ‘n’ Andy* radio show. The nagging, assertive Sapphire character on *Amos ‘n’ Andy* gave rise to an oft-repeated trope in popular culture representations of black women, from Aunt Esther on *Sanford and Son* to Pam on *Martin*. The brash, independent, hostile black woman rarely shows vulnerability or empathy. The myth of black women’s emasculating anger has not been studied in as much detail as the Jezebel and Mammy images. But the extant literature does suggest that while Sapphire is one name for the myth, the angry black woman has many different shadings and representations: the bad black woman, the black “bitch,” and the emasculating matriarch.

*Id.* at 88.

198. See *Videos*, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, <https://www.regulatemaine.org/videos> [<https://perma.cc/9BYR-FJKY>] (last visited Feb. 25, 2017) (Maine); “Dear Mom” Video: *Talking to Your Loved Ones About Marijuana*, REGULATE MARIJUANA LIKE ALCOHOL (May 11, 2016), <https://www.regulatemarijuanainarizona.org/dear-mom> [<https://perma.cc/M6DL-EZSG>] (Arizona).

disproportionate marijuana enforcement against African Americans.<sup>199</sup> Washington campaigners also emphasized in newspaper articles the “racialized law enforcement” of marijuana laws.<sup>200</sup> The 2014 Oregon campaign mentioned racial injustice a good deal more. Their website’s central arguments highlighted “huge and unjustified racial disparities in how current marijuana laws are implemented” and included endorsements from “Racial Justice Groups.”<sup>201</sup> Five weeks before the vote, the campaign also issued a press release announcing that four racial justice groups were endorsing the initiative and highlighting the ways that the “[c]urrent system has unfair impact on communities of color.”<sup>202</sup> Ultimately, however, the Colorado, Washington, Oregon, and Alaska campaigns primarily relied on white individualist appeals to advance their agendas.<sup>203</sup> Among these states, the Oregon campaign was the only one to exhibit any substantive acknowledgement of the racial justice outcomes of legalization, while simultaneously deploying the politics of white individualism.

Nonetheless, a number of campaigns meaningfully attended to the racial justice concerns of marijuana legalization: Washington, D.C. (2014), Ohio (2015), California (2010 and 2016), and Massachusetts (2016).

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199. *FAQ*, NEW APPROACH WASH., <http://www.newapproachwa.org/content/faq> [<https://perma.cc/TW3B-BZJU>] (last visited Feb. 25, 2017).

200. Leon & Weitzer, *supra* note 147, at 209. Leon and Weitzer argued, based on an analysis of local news reporting and editorials, that the Washington campaign’s argument centered on the “harms of the law’s overreach, enforcement costs, racialized law enforcement, and involvement of the criminal underworld in the marijuana trade—while failing to reduce usage. The campaign emphasized that over 241,000 state residents had been arrested for marijuana possession since 1986 and claimed that the cost of this enforcement was \$306 million, with blacks and Latinos arrested disproportionately.” *Id.* While that may be true with respect to print media, this author’s review of the campaign’s website and video ads suggest that “racialized law enforcement” was not a key feature of its messaging in those mediums. *See id.*

201. *Myth v. Fact*, NEW APPROACH OR., <http://www.newapproachoregon.com/legalize-marijuana-oregon-get-the-facts> [<https://perma.cc/YCA9-BQ4C>] (last visited Feb. 25, 2017); *Yes on 91 Endorsement*, NEW APPROACH OR., <http://www.newapproachoregon.com/yes-91-endorsers/#race> [<https://perma.cc/Z3HK-YD2V>] (last visited Feb. 25, 2017) (“People of color are disproportionately more likely to be arrested for and incarcerated longer for marijuana possession than white people, also making this measure a step toward reducing unjust impacts of the prison system on people of color. . . . Even though both groups use marijuana at the same rate, Black Oregonians are twice as likely to be arrested for marijuana possession as Whites.”).

202. *Press Release: Oregon Racial Justice Groups: End Marijuana Prohibition*, NEW APPROACH OR. (Sept. 29, 2016), <http://www.newapproachoregon.com/press-release-oregon-racial-justice-groups-end-marijuana-prohibition> [<https://perma.cc/2QP3-FSNH>] (“People of color in Oregon are 100 percent more likely to face legal punishments for marijuana than white people, despite equal rates of use. . . . ‘Too many people have been punished, and too many of them have been youth and people of color,’ said the Partnership for Safety and Justice in a statement. ‘Too many tax dollars have been wasted without increasing public safety. Too many public resources have been diverted that could have been used to help crime victims and address unmet community needs across Oregon. . . . We believe that it is time to start addressing marijuana realistically as a health, education and economic issue. Measure 91 would do just that.’”).

203. *Supra* Part II.A.

### 1. *Washington, D.C.*

In Washington, D.C., voters passed marijuana legalization in 2014. Although Congress blocked the law's implementation, racial justice concerns were central to the campaign.<sup>204</sup> Professor Paul Butler observed that D.C. was the "first place where the racial justice arguments were the main reasons behind the campaign" for legalizing marijuana.<sup>205</sup> The campaign website's slogan was "Legalization Ends Discrimination";<sup>206</sup> the website's background featured an illustration of a black woman partially handcuffed, raising her fist, and standing next to a field of marijuana.<sup>207</sup> The website further highlighted the "billions of dollars wasted on racially biased arrests."<sup>208</sup> When interviewed by a local media outlet, the leader of the D.C. campaign listed "[d]ignity for victims of the racist drug war" as the first of several reasons to support legalization.<sup>209</sup> During the campaign, recognizing the whiteness of the legal marijuana industry in general and the fact that D.C.'s medical marijuana industry only has one nonwhite dispensary owner, city councilpersons introduced a bill to require marijuana business owners to have lived in D.C. for at least six months to receive a license. The bill's purpose was to help ensure that local residents of color were not cut out of the industry.<sup>210</sup> D.C., with a black population of 48 percent,<sup>211</sup> is the only near-majority-black or majority-black jurisdiction in the United States that controls its criminal justice sentencing laws.<sup>212</sup> This may have influenced its ability to pass legalization using racial justice appeals.

### 2. *Ohio*

During Ohio's 2015 campaign, advertisements were notably direct about the racial justice stakes of marijuana legalization. Ads highlighted the severity of consequences attached to minor misdemeanor offenses, the disproportionate impact and application of these charges on black people, and aspirations for

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204. See Sheir, *supra* note 127.

205. Sheir, *supra* note 127.

206. DCMJ, *Legalize. Legalization Ends Discrimination.* (photograph), FACEBOOK (Nov. 10, 2014), <https://www.facebook.com/dcmj2014/photos/pb.405634282868085.-2207520000.1462594391./679469155484595> [https://perma.cc/BC6H-EEC7].

207. *Home*, DCMJ, <http://dcmj.org> [https://perma.cc/DK7J-B8FS] (last visited Feb. 25, 2017).

208. *About*, DCMJ, <http://dcmj.org/about> [https://perma.cc/KQ45-EJ2V] (last visited Feb. 25, 2017).

209. Matt Cohen, *Marijuana Activists Fight for Full Legalization, Home Cultivation in D.C.*, DCIST (Oct. 18, 2013, 4:47 PM), [http://dcist.com/2013/10/marijuana\\_activists\\_fight\\_for\\_full.php](http://dcist.com/2013/10/marijuana_activists_fight_for_full.php) [https://perma.cc/23BA-Z5G3].

210. Ted Hesson, *DC's Black Residents Want a Piece of the Legal Marijuana Market*, FUSION (Feb. 28, 2015, 8:07 AM), <http://fusion.net/story/56325/black-residents-want-a-piece-of-dcs-marijuana-market> [https://perma.cc/AS8T-6KDB].

211. *QuickFacts: District of Columbia*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/11> [https://perma.cc/7964-WA57] (last visited Feb. 25, 2017).

212. See Forman, *supra* note 113, at 117.

social justice change that motivated the campaign.<sup>213</sup> However, a number of campaign strategies might not have sat well with voters. First, a mascot named Buddie, a friendly, smiling, and muscular anthropomorphized bud of marijuana, was attached to campaign materials and appeared at campaign events.<sup>214</sup> Some voters perceived the superhero-like mascot as an appeal to children, and thus the campaign came under criticism like that leveled at Marlboro's Joe the Camel in the 1990s.<sup>215</sup> Second, the Ohio campaign's legislation would have granted a monopoly on marijuana production to ten investor groups—who each donated \$2 million to the campaign.<sup>216</sup> The roster of investors was a strange group of both former celebrities and conspicuous locals, including Nick Lachey (formerly of the band 98 Degrees), Frostee Rucker and Oscar Robertson (former professional athletes), and Woody Taft (descendant of William Howard Taft).<sup>217</sup> Although this list of investors is racially diverse, and the campaign emphasized the way in which legalization would combat the ills of racial injustice, voters may have been alienated by both the corporate monopoly system of marijuana production and the seemingly child-directed appeal of Buddie.<sup>218</sup> It is hard to divorce the impact of each of these factors from the larger viability of the campaign's racial justice messaging.

### 3. *California and Massachusetts*

The 2010 California campaign highlighted racial justice issues and failed. The campaign emphasized a broad set of policy issues, including growing tax revenue (for schools and police forces), increasing jobs, preventing teenagers from acquiring marijuana, reducing racial disparities in arrests, and reducing profits for Mexican cartels.<sup>219</sup> One TV ad opened, “A half million Californians

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213. ResponsibleOhio, *Legalizing Ohio: What's Wrong with What We Do Now?*, YOUTUBE (Aug. 6, 2015), <https://www.youtube.com/watch?v=UXqN8sgzkiI> [<https://perma.cc/2WHL-CTRS>]; ResponsibleOhio, *Legalizing Ohio: An Introduction*, YOUTUBE (Aug. 6, 2015), <https://www.youtube.com/watch?v=bCOwAIVQM9Y> [<https://perma.cc/9ZKX-FBZZ>].

214. Jackie Borchardt, *Buddie the Marijuana Mascot Draws Complaints from Children's Advocates*, CLEVELAND.COM (Aug. 27, 2015, 12:21 PM), [http://www.cleveland.com/open/index.ssf/2015/08/buddie\\_the\\_marijuana\\_mascot\\_dr.html](http://www.cleveland.com/open/index.ssf/2015/08/buddie_the_marijuana_mascot_dr.html) [<https://perma.cc/3WX5-TLBR>].

215. *See id.*

216. Anne Saker, *What You Need to Know About Marijuana Initiative*, CINCINNATI.COM (July 24, 2015, 12:52 PM), <http://www.cincinnati.com/story/news/2015/06/17/marijuana-ohio-ballotinitiative-responsibleohio/28897081> [<https://perma.cc/4YT3-A4CR>].

217. *Id.*

218. *See* Alan Johnson, *Pot-Legalization Push in 2016 to Drop Monopolies, Mascot Buddie*, COLUMBUS DISPATCH (Nov. 19, 2016, 6:36 AM), [http://www.dispatch.com/content/stories/local/2015/11/18/marijuana\\_mistakes.html](http://www.dispatch.com/content/stories/local/2015/11/18/marijuana_mistakes.html) [<https://perma.cc/C5GJ-QS6U>].

219. Leon & Weitzer, *supra* note 147, at 199–200; John Gravois, *Mexi-juana: The Debate over Cannabis Policy Has Always Had Everything to Do with Immigration*, SLATE (Oct. 27, 2010, 5:51 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2010/10/mexijuana.html](http://www.slate.com/articles/news_and_politics/politics/2010/10/mexijuana.html) [<https://perma.cc/6XY5-PA2D>].



have been arrested in the past ten years for marijuana possession, mostly minorities and the poor,” and suggested that funding from arrests could be redirected to schools and healthcare.<sup>220</sup> Other ads had a law enforcement focus, like one featuring a former police chief who implored voters to regulate marijuana “like alcohol.”<sup>221</sup> The California campaign seemed potentially viable, with its combination of sensible economics, law enforcement support, and a dash of racial justice; indeed, polls about a month before voting found that voters seemed to favor legalization.<sup>222</sup> Yet the measure failed to pass. A number of theories emerged about the factors that led to its failure. Polling researchers and the popular press have attributed its failure both to U.S. Attorney General Eric Holder’s announcement a few weeks before the election that the federal government would continue to enforce federal marijuana laws and the proposition’s provision for a complicated and potentially unmanageable patchwork of regulations set by local jurisdictions. Both issues received considerable media coverage before the vote, and perhaps dissuaded formerly supportive voters.<sup>223</sup>

While the Ohio and 2010 California campaigns failed, and the D.C. initiative was blocked, two successful campaigns from the second wave of legalization in 2016 emphasized racial justice: those in California and Massachusetts. The 2016 California campaign, as in 2010, highlighted racial justice among its arguments, as organizers ran several moving ads about racial inequality and the harms of prohibition—including an animated film featuring Jay Z.<sup>224</sup> California is an increasingly racially diverse and liberal state,<sup>225</sup> which may partially explain the campaign’s ability to successfully put forth a racial

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220. taxcannabis, *Yes on 19*, YOUTUBE (Oct. 31, 2010), <https://www.youtube.com/watch?v=doRymwwLdE0> [<https://perma.cc/G47H-YN2U>].

221. taxcannabis, *TV Ad - Police Chief McNamara: Vote YES on Proposition 19*, YOUTUBE (Oct. 24, 2010), [https://www.youtube.com/watch?v=L\\_oIplyZRu0](https://www.youtube.com/watch?v=L_oIplyZRu0) [<https://perma.cc/2KUP-AJZ3>].

222. J. Andrew Sinclair, Jaclyn R. Kimble & R. Michael Alvarez, *Why Did Proposition 19 Fail?*, in *SOMETHING’S IN THE AIR: RACE, CRIME, AND THE LEGALIZATION OF MARIJUANA* 54, 56–57 (Katherine Tate, James Lance Taylor & Mark Q. Sawyer eds., 2014).

223. *Id.* at 54–57.

224. See, e.g., *Yes on 64 - The Adult Use of Marijuana Act, Prop 64: “Every Future.”* YOUTUBE (Oct. 28, 2016), <https://www.youtube.com/watch?v=bCXi8ld4IHA> [<https://perma.cc/WD6Q-82NC>]; Patrick McGreevy, *A New Jay Z Video Says Pot Should Be Legal in California and Calls the War on Drugs an ‘Epic Fail,’* L.A. TIMES (Oct. 18, 2016, 1:12 PM), <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-war-on-drugs-is-epic-fail-jay-z-1476819919-htmlstory.html> [<https://perma.cc/ZK4F-2F4N>].

225. Wendell Cox & Joel Kotkin, *The Future of Racial Politics*, REAL CLEAR POL. (Dec. 9, 2016), [http://www.realclearpolitics.com/articles/2016/12/09/republicans\\_and\\_the\\_future\\_of\\_racial\\_politics\\_132523.html](http://www.realclearpolitics.com/articles/2016/12/09/republicans_and_the_future_of_racial_politics_132523.html) [<https://perma.cc/ZR6X-XJCJ>] (stating that in 2016, racial minorities constituted 62 percent of California’s population, compared to 43 percent in 1990; and in 2016, the electorate was 45 percent Democrat and 26 percent Republican, compared to 49 percent Democrat and 37 percent Republican in 1994).

justice-oriented campaign. In addition, the campaign overcame several political, legal, and financial obstacles that it had faced in 2010.<sup>226</sup>

The Massachusetts campaign also highlighted racial injustice. The website reads, “Too often young people and people of color can’t find a job or take care of their families because they have a petty arrest record for possessing marijuana. . . . In Massachusetts, people of color are three times more likely to be arrested for marijuana possession. . . . These arrests lead to jail terms and a lifetime of difficulty getting a job.”<sup>227</sup> Two video ads highlighted the racial harms and social justice dimensions of marijuana prohibition.<sup>228</sup> In one, Boston City Council President Michelle Wu states, “It just seems ridiculous that kids at Harvard can smoke pot and have incredibly successful careers while blacks and Latinos, particularly men and boys, who are using the same substance are sent to jail. It doesn’t make sense for our criminal justice system . . . [or] for our economy.”<sup>229</sup> The campaign also argued that legalization of marijuana is a “reasonable way to slow the [opiate addiction] epidemic down” by increasing access to marijuana as treatment for chronic pain and opiate addiction.<sup>230</sup> The Massachusetts campaign’s success suggests that racial justice arguments—in conjunction with other policy concerns, such as opiate addiction—are increasingly viable in legalization campaigns.

### C. *Why Marijuana Legalization Campaigns Rely on White Individualism*

Despite recent emphasis on racial justice in California and Massachusetts, white individualism remains an important and politically expedient aspect of marijuana politics. Observers have attributed the white individualism of many marijuana legalization campaigns to self-interest and strategy. Carl Hart, a Columbia University neuroscience professor active in the drug reform movement, attributed it to the racial composition and experiences of reform organization members:

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226. First, since the 2010 election, the U.S. Department of Justice issued a memo advising federal prosecutors to allow access to recreational marijuana, provided that individuals and business comply with state law. See MARIJUANA POLICY PROJECT, FEDERAL ENFORCEMENT POLICY ON STATE MARIJUANA LAWS, <https://www.mpp.org/federal/federal-enforcement-policy-on-state-marijuana-laws> [<https://perma.cc/JZ59-JP4P>] (last visited Feb. 25, 2017). Second, the campaign raised much more money than the previous campaign. See Robin Abcarian, *Is Marijuana Legalization in California the Beginning of the End of the War on Weed?*, L.A. TIMES (Dec. 21, 2016, 2:50 PM), <http://www.latimes.com/local/abcarian/la-me-yir-abcarian-essay-12252016-story.html> [<https://perma.cc/5ZGE-68FD>] (“Unlike previous failed legalization campaigns, there was a lot of money backing Prop. 64—\$22.5 million compared with a paltry \$2.1 million for the No on 64 side.”). Third, campaign ads focused on persuading parents, many of whom voted “no” in 2010, by emphasizing that the new proposition would prohibit marijuana ads on TV, mandate child-proof packaging, and ban edibles that appeal to children. See *id.*

227. YES ON 4: REGULATE MASS., *supra* note 155.

228. *Videos*, YES ON 4: REGULATE MASS., <https://www.regulatemassachusetts.org/videos> [<https://perma.cc/BL4L-UGQA>] (last visited Feb. 25, 2017).

229. *Id.*

230. YES ON 4: REGULATE MASS., *supra* note 155.

[T]he membership consists almost exclusively of white, privileged and devoted marijuana smokers. Not that there's anything wrong with that, per se, but it helped me understand why racial equality is not a central priority for them. Most of these individuals would like to light up without fear of personal legal consequences—a self-interested goal that could make it difficult to empathize with those who are actually vulnerable to racially motivated marijuana law enforcement.<sup>231</sup>

Paul Butler suggested that drug reformers also avoid racial equality because of strategy: “[T]hey think it would turn people off, or make people more willing to lock up marijuana users if they know it has a disparate impact on African Americans.”<sup>232</sup>

When drug use has a “white face,”<sup>233</sup> politicians and members of the public are more willing to opt for “saner, less punitive drug policies.”<sup>234</sup> This could be motivating white individualism in marijuana legalization campaigns.<sup>235</sup> Consider a heroin and opioid epidemic that has been “ravaging white populations” in recent years.<sup>236</sup> The *New York Times* editorial board observed that while “Congress has historically treated drug abuse as a malady afflicting mostly poor, minority communities, best dealt with by locking people up for long periods of time,” the current epidemic “altered this line of thinking, and forced lawmakers to acknowledge that addiction is a problem that knows no racial barriers and can be best addressed with treatment.”<sup>237</sup> As a result, Congress lifted a ban on using federal money for needle exchange programs and has considered a bill that would expand and improve drug treatment services nationwide.<sup>238</sup> Ekow Yankah contrasted this approach with the response to the crack epidemic in the 1980s, which had a devastating impact on black communities, but was met with brute criminal enforcement:

African-Americans were cast as pathological, an indistinguishable and unsympathetic mass. The plight of Black America was evidence of its collective moral failure—of welfare mothers and rock-slinging thugs—and a reason to cut off all help. Blacks would just have to pull themselves out of the crack epidemic. Until then, the only answer lay

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231. Carl L. Hart, *Pot Reform's Race Problem: The Fight Against Marijuana Prohibition Must Put Racial Justice at the Center*, NATION (Oct. 30, 2013), <http://www.thenation.com/article/pot-reforms-race-problem> [https://perma.cc/54KH-5PWS].

232. Sheir, *supra* note 127.

233. See Ekow N. Yankah, *When Addiction Has a White Face*, N.Y. TIMES (Feb. 9, 2016), <http://www.nytimes.com/2016/02/09/opinion/when-addiction-has-a-white-face.html> [https://perma.cc/MD8S-CNPV].

234. See *Drug Deaths Reach White America*, N.Y. TIMES (Jan. 25, 2016), <http://www.nytimes.com/2016/01/25/opinion/drug-deaths-reach-white-america.html> [https://perma.cc/529W-UKAX].

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

in cordoning off the wreckage with militarized policing.<sup>239</sup>

In response to the current heroin epidemic, police chiefs in impacted regions are not using “military metaphors, weapons and tactics,” but are ensuring people get treatment.<sup>240</sup> A white former undercover narcotics officer in New Hampshire, who now does drug outreach for a police department, described a shift in his outlook, “The way I look at addiction now is completely different. . . . I can’t tell you what changed inside of me, but these are people and they have a purpose in life and we can’t as law enforcement look at them any other way.”<sup>241</sup> Yankah has written, “In [this officer’s] inability to name the change that allowed this epiphany, his words also capture our cringe-worthy self-denial . . . . When the face of addiction had dark skin, this nation’s police did not see sons and daughters, sister and brothers.”<sup>242</sup> Viewed in this light, marijuana legalization campaigners may be drawn to white individualism either because it may help motivate public sympathy and/or because it galvanizes their own emotional drive for marijuana reform.

### III.

#### POLICYMAKING FOR MARIJUANA LEGALIZATION

##### *A. Addressing Past Harms*

Even when marijuana prohibition ends, its harms persist in the form of racial stereotypes, criminal convictions, lack of access to economic opportunities, and perception of the legal system as unfair. Characterizing marijuana legalization in terms of white individualism skirts, and implicitly reinforces, the deeply racialized history of marijuana prohibition. This whitewashing insulates racial myths and inequities perpetuated through the war on drugs. As seen with the end of alcohol prohibition and the start of marijuana prohibition, new institutional forms can adopt these myths and practices. And a close look at marijuana legalization campaigns reveals that legalization achieved via conceptions of white, middle-class interests may coincide with post-legalization policies favoring white entrepreneurialism, rather than policies that redress some of the social harms and inequities of prohibition. While many people, disproportionately black and brown, continue to experience the effects of criminalization and unchallenged, destructive racial myths, largely white entrepreneurs reap legal marijuana’s profits.

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239. Yankah, *supra* note 233.

240. *Id.*

241. Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), <http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html> [<https://perma.cc/UM6Z-SV3V>].

242. Yankah, *supra* note 233; *cf.* Sophie Trawalter, Kelly M. Hoffman & Adam Waytz, *Racial Bias in Perceptions of Others’ Pain*, 7 PLOS ONE 1 (2012) (an empirical study of physician-patient interactions finding that “White and Black Americans—including registered nurses and nursing students—assume that Black people feel less pain than do White people.”).

Marijuana legalization should address past harms because marijuana prohibition was created and enforced in an unjust and racially biased fashion; merely legalizing marijuana will do nothing to reckon with that legacy and nothing "for the individuals and communities wrecked by our aggressive and disparate enforcement of past marijuana laws."<sup>243</sup> Some, including Jamelle Bouie, have explicitly advocated for marijuana reparations; Bouie has argued that legalization of marijuana "won't just be for new revenues and savings. In part, it will be because we recognize the tremendous injury we've done to countless young men and women over decades of unfair enforcement of the law."<sup>244</sup> Although "[w]e can't wash our hands of our past mistakes," we should earmark marijuana taxes for community reparations, including "policies for affected communities, from job training and educational services to [mentoring]."<sup>245</sup> Michelle Alexander has also advocated for reparations, suggesting we start with "Truth and Reconciliation" hearings, like those held in post-apartheid South Africa, to allow perpetrators and victims to publicly acknowledge the tragic legacies of the past.<sup>246</sup> While such proposals are likely to face political opposition (especially considering the persistence of racial discrimination and unjustified criminalization throughout society), "the reparations idea does present a question of what society should do after the madness of a moral panic dims."<sup>247</sup> Although white individualism may anticipate that society will do nothing, that plan seems inadequate.

### B. Policymaking

While people of color have borne a disproportionate brunt of the war on drugs, policies of most jurisdictions that have legalized marijuana have failed to address past criminal records and convictions. Advocates have observed, "While it's mostly black men who have been arrested and put in jail because of marijuana, it's mostly white men who have been profiting."<sup>248</sup> Michelle Alexander noted, "[A]fter 40 years of impoverished black kids getting prison time for selling weed, and their families and futures destroyed. Now, white

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243. Jamelle Bouie, *The Case for Marijuana Reparations*, SLATE (July 28, 2014, 6:49 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/07/the\\_case\\_for\\_marijuana\\_reparations\\_the\\_profits\\_from\\_drug\\_legalization\\_should.html](http://www.slate.com/articles/news_and_politics/politics/2014/07/the_case_for_marijuana_reparations_the_profits_from_drug_legalization_should.html) [<https://perma.cc/4MK4-KV5G>].

244. *Id.*

245. *Id.* Bouie suggested that individual reparations would be too complicated. *Id.* For a broader discussion of reparations for black Americans, see Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/5PK5-GJZB>].

246. Zak Cheney Rice, *There Should be Payback to the Victims of the Government's Mindless War on Drugs*, MIC (Mar. 17, 2014), <http://mic.com/articles/85529/there-should-be-payback-to-the-victims-of-the-government-s-mindless-war-on-drugs#.XIsBF1BkX> [<https://perma.cc/6D3W-H8QW>].

247. Lucy Steigerwald, *Sentencing Reform and How to Right the Drug War's Wrongs*, WASH. POST (Nov. 3, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/11/03/sentencing-reform-and-how-to-right-the-drug-wars-wrongs> [<https://perma.cc/S3D7-F4DD>].

248. Sheir, *supra* note 127.

men are planning to get rich doing precisely the same thing?”<sup>249</sup> Russ Belville, a former staffer for reform group NORML and the executive producer of a marijuana legalization online radio station, responded, “[T]he fight to legalize marijuana was founded by white men forty years ago when there was nothing but public scorn and career suicide to be gained . . . [whereas] black kids selling weed” did not join white advocates “to shape legalization in a way that profits them and benefits their communities.”<sup>250</sup> This troubling statement is at odds with several salient aspects of marijuana policy: white men founded marijuana prohibition to criminalize people of color,<sup>251</sup> black kids do not sell drugs more often than white kids do,<sup>252</sup> prominent critics of marijuana prohibition include people of color,<sup>253</sup> and white advocates of legalization have no right to direct profits to “their communities” in light of a history of marijuana prohibition imposing particular costs on communities of color.

Post-legalization policy outcomes have varied across jurisdictions. Following the first wave of legalization, in Colorado, Washington, Oregon, and Alaska, governing bodies have enacted statutes and regulations to enable retail marijuana sales.<sup>254</sup> The U.S. Department of Justice also issued a memo advising federal prosecutors to allow individuals and businesses to access recreational marijuana provided they do so in compliance with state law.<sup>255</sup> Following the successful D.C. campaign, however, Congress passed a spending prohibition that blocked the city’s retail sales and taxation.<sup>256</sup>

Policies that favor preserving past criminal convictions are especially evident in Colorado, the site of the most prominent deployment of white individualism. In the first year of marijuana business in Colorado, legal sales

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249. April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (Mar. 16, 2014), <http://www.alternet.org/drugs/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison> [<https://perma.cc/5DBT-BJ3D>].

250. Russ Belville, *Racism in Marijuana Prohibition Doesn’t Transcend to Legalization*, HIGH TIMES (Nov. 25, 2014), <http://www.hightimes.com/read/racism-marijuana-prohibition-doesnt-transcend-legalization> [<https://perma.cc/JGX3-CGLU>] (“Not many of those weed-selling kids (black or white) ever picked up a clipboard to volunteer to register voters and collect petition signatures in their neighborhoods for marijuana market legalization in California, Colorado, Washington, Oregon, and Alaska.”).

251. See *supra* Part II.B.

252. See *id.*

253. See *supra* Part III.

254. Retail sales have begun in Colorado, Washington, Oregon, and Alaska. Laurel Andrews, *Here’s How Much Alaska Made in Taxes from the First Few Days of Legal Pot*, ALASKA DISPATCH NEWS, (Dec. 1, 2016), <https://www.adn.com/alaska-marijuana/2016/12/01/heres-how-much-alaska-made-in-taxes-from-the-first-few-days-of-legal-pot> [<https://perma.cc/67PP-NF7M>]; Tom Huddleston, Jr., *You Can Legally Buy Recreational Pot in Oregon Starting Today*, FORTUNE (Oct. 1, 2015, 9:14 AM), <http://fortune.com/2015/10/01/oregon-marijuana-sales> [<https://perma.cc/2AHV-4ZET>].

255. MARIJUANA POLICY PROJECT, *supra* note 226.

256. Cox, *supra* note 1.

exceeded \$700 million.<sup>257</sup> A sample of fifty top dispensaries in the Denver metropolitan area found that dispensary ownership is predominantly male and white; as of March 2015 there was only one black dispensary owner in the state.<sup>258</sup> At the same time, anyone “convicted of a felony at anytime regarding the possession, distribution, or use of a controlled substance,” including marijuana, cannot receive a marijuana business license.<sup>259</sup> While total marijuana arrests decreased after legalization, racial disparities increased in the enforcement of criminal laws against public consumption and possession greater than one ounce.<sup>260</sup> Further, Colorado has failed to pass a proposed bill that would allow those with marijuana convictions based on conduct that is now legal (e.g., possession of small amounts of marijuana) to seal their records. The bill, voted out of the state senate judiciary committee, “ran into strong opposition from prosecutors worried that it would let people hide felony drug convictions,” and was postponed indefinitely by the appropriations committee.<sup>261</sup>

Likewise, in Washington, a bill that would expunge the records of people with misdemeanor marijuana convictions has sat idle in committee. Washington state Rep. Joe Fitzgibbon, who introduced the bill, said he got pushback from the state prosecutors’ association and lawmakers who wanted to let the dust settle from pot legalization.<sup>262</sup> Alaska, meanwhile, has no statutes or mechanisms that enable individuals to remove marijuana charges from their records.<sup>263</sup>

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257. Angela Bacca, *The Unbearable Whiteness of the Marijuana Industry*, ALTERNET (Mar. 31, 2015), <http://www.alternet.org/drugs/incredible-whiteness-colorado-cannabis-business> [<https://perma.cc/Z5SL-GT8B>].

258. *Id.* Despite constituting 35 percent of Colorado’s total population, white males made up 58 percent of dispensary license holders in the survey. Overall, whites constituted a total of 84 percent of license holders and the women in the sample were all white. *Id.*

259. COLO. DEP’T OF REVENUE, MARIJUANA ENF’T DIV., DR 84520, COLORADO ASSOCIATED KEY MARIJUANA LICENSE APPLICATION, (Apr. 22, 2016), <https://www.colorado.gov/pacific/sites/default/files/DR8520eAssociatedKey09102014.pdf> [<https://perma.cc/S7UQ-V8VX>].

260. Associated Press, *Colorado’s Pot Legalization Does Little to Solve Racial Disparity in Drug Arrests*, GUARDIAN (Mar. 25, 2015), <https://www.theguardian.com/us-news/2015/mar/25/colorado-marijuana-legalization-racial-disparity-drug-arrests> [<https://perma.cc/XA9F-GCQD>].

261. Jeffrey A. Roberts, *Committee Passes Bill Allowing Easier Sealing of Past Marijuana Crimes Now Legal in Colorado*, COLO. FREEDOM OF INFO. COAL. (Apr. 30, 2014), <http://coloradofaic.org/committee-passes-bill-allowing-easier-sealing-past-marijuana-crimes-now-legal-amendment-64> [<https://perma.cc/6FT7-U8LD>]; see *SB 14-218—Seal Marijuana Convictions Legal Amendment 64*, OPEN STATES, <http://openstates.org/co/bills/2014A/SB14-218> [<https://perma.cc/2PD3-TZTK>] (last visited Mar. 23, 2017).

262. Jake Thomas, *After Legalization, Why Can’t People’s Prior Pot Convictions Be Wiped Clean?*, SUBSTANCE.COM (Dec. 11, 2014), <http://www.substance.com/after-legalization-why-cant-peoples-prior-pot-convictions-be-wiped-clean-2/17203> [<https://perma.cc/QS87-CZZ8>]; H.B. 1024, 64th Leg., Reg. Sess. (Wa. 2015).

263. Scott Woodham, *Can People Convicted of Pot Crimes Get Their Records Cleared After Alaska’s Vote to Legalize?*, ALASKA DISPATCH NEWS (Sept. 17, 2015), <http://www.adn.com/highly->

By contrast, Oregon, where the successful state campaign mentioned racial disparities in its primary messaging, passed two new laws that facilitate record clearing for marijuana convictions.<sup>264</sup> One law requires courts to use current law, under which possession, cultivation, and sale of marijuana are legal, in considering record-sealing applications.<sup>265</sup> The other law allows a faster record-clearing process for people who were under twenty-one at the time of a past marijuana conviction.<sup>266</sup>

Criminal-record-sealing legislation following legalization was the most extensive in Washington, D.C., where the campaign centered on racial justice issues. Eight days after D.C. voters approved a measure to legalize use of up to two ounces of marijuana and the possession and cultivation of up to six plants,<sup>267</sup> Mayor Vince Gray signed the Record Sealing For Non-Violent Marijuana Possession Act of 2013.<sup>268</sup> This law, originally proposed following a prior legislative decriminalization of marijuana, went into effect in March 2015.<sup>269</sup> It provides that a person who was arrested for, charged with, or convicted of a crime under D.C. law that has since been decriminalized or legalized may file a motion to seal the criminal record.<sup>270</sup> A court *must* grant the motion if the arrest was not in connection with or did not result in any other local or federal charges or convictions against the person; even if the arrest was in connection with other charges or convictions, the court may grant the motion if doing so is in the interest of justice, considering the interests of the person and the community.<sup>271</sup> Based on a survey of state laws addressing expungement of criminal records, D.C. appears to be the only jurisdiction with a specific statutory section addressing decriminalized or legalized offenses.<sup>272</sup>

In October 2015, during the Democratic primary campaign for the 2016 presidential election, Black Lives Matter activists raised the subject of record-

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informed/article/can-people-convicted-pot-crimes-get-their-records-cleared-after-alaska-vote/2015/09/17 [https://perma.cc/5FDQ-YKXU].

264. Kirk Johnson, *Oregon's Legal Sale of Marijuana Comes with Reprieve*, N.Y. TIMES (Sept. 20, 2015), <http://www.nytimes.com/2015/09/21/us/oregons-legal-sale-of-marijuana-comes-with-reprieve.html> [https://perma.cc/65H8-U8KQ].

265. *Id.*

266. *Id.*

267. Andrea Noble, *Marijuana Legalization Measure Passes Easily in D.C.*, WASH. TIMES (Nov. 4, 2014), <http://www.washingtontimes.com/news/2014/nov/4/dc-marijuana-legalization-measure-on-track-for-eas> [https://perma.cc/2B53-22FG].

268. COUNCIL OF THE D.C., OFFICE OF THE SEC'Y, B20-0467, LEGISLATION DETAIL—RECORD SEALING FOR NON-VIOLENT MARIJUANA POSSESSION ACT OF 2013 (2016), [http://lims.dccouncil.us/\\_layouts/15/uploader/AdminProxy.aspx?LegislationId=B20-0467](http://lims.dccouncil.us/_layouts/15/uploader/AdminProxy.aspx?LegislationId=B20-0467) [https://perma.cc/QTZ6-2CSJ].

269. *Id.*; Matt Cohen, *D.C. Council Votes to Further Change City's Marijuana Laws*, DCIST (Oct. 7, 2014, 2:41 PM), [http://dcist.com/2014/10/dc\\_council\\_votes\\_to\\_pass\\_bill\\_seali.php](http://dcist.com/2014/10/dc_council_votes_to_pass_bill_seali.php) [https://perma.cc/U2MQ-HWAU].

270. D.C. Code Ann. § 16-803.02(a) (West 2015).

271. § 16-803.02(a)(1)–(2).

272. See 50 STATE STATUTORY SURVEYS, EXPUNGEMENT OF CRIMINAL RECORDS, 0030 SURVEYS 20 (West 2015).



clearing policies post-legalization.<sup>273</sup> DeRay Mckesson and other Black Lives Matter activists met with then-presidential candidate and current Senator Bernie Sanders, who had come out in favor of federal marijuana legalization and made economic inequality the centerpiece of his campaign.<sup>274</sup> The activists discussed the need to ensure that “people of color . . . disproportionately criminalized in the informal marijuana economy, do not get locked out of the emerging legalized marijuana economy because of criminal records tied to possessing or distributing marijuana.”<sup>275</sup>

In the November 2016 elections, in a second wave of marijuana legalization, four states passed ballot measures: California, Maine, Massachusetts, and Nevada. The ways in which governing bodies implement legalization in these states may reveal further insights into the connection between marijuana campaigns and policies.<sup>276</sup> Notably, the California ballot measure contained a unique policy not found in other ballot initiatives: a resentencing and expungement provision.<sup>277</sup> A person previously convicted of a marijuana-related offense, including someone currently in custody, may apply to a court for relief.<sup>278</sup> If a conviction involved conduct that is now legal after marijuana legalization, the court must dismiss and seal the conviction; if a conviction involved conduct under which a lesser sentence would apply after legalization—for certain offenses—the person can obtain a reduced sentence or conviction.<sup>279</sup> The California measure also allocates \$10 million from marijuana tax revenue—increasing by \$10 million each year until it reaches \$50 million in 2022—for grants to local health departments and community nonprofits to provide services to communities disproportionately affected by past federal and state drug policies.<sup>280</sup> Further, the Massachusetts initiative specifically stated that the commission overseeing recreational marijuana licensing must develop “procedures and policies to promote and encourage full participation in the regulated marijuana industry by people from communities

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273. DeRay Mckesson, *Reflections on Meeting with Senator Bernie Sanders and Secretary Hillary Clinton, and the #DemDebate*, MEDIUM (Oct. 15, 2015) <https://medium.com/@deray/reflections-on-meeting-with-senator-bernie-sanders-and-secretary-hillary-clinton-and-the-38c4a2d9f797> [<https://perma.cc/JQE5-5KEH>].

274. *Id.*

275. *Id.*

276. At the time of writing, these policies are not sufficiently developed to merit commentary.

277. See HONS. J. RICHARD COUZENS & TRICIA A. BIGELOW, CAL. COURTS, PROPOSITION 64: “ADULT USE OF MARIJUANA ACT” RESENTENCING PROCEDURES AND OTHER SELECTED PROVISIONS 4, 10–53 (2016), <http://www.courts.ca.gov/documents/prop64-Memo-20161110.pdf> [<https://perma.cc/V8JD-LA6H>].

278. See generally *id.* for further analysis, procedures, requirements, and exceptions.

279. *See id.*

280. David Downs, *Will Revenue from Legalizing Marijuana and Passing Proposition 64 Mostly Go to Police?*, EAST BAY EXPRESS (Sept. 28, 2016), <http://www.eastbayexpress.com/oakland/a-very-special-legalization-nation-proposition-64-q-and-a-session/Content?oid=4986500> [<https://perma.cc/6GSE-T4NX>].

that have previously been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities.”<sup>281</sup>

#### IV.

##### INCLUSIVE LEGALIZATION CAMPAIGN MESSAGING

Rhetoric that incorporates how race is situated within marijuana policy can enable more inclusive dialogue and policymaking in legalization campaigns. Such rhetoric might also allow advocates to push jurisdictions to remedy past wrongs—for example, through expunging and reducing marijuana-related criminal convictions and sentences, as provided by California’s 2016 initiative. Jurisdictions might encourage participation in the legalized marijuana economy by people from communities disproportionately harmed by prohibition, as provided by Massachusetts’s 2016 initiative. John A. Powell wrote that a “colorblind agenda is incapable of addressing many of the structural problems that prevent the development of social solidarity across racial boundaries.”<sup>282</sup> Instead, race can be a “diagnostic and bridging tool” that advances racial justice by taking into account the needs of people who are differently situated within an “inclusive social agenda.”<sup>283</sup> This approach, which he called “targeting within universalism . . . combines a call for the universal common good with attention to the particular experience” of members of different racial groups.<sup>284</sup> For example, Oregon’s campaign, which addressed racial disparities in addition to white individualism, yielded policies that to some extent facilitate the clearing of criminal records.<sup>285</sup> The Washington, D.C., campaign centered race in its narrative, and while it has faced political opposition, it followed legalization with remedial policies specifically focused on expungement of criminal records for acts that have been decriminalized or legalized.<sup>286</sup>

Powell’s targeting within universalism notion suggests that marijuana campaigns should combine a broad argument about the benefits of legalization with an analysis of targeted harms that prohibition has imposed on people. Campaigns can go beyond merely sharing statistics on racial disparities in enforcement; they could tell stories of how political actors have deployed problematic racial imagery to advance policies that damaged the lives of people from all racial groups. This framing enfolds the particular effects of prohibition within a universal story. Campaigns can argue for various benefits of legal access to marijuana, like increased tax revenue and civil liberty (universal

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281. Kristin Toussaint, *Activists Call for Equal Opportunity in Mass. Cannabis Industry*, METRO (Dec. 5, 2016), <http://www.metro.us/boston/activists-work-to-ensure-equal-opportunity-in-mass-cannabis-industry/zsJplb---jXgnSVxi2cyM> [https://perma.cc/3GED-AML8].

282. Powell, *supra* note 28, at 426.

283. *Id.* at 399.

284. *Id.* at 399, 404.

285. *Supra* Part II.A.2.

286. *Id.*

goals), while addressing the shameful ways it has subjected specific people to the criminal justice system and propagated stereotypes about people with specific racial identities (targeting). By addressing past harms and the future benefits of legalization, jurisdictions may have more political will to challenge racial stereotypes, advance public health goals, recognize the dignity of people who have used and sold marijuana, and distribute profits fairly across the community.

#### CONCLUSION

This Note considered the role of whiteness in marijuana legalization campaign messaging. A number of legalization campaigns have displayed marijuana users who are white, responsible, and middle-class as the faces of legal marijuana. This framing is consistent with the long history of racialized messaging associated with both the prohibition and popularization of marijuana usage in the United States. At the beginning of the twentieth century, temperance and alcohol and marijuana prohibition were openly racist. With the advent of "dog whistle politics," blatant racism was abandoned for coded language that still communicated the underlying racial logic of drug prohibition. Marijuana legalization campaigns can and must be read in the context of the long history of blatant and coded racial logic of drug and alcohol movements in America. A prevalent current form of messaging, "white individualism" represents a further development of a racial logic and sublimation of the race coding in drug policy.

This Note also examined policies enacted after marijuana legalization, arguing that when prohibition ends, policymakers should address the harms of prohibition, which persist as stereotypes, criminal records, lack of access to economic opportunities, and the perception of the criminal system as unfair. A few jurisdictions where campaigns to some extent emphasized racial justice issues have enacted policies to facilitate the expungement and reduction of criminal convictions and sentences, as well as participation in the legalization marijuana economy by people from communities disproportionately harmed by prohibition. Other jurisdictions, often where campaigns featured white individualism, have not passed remedial measures. Thus, this Note takes seriously white individualism—and its accompanying myth of the "mellow pot smoker"—as an obstacle that can prevent jurisdictions from contending with the failures of marijuana prohibition.

