
“US” AND “THEM” AND THE NATURE OF MORAL REGULATION

CHARLES H. WHITEBREAD*

What is morality in any given time or place? It is what the majority then and there happen to like, and immorality is what they dislike.

The Dialogues of Alfred North Whitehead

If your morals make you dreary, depend upon it, they are wrong. I do not say give them up, for they may be all you have, but conceal them like a vice lest they should spoil the lives of better and simpler people.

Robert Louis Stevenson, *Across the Plains*

Conventionality is not morality. Self-righteousness is not religion. To attack the first is not to assail the last.

Charlotte Brönte, *Jane Eyre*

I. MORAL REGULATION AS THE FOUNDATION OF THE SOCIAL HIERARCHY

During the early eighteenth century, constables in towns throughout Connecticut were directed by statute to restrain “all such as they judge to exceed their social conditions and ranks.”¹ Exceeding one’s social conditions most often meant engaging in the “several sins and offences of swearing, curseing, profaincing Gods holy name, Sabbath abuseing, drunkenness, fornication, and adultery.”² Today, in New York City,

* George T. and Harriet E. Pflieger Professor of Law, University of Southern California Law School. I wish to thank Chris Brown and Larry Bolton, my research assistants, for their hard work.

1. ALAN HUNT, GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION 232 n.8 (1999) (quoting STEPHEN FOSTER, THEIR SOLITARY WAY: THE PURITAN SOCIAL ETHIC IN THE FIRST CENTURY OF SETTLEMENT IN NEW ENGLAND 29 (1971)).

2. *Id.* at 232 n.3 (quoting a 1691 Virginia law).

ninety-two percent of those arrested under the drug laws are African-American or Hispanic.³ Thus, from the birth of the Republic to its entrance into the twenty-first century, the enforcement of moral regulation in the United States has been inextricably tied to the reinforcement of the existing social order.⁴ Based on this insight, this essay hopes to make a single point: Social anxiety is, and always has been, the progenitor of prohibitions. This trend is clearly illustrated by the statutes of colonial America, but it is also evidenced by the consequences of modern regulations. My hope is that a more informed understanding of the marriage between social anxiety and moral regulation might contribute to its dissolution.

In an effort to look behind the curtain of prohibition in the twentieth century, this essay proceeds in four parts, each briefly examining a specific prohibitory movement. First, the well-known story of alcohol prohibition is considered. Next, the evolution of gambling regulation is discussed, followed by an account of the movement to prohibit prostitution. The essay concludes with an overview of the most costly moral campaign in the history of the United States: the war on drugs. The examinations are brief, since the lesson is clear. Moral regulation perpetuates fear, not morality.

II. "US" AND "THEM": A BRIEF EXAMINATION OF THE TWENTIETH-CENTURY PROHIBITIONS

Historically, prohibitory legislation most often occurs when a social majority objects morally to the specific conduct, value system, or culture of others and imposes regulation upon them.⁵ Not surprisingly, regulations similar to the Connecticut ordinance have been part of our legal tradition for centuries. The legislation of morality throughout the history of the United States, like current prohibitory laws, has therefore tended to reflect the social anxieties of the day.⁶ While the major prohibitory movements of the last century share many characteristics with those of the early Republic, this essay emphasizes only one. Specifically, this essay maintains that at the core of the effort to regulate morality lies the desire of "us" to regulate "them." With each prohibition, a socially dominant group burdens a weaker class of citizens with its notion of propriety. And notwithstanding the moral justifications used to support them, moral regulations only

3. Neal R. Peirce, *Neither Bush nor Clinton Are [sic] Offering Alternatives to Failed War on Drugs*, HOUSTON CHRON., July 23, 1992, at A25.

4. See HUNT, *supra* note 1, at 110–12.

5. *Id.* at 1.

6. See *id.* at 213–15.

succeed in exacerbating existing social rifts. While the socially divisive nature of prohibition is one of its many costs, it is a cost that is often overshadowed by the more tangible casualties that commonly follow most prohibitory movements. I simply point to it in the hope that it further supports a claim that I have made elsewhere: As we enter a new century, it is abundantly clear that it is time to free ourselves from the idea of prohibition.

A. ALCOHOL PROHIBITION

National Prohibition remains the standard against which all other attempts at legislating morality are measured. After all, its rise and fall is documented in the Constitution itself. National Prohibition vividly reflects the hypocrisy of moral regulation. The Eighteenth Amendment never intended to keep all Americans from drinking. Rather, it desired to regulate the behavior of a particular class of citizens who drank. This hypocrisy, coupled with the increasing political influence of the targeted class, ultimately caused the political edifice of National Prohibition to crumble.

The foundation of the political edifice of National Prohibition can be traced to the inclusion of an alcohol prohibition provision in Oklahoma's 1906 constitution.⁷ This event signaled the political birth of temperance legislation. By 1913, more than half of the population in the United States found their drinking habits at least nominally regulated by prohibitory laws.⁸ But temperance groups did not ultimately succeed in legislating their morality until they joined ranks with the reform movement. By adopting the political strategy of the Progressives, which included associating "immoral" activity with the immigrant throngs that threatened to undermine the cultural dominance of the established Anglo-Saxon population, temperance groups gained the support of those who were horrified by both the evils of excessive alcohol use and by the pressures of untrammelled immigration.⁹ The Eighteenth Amendment was born out of this disgust.¹⁰

The political foundation of the Eighteenth Amendment was unsound long before its repeal in 1931 because, as one federal study noted, National

7. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 23 (1974).

8. *Id.*

9. *Id.* at 24–25.

10. See HUNT, *supra* note 1, at 213–15.

Prohibition never reflected a majority of the public's opposition to the use of intoxicating beverages. Prohibition merely underscored the public's hostility toward excessive consumption, political corruption, and licensed saloons. While proponents of National Prohibition managed to capitalize on the association of these problems with the immigrant classes for a time, such moral disapproval ultimately gave way to the logic of the ballot box as the immigrant populations developed their own political base.¹¹

By all estimates, the Eighteenth Amendment was a costly blunder. Between 1920 and 1930, the federal government spent an average of twenty-one million dollars enforcing the Volstead Act.¹² During the same period, the United States lost an estimated \$1.25 billion in potential tax revenues annually.¹³ In spite of the resources consumed by Alcohol Prohibition, it affected only one segment of the nation. National Prohibition cut in half the consumption of spirits by the poor and working classes, but the "consumption of alcoholic beverages by the business, professional and salaried class [was] fully as great . . . as it was prior to prohibition."¹⁴ While National Prohibition kept the poor dry, it made local organized crime groups wealthy enough to extend their control over entire cities.¹⁵ This success further reflected mainstream America's implicit rejection of temperance morality. As Al Capone himself so pointedly remarked:

I make my money by supplying a public demand. If I break the law, my customers, who number hundreds of the best people in Chicago, are as guilty as I am. The only difference between us is that I sell and they buy. Everybody calls me a racketeer. I call myself a business man. When I sell liquor, it's bootlegging. When my patrons serve it on a silver tray on Lake Shore Drive, it's hospitality.¹⁶

Capone's remarks underscore the fundamental problem of prohibitory regulation. Such legislation may influence the price of the illegal good, but it rarely affects the conscience of the customer seeking to purchase it. Like most prohibitory regimes, alcohol prohibition criminalized an activity that many citizens did not regard as criminal, and then proceeded to enforce regulations along class lines. For these reasons, National Prohibition

11. *See id.*

12. *See* CLARK WARBURTON, THE ECONOMIC RESULTS OF PROHIBITION 246 tbl.113 (1930).

13. *See id.* at 250 tbl.116.

14. *Id.* at 240.

15. ANDREW SINCLAIR, PROHIBITION: THE ERA OF EXCESS 221 (1962).

16. *Id.* at 220.

remains the classic case study in the legislation of morals. Unfortunately, it is not the only one.

B. THE GAMBLING PROHIBITION

The gambling prohibition in the United States shares many of the same characteristics as the prohibition against alcohol. It is an activity that has moved, though not as dramatically, from criminalization to regulation. The most common form of legalized gambling, the state lottery, boasts a surprising legacy. From the seventeenth century through the nineteenth century, lotteries supported endeavors such as the Continental Army, Harvard University, Reconstruction, and numerous charities throughout the young Republic.¹⁷ Not surprisingly, however, a substantial portion of the revenue generated by state-run lotteries often ended up in the pockets of corrupt politicians. Widespread corruption, particularly in Louisiana, eventually moved Congress to prohibit any form of lottery sales and promotion.¹⁸ This was yet another prohibition, however, that was doomed. Enticed by the enormous sums of money generated by state-sanctioned gambling, and by the seemingly victimless nature of the activity, most states gradually legalized various forms of gambling.¹⁹ And according to recent estimates, revenue generated by legalized gambling continues to increase exponentially. In 1994, Americans wagered a total of \$482 billion, an increase of 2800% from two decades earlier.²⁰

Like most prohibitory regimes, gambling has a history of selective enforcement. For example, in 1767, a Virginia court found an individual guilty of betting on a horse race. The crime, however, was not the gambling itself, but that the defendant was a tailor, "it being contrary to the Law for a Labourer to make a race, being only a sport for Gentlemen."²¹ Little seems to have changed in the intervening 230 years. Today, owing perhaps to a sense of paternalism on the part of legislators, the only major form of gambling not sanctioned somewhere in the United States is numbers, the form of gambling most favored by the poor of the inner city.²²

17. Stephanie A. Martz, Note, *Legalized Gambling and Public Corruption: Removing the Incentive to Act Corruptly, or, Teaching an Old Dog New Tricks*, 13 J.L. & POL. 453, 458 (1997).

18. *Id.* at 458–59.

19. *See id.* at 459–60. Examples of legalized gambling include state lotteries, on- and off-track betting, casinos, and riverboat gambling.

20. *Id.* at 460.

21. HENRY CHAFETZ, *PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 TO 1955*, at 12 (1960).

22. GILBERT GEIS, *ONE EYED JUSTICE: AN EXAMINATION OF HOMOSEXUALITY, ABORTION, PROSTITUTION, NARCOTICS, AND GAMBLING IN THE U.S.* 226 (1974).

One need not wonder who suffers most from the enforcement of the numbers prohibition.

C. THE PROSTITUTION PROHIBITION

The prostitution prohibition persists, unlike those laws against gambling and drinking. Communities throughout the United States began to pass ordinances criminalizing fornication, bawdy houses, night walking, and adultery as the female population of the Republic increased.²³ Urbanization and industrialization soon transformed these early attacks on prostitution into an organized effort to regulate the trade. New York, Cincinnati, Chicago, Baltimore, and the entire state of Pennsylvania tried to legalize and control prostitution. Although these initiatives failed, most urban areas continued to tolerate the presence of prostitutes in demarcated “red-light” districts.²⁴ These districts often coincided with urban areas containing large immigrant populations.²⁵

This widespread toleration and de facto regulation sparked the sexual purity movement, a movement seeking to repress prostitution entirely. Much like the temperance reformers, purity reformers incorporated elements of nationalism and nativism into their thought. Looking to the “future of the race,” reformers feared that society itself was degenerating.²⁶ Prostitution not only threatened the family, which was considered the foundation of the respectable classes, but because immigrants in poor neighborhoods often operated brothels, it was seen as evidence of the perceived inferiority of the ethnically diverse lower classes.²⁷ As in the case of alcohol prohibition, reformers were successful in pressuring state and federal legislators to act on the fears and prejudices of the Progressive Era. In 1910, Congress passed the White Slave Traffic Act, popularly known as the Mann Act.²⁸ The federal statute prohibited the interstate transportation of prostitutes and required the deportation of alien

23. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 427, 430 (1998).

24. JOHN F. DECKER, *PROSTITUTION: REGULATION AND CONTROL* 61 (1979). In major urban centers, city officials often developed a set of de facto regulations whereby “licensed” brothels were subject to medical and police inspections. Prosecution under antiprostitution ordinances was threatened if houses refused to comply. *Id.*

25. *See id.* at 60–61.

26. HUNT, *supra* note 1, at 129.

27. *See* DECKER, *supra* note 24, at 61.

28. *Id.* at 71.

prostitutes. By 1925, every state had passed legislation criminalizing prostitution.²⁹

Today, it is painfully obvious that the nationwide criminalization of prostitution has done more harm than good. It has failed both society and the prostitute. Recent prostitution arrest statistics indicate that the market for sex continues to thrive. And while prostitutes continue to be arrested, prosecuted, and incarcerated at alarming rates, their customers often go unpunished. Such gender-based enforcement has made women the fastest growing population in the criminal justice system.³⁰ Moreover, because most enforcement efforts focus on street prostitutes, the vast majority of those incarcerated for prostitution-related offenses are poor women of color. So while street prostitutes account for only a small minority of all prostitutes, they account for ninety percent of those arrested.³¹ Only forty-five percent of street prostitutes are minorities; yet fifty-five percent of those arrested for prostitution and eighty-five percent of those sentenced to jail are women of color.³² The fact that street prostitutes are often subject to harsher treatment when incarcerated only adds to the problem.³³ The effect of such enforcement patterns on the already acute racial tensions of America's inner cities can only be surmised.

Thus, in legislating sexual morality, the United States has succeeded only in increasing the number of women behind bars while making it more difficult to combat the health problems associated with prostitution. Furthermore, selective enforcement has placed the burden of criminalization primarily on poor minority women, ignoring the reality that their customers are equal participants in the market for sex.³⁴ In the end, the prostitution prohibition only aids the self-serving goals of politicians who seem happy to overlook the needs of the prostitute. The current "war

29. *Id.*

30. See DeCou, *supra* note 23, at 427.

31. DOLORES FRENCH, WORKING: MY LIFE AS A PROSTITUTE 149 (1988).

32. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 261 (1989); Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 206–07 (Frederique Delacoste & Priscilla Alexander eds., 1987).

33. Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 49 (1995).

34. The focus of law enforcement officials, although still focused primarily on the prostitute, has shifted in recent years. Efforts to combat the demand for prostitution include car forfeiture, revocation of driver's licenses, publication of names in various media, mandatory enrollment in educational programs, and the institution of civil causes of action for prostitutes against pimps and johns. See Julie Lefler, Note, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 11 (1999).

on drugs” exhibits the same politically expedient pattern of selective enforcement, only at a higher price.

D. THE WAR ON DRUGS

Given the history of moral regulation in the United States, it is not surprising to find that the war on drugs has been an abysmal failure. The effort consumes more than an estimated seventy-five billion dollars per year of public money; exacts an estimated seventy billion dollars a year from consumers; is responsible for nearly fifty percent of the millions of Americans who are today in jail; occupies an estimated fifty percent of the trial time of our judiciary; and devours the time of over 400,000 police officers.³⁵ However, no cure is at hand as the number of casual and serious drug abusers has remained constant.³⁶

Aside from the purely financial costs, the indirect social costs of the drug war are incalculable. The war on drugs has magnified a sense of alienation and economic despair among our inner-city communities, particularly minority communities, like no other prohibitory regime before it. From the outset, the enforcement emphasis of the drug war emphasizes inner-city street dealing in a way that produces a disproportionate number of black and Hispanic arrests.³⁷ The petty drug users and sellers among these minority groups are swept into the criminal justice system, often destroying their hopes of becoming productive citizens.³⁸

The exponential growth rate in the arrests of minorities compared to whites is staggering. As mentioned previously, ninety-two percent of drug charge arrestees in New York City are either black or Hispanic.³⁹ Blacks and Hispanics are over-represented both in the number of arrests and in the numbers of marijuana offenders incarcerated.⁴⁰ They make up twenty percent of the marijuana smokers in the United States, but comprise fifty-eight percent of the marijuana offenders sentenced under federal law in 1995.⁴¹ These racial inequities are further exacerbated by the difference in

35. William F. Buckley, Statement to the New York Bar Association (Summer 1995), in NAT'L REV., *The War on Drugs Is Lost*, Feb. 12, 1996, at 34, 35.

36. *If the Drug War has Failed, What Next? The End of Prohibition Should Be Open for Discussion*, DES MOINES REG., Feb. 11, 1996, at A1.

37. See LYNN ZIMMER & JOHN P. MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE 40-42 (1997).

38. Peirce, *supra* note 3.

39. *Id.*

40. NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, STILL CRAZY AFTER ALL THESE YEARS: MARIJUANA PROHIBITION, 1937-1997, at 12-13 (1997).

41. *Id.* at 12.

penalty for the possession and use of crack cocaine versus powder cocaine. Most crack cocaine users are black, while whites are the primary users of powder cocaine.⁴² “It is economics—not race—that places cheap crack cocaine in poor black and brown neighborhoods,” but unfair enforcement procedures place a disproportionate number of minority drug users behind bars for longer periods of time.⁴³ Civil rights groups have long attacked this sentencing disparity as racially discriminatory, arguing that the current federal sentencing guidelines for crack cocaine possession and use amount only to a war on poverty.⁴⁴

A final consequence of the drug prohibition has been the permanent disenfranchisement of 1.4 million black men—thirteen percent of black males in the country—who have had their right to vote taken away because of felony convictions.⁴⁵ Forty-six states deny prisoners the right to vote; thirty-two states prohibit felons on probation or parole from voting; fourteen states and the District of Columbia take away voting rights only while felons are in prison; and another fourteen rescind voting rights permanently.⁴⁶ Among the latter states, former felons may regain their voting rights by order of the governor or by an action of the parole or pardons board, but this rarely happens.⁴⁷ For example, in Virginia, a state that permanently removes the voting rights of felons, only 404 of the approximately 200,000 felons have had their rights restored in the past few years.⁴⁸

Like the prohibitions discussed above, harsh penalties have neither reduced the crime that plagues poor, inner-city neighborhoods nor stopped the disintegration of families torn apart by drug dependency. The only thing these laws have accomplished has been the reinforcement of black America’s deep distrust of the criminal justice system, which has created rules that ensure the perpetuation of racial and economic disparities for

42. Cynthia Tucker, *Drug Laws Mete Out Injustice*, DENVER POST, Apr. 18, 1997, at B7.

43. *See id.*

44. Paul D. Butler, *Race-based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 919 (1997) (“The Sentencing Commission was lobbied by civil rights groups, and they agreed that disparity was unfair.”). *See also* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998); Reynolds Holding, *Crack Case Penalties Are Upheld, Court Has No Power to Ignore Guidelines*, S.F. CHRON., Dec. 14, 1996, at A3 (reporting that civil rights groups have long attacked the sentencing disparity as racially discriminatory).

45. Kathryn Casa, *Prisons: The New Growth Industry*, NAT’L CATHOLIC REP., July 2, 1999, at 15, 18.

46. *Id.*

47. *Id.*

48. *Id.*

suspects and criminal defendants.⁴⁹ Ron Harris of the *Los Angeles Times* characterized the war on drugs best, in an article for which more than one hundred drug-law enforcement agents, defense attorneys, and members of black communities across America were interviewed. He observed: “Maybe no one planned it, maybe no one wanted it and certain few saw it coming, but around the country, politicians, public officials and even many police officers and judges say, the nation’s war on drugs has in effect become a war on black people.”⁵⁰

III. PROHIBITION AT THE DAWN OF THE TWENTY-FIRST CENTURY

So it seems that the nature of moral regulation has changed little in the last three hundred years. Drug enforcement agents might have taken the place of Connecticut constables, but the object of enforcement remains the same. Twentieth century prohibitions teach us that when a society attempts to regulate morality, it ends up regulating only the lifestyle of those who have no voice in defining the mores that are enforced. After the twentieth century, few questions should remain regarding the viability of the prohibition idea. We should understand, like never before, that the idea is inherently flawed. More important questions remain, however. At the dawn of the twenty-first century, how should we treat those members of our society that run numbers, prostitute themselves, or use drugs? Should we continue to prosecute “them”? Or, alternatively, should we free both “us” and “them” from the bonds of the prohibitory impulse? The answer seems obvious. Unfortunately for all of us, however, the answering of such questions in the twenty-first century, like gambling on horses in eighteenth century Virginia, is likely to remain predominantly “a sport for gentlemen.” And as long as our lawmakers fear those different from themselves, prohibitions, in all forms, will continue to harm us all.

49. For example, in 1996, the Supreme Court agreed to hear a challenge to federal prosecution policies in crack cocaine cases on grounds of racial discrimination. *United States v. Armstrong*, 517 U.S. 456 (1996). The defendants wanted to examine prosecution records to try to show that federal prosecutors in Los Angeles target blacks for crack cocaine charges while allowing white defendants to be tried on lesser charges in state courts. The Supreme Court rejected the claim that African-Americans have been singled out for crack prosecutions in Los Angeles. *See id.* at 470. The Court further stated that the defendants were not entitled to discovery in a selective prosecution claim unless the defendants first showed prima facie evidence of selective prosecution. *Id.* at 463–67. In other words, the defendants failed to show that whites that commit the same crimes get lighter treatment. *Id.* at 469.

50. Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1.