

Inventing Drugs: A Genealogy of a Regulatory Concept

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The trade in, and consumption of, illicit drugs is perhaps the archetypal ‘wicked problem’ of our time – complex, globalized, and seemingly intractable – and presents us with one of the very hardest legal and policy challenges of the twenty-first century. The central concept of a ‘drug’ remains under-theorized and largely neglected by critical socio-legal and criminological scholars. Drawing on a range of primary archival material and secondary sources, this article sets out a genealogy of the concept, assembled a little over a century ago out of diverse lines of development. It is argued that the drug label is an invented legal-regulatory construct closely bound up with the global drug prohibition system. Many contemporary features of the ‘war on drugs’ bear traces of this genealogy, notably how drug law enforcement often contributes to racial and social injustice. To move beyond prohibition, radical law and policy reform may require us to abandon the drug concept entirely.

We face a transnational threat of extraordinary proportions that amounts to US\$320 billion or some 0.5 per cent of global GDP. A threat that, every year, kills around 250,000 people across the globe, while destroying the lives of families and weakening community ties. A threat that jeopardises good governance and the rule of law, and encourages crime and corruption. A threat that feeds violence, fuels terrorism and undermines stability and security of

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states and entire regions. Its name is illicit drugs. Two words, that, when combined, evoke fear, denial, and anger.¹

Had all that we poor fools bothered our heads about never been anything but a phantom?

Herman Hesse, *Steppenwolf* (1929)

INTRODUCTION

‘There are no drugs “in nature”,’ Jacques Derrida once declared,² ‘the concept of drugs is not a scientific concept, but is rather instituted on the basis of moral or political evaluation.’ In other words, to label a substance a ‘drug’ is an evaluative rather than descriptive act,³ a form of decree which is usually ‘of a prohibitive nature’.⁴ Prior to, or outside of, these evaluations, there exist simply plants and chemicals – whether naturally-occurring, processed or entirely synthetic – which have a variety of properties when ingested by humans (poison, stimulant, sedative, nourishment, analgesic, hallucinogen, and so on).⁵ The different labels we attach to them are human constructions, some of which are legal in character, some not. Contrary to much public and political discourse on the matter, these labels are not settled or universal but, rather, are historically and culturally contingent, that is, they change over time and vary from place to place.⁶

It is the historical contingency of the ‘drug’ label that is the focus of this article. The puzzle that is explored is highlighted by this observation from the late historian, Roy Porter:

If you’d talked about the ‘drugs problem’ two hundred years ago, no one would have known what you meant. There was no notion then of ‘drugs’, in the sense of a small group of substances scientifically believed to be harmful because addictive or personality destroying, the availability of which is restricted by law. The term ‘drugs’ as a shorthand for a bunch of assorted narcotics is in fact a twentieth-century coinage: if you’d mentioned ‘drugs’ to anyone in George III’s time or in the Victorian era, they’d have thought you

- 1 Y. Fedotov, Executive Director of the UN Office on Drugs and Crime, March 2012.
- 2 J. Derrida, ‘The rhetoric of drugs: an interview’ (1993) *5 differences: A J. of Feminist Cultural Studies* 2.
- 3 V. Ruggiero, ‘Drugs as a password and the law as a drug’ in *Drugs: Cultures, Controls and Everyday Life*, ed. N. South (1999).
- 4 Derrida, *op. cit.*, n. 2, p. 2.
- 5 Zinberg established that the effects of ingesting a substance are not reducible solely to biochemistry; rather, the psychological mindset of the consumer and the context in which consumption takes place are also central (in shorthand, ‘drug, set, and setting’). See N. Zinberg, *Drug, Set, and Setting: The Basis for Controlled Intoxicant Use* (1984).
- 6 J. Goodman, P. Lovejoy, and A. Sherratt (eds.), *Consuming Habits: Drugs in History and Anthropology* (1995).

were referring to the remedies physicians prescribed and apothecaries made up.⁷

Porter directs us here towards two central points. First, that the contemporary ‘drug’ concept has two related but distinct meanings: as a medicine and as an illicit psychoactive substance. The English language⁸ is in fact unusual in condensing both meanings in a single term. Certainly in most of the main European languages, there are separate words for these two senses: in Spanish, for example, *medicamentos* and *drogas*, respectively.⁹ The focus in this article is on the second of these meanings, that is, the notion of a ‘drug’ as an illicit substance used for the purpose of altering one’s psychic state or consciousness.

The second point that Porter reminds us of is that this latter meaning of the drug concept is a relatively recent invention, still only a little more than 100 years old. This may be quite a surprise for many, as this ‘twentieth-century coinage’ has rapidly accomplished a self-evident or taken-for-granted character as a common-sensical category of ‘things’. Indeed, even the most radical critics of drug policy rarely question the term ‘drug’ itself. Campaigners for change usually describe their goal as drug law or drug policy reform – the idea of jettisoning the drug concept altogether is simply not on the agenda.¹⁰

The aim in this article is to trace the genealogy of this modern sense of the term. In a Nietzschean spirit, the concern is with pinpointing its *invention* – the drug concept does not have a ‘true’ essence hidden in its origin, waiting to be uncovered; rather, it was made or manufactured.¹¹ Whilst invention indicates a break or innovation, at the same time, it rarely involves conjuring up something out of nothing. It is this piecing together of heterogeneous lines of descent that is indicated by the notion of genealogy: in simple terms, it asks ‘where did this come from?’¹² The analysis that follows seeks to

7 R. Porter, ‘The history of the “drugs problem”’ (1996) 24 *Criminal Justice Matters* 3, at 3.

8 A limitation of this article is its reliance on English-language sources which of course foregrounds the Anglo-American branches of the genealogy. Whilst the historical literature suggests these are arguably the most important (for example, D. Bewley-Taylor, *The United States and International Drug Control, 1909–1997* (1999)), nevertheless, a multilingual comparative genealogy remains an important project for the future. See also n. 96 below.

9 This is the same in French, German, and Italian. I am grateful to Juanjo Medina, Pierre Schammo, and Simona Giordano for information on this.

10 See, for example, the two foremost NGOs in the field: the British Transform Drug Policy Foundation, at <<http://www.tdpf.org.uk>> and the American Drug Policy Alliance, at <<http://www.drugpolicy.org>>.

11 See the discussion of Nietzsche in ‘Truth and Juridical Forms’, the first of Foucault’s series of lectures given in Rio in May 1973, published in *Power: Essential Works of Foucault 1954–1984, Vol. 3*, ed. J. Faubion, tr. R. Hurley et al. (2000).

12 M. Foucault, ‘Nietzsche, Genealogy, History’ in *The Foucault Reader: An Introduction to Foucault’s Thought*, ed. P. Rabinow (1984) 81.

describe the emergence of the drug concept, tracing the diverse elements from which it has been assembled and the ‘historical struggles and exercises of power that shaped [its] character’.¹³

As Tupper has observed,¹⁴ for a term so deeply embedded in public, political, and policy discourse, the drug concept is surprisingly under-theorized. This lacuna matters, not simply intellectually, but in a more urgently practical way. To transform our legal and policy approaches to what we currently call the ‘drug problem’, we need to move beyond the conceptual frame to which the status quo is tethered. The critical purpose of the article is to destabilize the concept’s apparent self-evidence and bring to the surface its invented and contingent character as a way of ‘naming the world’.¹⁵ By excavating this genealogy, we can identify within the concept the ‘traces of the past [...] and their continuing operation today’,¹⁶ and start the process of unravelling and rethinking the entire range of practices, including knowledge production,¹⁷ which have been built on its foundation. Indeed, the drug concept is embedded within the structure of contemporary drug laws. The Misuse of Drugs Act 1971, for example, in section 2(1)(a) defines the term ‘controlled drug’ used in the Act simply as ‘any substance or product for the time being specified in Part I, II, or III of Schedule 2 to this Act’. A ‘drug’ is no more or less than those substances listed as being so. It will be argued that moving beyond prohibition is impossible without understanding the genealogy of this foundational term. Pushing the point, it could even be said that the notion of ‘drug law reform’ is oxymoronic, as there can be no truly fundamental or radical change for as long as we remain attached to the drug concept. The aim of the article is, therefore, not to retell the relatively familiar story of the origins of drug prohibition – for which the work of historians like Virginia Berridge or David Courtwright should be the first port of call – but, rather, to shine a light on a critical element of the foundations of prohibition which has been relegated to the margins of existing accounts.

The significance of the argument runs wider than the world of drug law and policy. The article presents a study of an invented legal-regulatory construct, defined as a concept constructed for the purpose of regulation rather than one directly or simply transferred across from another field. It

13 D. Garland, ‘What is a “history of the present”? On Foucault’s genealogies and their critical preconditions’ (2014) 16 *Punishment & Society* 365, at 373.

14 K. Tupper, ‘Psychoactive substances and the English language: “Drugs”, discourses, and public policy’ (2012) 39 *Contemporary Drug Problems* 461.

15 P. Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1987) 38 *Hastings Law J.* 814.

16 Garland, *op. cit.*, n. 13, p. 375.

17 For example, attempts to develop ‘drug science’ as a field of study, most notably pursued in Britain by Professor David Nutt, rest on the assumption that ‘drug’ is an objective scientific category, an assumption that this article argues is fundamentally flawed.

provides a window therefore into broader questions of regulation and governance at the turn of the twentieth century. As we will see, it casts a particular light on aspects of the formation of the modern administrative state and the regulation of certain social groups. It is a specific contribution, in this sense, to the more general project of Madsen and Thornhill to recentre the study of law and legal transformations within analyses of the formation of modern societies, particularly during what they describe as Europe's 'tumultuous' twentieth century.¹⁸ The article also takes up the challenge recently set out by Mariana Valverde¹⁹ to revise standard views on the relevance of Foucault for law and society scholarship by drawing on previously unknown or untranslated lectures that have been published for the first time in the last few years.²⁰

A GENEALOGY OF THE MODERN DRUG CONCEPT

The word 'drug' has a long history. Etymological dictionaries suggest that its first or primary meaning as a medicinal or therapeutic substance can be traced as far back as the fourteenth century.²¹ Unusually for a word that is now so commonly used, its roots are described variously by etymologists as 'obscure', 'uncertain', and 'much-disputed'. There is broad consensus that it traces back to the Middle English *drogge*²² which, in turn, derives from the Old French *drogue*. Here, the picture becomes much less clear. Some relate *drogue* to the Dutch *droog*, and cognates like the Anglo-Saxon *drig*, meaning dry, and suggest it may have been used originally to refer to dried herbs or roots, some of which may have been used therapeutically. Others claim a lineage from the Middle Low German *droge fate*, meaning dry casks or barrels, and speculate that the first part of that phrase may have come to stand for the contents of the casks which will often have been dried spices.

18 M. Madsen and C. Thornhill (eds.), *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law* (2014).

19 M. Valverde, 'Foucault on "Avowal": Theatres of Truth from Homer to Modern Psychology' (2015) 40 *Law & Social Inquiry* 1080.

20 See n. 114 below. Valverde, id. argues that Foucault's 1981 Louvain lectures, in particular, published for the first time in English translation in 2015, constitute a 'major revelation' for (socio-)legal scholars.

21 Sources consulted: H. Wedgwood, *A Dictionary of English Etymology* (1859); T. Hoad, *The Concise Oxford Dictionary of English Etymology* (1986); J. Donald, *Chambers's Etymological Dictionary of the English Language* (1867); C.T. Onions, *The Oxford Dictionary of English Etymology* (1966); E. Klein, *A Comprehensive Etymological Dictionary of the English Language* (1966); W. Skeat, *An Etymological Dictionary of the English Language* (1893); and <www.etymonline.com>.

22 Chaucer, for example, uses the word *drogge* in the General Prologue to *The Canterbury Tales* (written in the late fourteenth century), referring to medicines made by apothecaries.

This suggests interestingly that the notion of a drug as a commodity for trade may be deeply buried in the prehistory of the concept.

Related to this, there is an almost equally long sense of drug as a verb, meaning to administer a drug or to poison or stupefy with a drug. Medical historian John Parascandola²³ notes an example in Shakespeare's *Macbeth* from 1606, in which Lady Macbeth confesses 'I have drugged their possets',²⁴ referring to her poisoning of King Duncan's guards. A few decades later, in Milton's *Paradise Lost*, when Satan's serpents eat fruit which then turns to bitter ashes in their mouth, they are described as 'drugged' as 'with hatefullest disrelish writh'd thir jaws'.²⁵ This shows us that connotations of stupefaction and even deadliness, common tropes in contemporary drug discourse, are embedded centuries back in the earliest branches of the genealogy.

How then did this *longue dure* of semantic stability, counted in centuries rather than decades, come to be disrupted at the turn of the twentieth century by this specific 'event',²⁶ the invention of the modern drug concept? In a British legislative context, how did we move in the space of a little over 50 years from the Pharmacy Act of 1868, which is framed as a set of measures to control access to poisons, to the Dangerous Drugs Act 1920, which is constructed entirely in terms of the modern drug concept?

According to Parascandola, the first occurrence of the concept's modern meaning was in fact in 1897,²⁷ in a paper by American physician, and specialist in 'nervous and mental diseases', Dr Francis Xavier Dercum.²⁸ Parascandola's study was based on an examination of article titles in the *Index Medicus*, a monthly guide to the global literature in medical periodicals which had been established in 1879, and he found that after this initial appearance in 1897, the new meaning of the term began to proliferate in articles in the *Index*, initially only in journals in the United States.²⁹ Indeed, the first instance elsewhere was not until 1908, in an article in the *South African Medical Record*.³⁰ This suggests a very specific

23 J. Parascandola, 'The Drug Habit: The Association of the Word "Drug" with Abuse in American History' in *Drugs and Narcotics in History*, eds. R. Porter and M. Teich (1995) 158.

24 W. Shakespeare, *Macbeth*, Act 2, Scene 2.

25 J. Milton, *Paradise Lost*, tenth book, lines 568–9.

26 The idea of 'eventalization', as a distinctive analytical method for historical enquiry, is, of course, a Foucauldian one: M. Foucault, 'Questions of Method' in *The Foucault Effect*, eds. G. Burchell, C. Gordon, and P. Miller (1991) 73.

27 He notes a slightly earlier reference in 1896 which did not appear in the *Index Medicus*: Parascandola, op. cit., n. 23, pp. 165–6.

28 F.X. Dercum, 'The Drug Habits' in *A System of Practical Therapeutics*, ed. H.A. Hare (1897) 795.

29 Parascandola, op. cit., n. 23, p. 157.

30 C. Kitching, 'Treatment of Drug Habits as Illustrated by that of Opium and Morphine' (1908) 6 *South African Medical Record* 33.

historical and cultural epicentre for this ‘event’: the United States at the turn of the twentieth century.

Other historical sources, however, indicate that this is a truncated account.³¹ For example, the *Proceedings* of the British-based Society for the Study of Inebriety (SSI) show that Lewis Mason, a physician from the Fort Hamilton Inebriates Home in New York, presented a paper in July 1887 to the first Colonial and International Congress on Inebriety, held in London, in which he described ‘inebriates’ and ‘opium habitus’ as having a ‘natural tendency to stimulating and narcotic drugs’.³² This implies that a usage strongly resembling the modern drug concept was in circulation a full ten years earlier than the Dercum paper identified by Parascandola and was being discussed outside North America. The reference to ‘inebriates’ indicates a perhaps unexpected dimension: the first instances of what would become this ‘twentieth-century coinage’ were as likely to be applied to alcohol as to opiates. For example, a pamphlet on alcohol written by Sir Andrew Clark in 1878 referred to the ‘abuse of this drug’.³³ Less commonly, the term was applied to tobacco, as, for instance, in a report in the *British Medical Journal* in 1881, discussing a French anti-tobacco society.³⁴

Why is this significant to our genealogy? At one level, it provides an echo of Harry Levine’s famous argument that the addiction concept was first worked out in the early nineteenth century for alcohol and then later applied to opium and opiates, the reverse of the conventional chronology.³⁵ It seems that the drug concept may have a similarly counter-intuitive early line of development. But there is a deeper critical point. What is emerging from the 1870s and 1880s is not simply a new concept but rather a new *problematization*.³⁶ This is not to say that these substances had previously been viewed as problem-free: both alcohol and opiates were of course already seen by this point as problematic in different ways. Temperance movements, for instance, had been flourishing since the early decades of the nineteenth century, based on assumptions about the ‘perils of drink’³⁷ and indeed

31 The primary historical sources drawn on for the research presented in this article were: *Proceedings of the Society for the Study of Inebriety* (1884–1901); *Times* newspaper (1870–1900); *Brit. Medical J.* (1870–1900); and *Proceedings of the Old Bailey* (1870–1900).

32 *Proceedings of the Society for the Study of Inebriety* (hereafter *Proceedings*), vol. 13, August 1887, 13.

33 A. Clark, *The Action of Alcohol Upon Health* (1878). See, also, T.D. Crothers in *Proceedings*, vol. 18, November 1888, 14.

34 *British Medical J.* (hereafter *BMJ*), 11 June 1881, 933.

35 H. Levine, ‘The Discovery of Addiction: Changing conceptions of habitual drunkenness in America’ (1978) 39 *J. of Studies on Alcohol* 143.

36 R. Castel, ‘“Problematization” as a Mode of Reading History’ in *Foucault and the Writing of History*, ed. J. Goldstein (1994).

37 B. Harrison, *Drink and the Victorians* (1971). It has been argued that the problematization of alcohol in fact started to emerge in a distinctive form with the onset of modern industrial capitalism in the second half of the eighteenth century:

Clark's 1878 pamphlet referred to above was published under the auspices of the Church of England Temperance Society. Similarly, opium had been viewed as a population health problem at least as far back as the 1820s, notably in the famous Earl of Mar life insurance case in 1828.³⁸ But what began to happen in the last quarter of the century was the creation of a new form or pattern of problematization. It is this emerging problem framework that provides the key to understanding the first stage in the assembly of the modern drug concept.

1. *Problematizing*

One part of this new pattern of problematization involved the connection of practices of *self-intoxication* with the drug concept. An early example is a report from 1875 in the *British Medical Journal (BMJ)* which discusses a paper by a German doctor presenting the case of a 32-year old man 'notorious in Berlin for intoxicating himself with ether',³⁹ by inhaling it from a handkerchief.⁴⁰ It describes a variety of attempts made to ease the patient away from his 'habit', including giving the 'drug' cannabis as a substitute for ether. A paper given to the SSI in 1889 by Mrs L'Oste, a Superintendent at a Licensed Home for Ladies, referred to 'the use of a French drug, called Eau des Carmes de Melisse'⁴¹ [...] often resorted to by girls and women as a pick-me-up.'⁴² This theme of 'drugs' being consumed for the primary purpose of intoxication appears in a wide range of geographical contexts in the last two decades of the nineteenth century. For example, we have an account in 1887 of how opium in China is 'now mainly used as a means of procuring a delightful species of intoxication',⁴³ a report from 1890 describing an apparently serious problem of ether drinking in Ireland,⁴⁴ and in 1893 reports of 'ganja' use in Bengal⁴⁵ and the smoking of 'bhanga' in Cairo.⁴⁶ All of these accounts use the term 'drug' to describe the substances.

for example, J. Nicholls, 'Gin Lane Revisited: Intoxication and Society in the Gin Epidemic' (2003) 7 *J. for Cultural Research* 125; Levine, op. cit., n. 35.

38 V. Berridge, 'Opium eating and life insurance' (1977) 72 *Brit. J. of Addiction* 371. On the question of inebriety and insurance, see, also, the lecture by Norman Kerr in *Proceedings*, vol. 35, May 1893, 12.

39 Diethyl ether, commonly known as ether, is a colourless volatile liquid which in the nineteenth century was not only used in medical practice as an anaesthetic but was also widely consumed as an intoxicant, notably in Ireland (see n. 44 below). Today, medical use of ether has disappeared but it is still used as an intoxicant in parts of Eastern Europe, particularly in Poland where the practice of ether drinking dates back to the 1920s and 1930s.

40 *BMJ*, 10 April 1875, 826.

41 A herbal mixture distilled in alcohol.

42 *Proceedings*, vol. 20, May 1889, 10.

43 *BMJ*, 2 April 1887, 731.

44 *BMJ*, 18 October 1890, 885.

45 *BMJ*, 29 April 1893, 915.

46 *BMJ*, 25 March 1893, 679.

The precise nature of the problem posed by self-intoxication with these substances is not always explicit and there is some ambivalence concerning its problematic character. For example, a *Times* editorial in 1875⁴⁷ on the Indian Government's opium policy observed that despite some claims about the pernicious effects of opium consumption, the everyday reality was often considerably more prosaic:

A Chinaman, after a hard morning's work, enjoying his midday meal with a hearty appetite, and solacing himself afterwards with a whiff of Opium, just as an English labourer might take his harmless pipe of tobacco, and then going back to his work again none the worse for his indulgence.

For those who did see problems associated with the practice of self-intoxication, these took two main forms. The first was distinctively 'moral' in nature. In a classic example, Brigade-Surgeon Robert Pringle, of the Sanitary Department of the Bengal Army, describing in 1894 the use of opium and cannabis in India, asserted that the people who 'use these drugs are for the most part a debauched and disreputable lot' and that all non-medical use of opium was 'vicious'.⁴⁸ A case reported in the *BMJ* in 1887 painted a particularly vivid picture of this idea of the moral dangers of drug taking, describing the death by chlorodyne overdose⁴⁹ of a woman 'addicted to the excessive taking of drugs and drink', noting that the 'room of the deceased, which was in a filthy condition, contained nearly one hundred empty chlorodyne bottles'.⁵⁰ In a related but more consequentialist vein, Norman Kerr, President of the SSI, described opium as a 'drug [...] destructive of life' in a lecture on inebriety given in January 1893 at the Medical Society of London.⁵¹

The second form of problem linked to self-intoxication, and perhaps the more commonly cited, referred to the habit-forming potential of some of these substances, frequently using the metaphor of enslavement.⁵² The potency of this metaphor, which of course has a contemporary ring to it, is significant. O'Malley has described drug addiction as a 'peculiarly liberal affliction', in the sense that it is a pathology of precisely the faculties that are most valorized within modern liberal capitalism, individual self-control and freedom.⁵³ As newly-industrialized societies began to survey and respond to the consequences of the socio-economic transformation that had unfolded in

47 *Times*, 30 June 1875, 9.

48 *Proceedings*, vol. 39, February 1894, 16.

49 Chlorodyne was a popular patent medicine containing a mix of laudanum (tincture of opium), tincture of cannabis, and chloroform.

50 *BMJ*, 5 February 1887, 305.

51 *Proceedings*, vol. 36, May 1893, 13.

52 For example: *Proceedings*, vol. 28, May 1891, 11.

53 P. O'Malley, 'Drugs, risks and freedoms: Illicit drug "use" and "misuse" under neo-liberal governance' in *Crime Prevention and Community Safety: New Directions*, eds. G. Hughes and E. McLaughlin (2002) 279–80. See, also, T. Seddon, 'Drugs and freedom' (2007) 15 *Addiction Research & Theory* 333.

the first half of the nineteenth century, it is unsurprising that practices of self-intoxication which threatened to undermine the capacities of individual citizens could be viewed with alarm. A paper given in 1896 to the SSI by Dr Huntley, describing the ‘opium habit’ as a ‘slave’, pointed to the central anxiety, noting that for such individuals ‘cutting off the drug is immediately followed by loss of the power to work’.⁵⁴ An inability to work has obvious consequences for productive capacity within an industrial society but is also troubling in relation to the idea of individual responsibility which was a central element in nineteenth-century understandings of the liberal subject.⁵⁵ This partly explains⁵⁶ why the early problematizations of opium during this period were often related to questions of insurance, particularly life assurance.⁵⁷ As Ewald argues, the emerging new form of insurance at this time was itself bound up with the notion of the prudential and responsible subject of classical liberalism, an idea challenged by the figure of the ‘enslaved’ morphinist or opium-eater.⁵⁸ It is notable in this regard that during the middle decades of the century, the famous Edinburgh toxicologist and physician, Professor Sir Robert Christison, published on the effects of opium in both medical⁵⁹ and actuarial⁶⁰ journals.

A nearby branch of the genealogy saw the association increasingly being made in this period between the drug concept and the *intoxication of others*, usually for criminal purposes. There is an echo here of that much older notion of ‘drugging’ – as in Lady Macbeth’s poisoning of King Duncan’s guards referred to earlier – and its connotations of deadliness, danger, and even violence. One version of this was the administration of a drug in order to commit a sexual offence. An example was the case of Richard Freeman, tried at the Old Bailey in 1870 for ‘feloniously administering to Lucy Ashbey a certain drug, to enable him to ravish her’.⁶¹ Another common version was the use of a drug to commit robbery, as, for example, in the case of George Forman and others, tried for robbery with violence in 1881, who were alleged to have ‘spiked’ the drink of Edward Pratt during a drinking session in a beerhouse, prior to attacking Pratt when he left and forcibly

54 *Proceedings*, vol. 50, November 1896, 9.

55 See C. Gordon, ‘Governmental Rationality: An introduction’ in Burchell et al., op. cit., n. 26, p. 1.

56 For an elaboration of this argument, see T. Seddon, *A History of Drugs: Drugs and freedom in the liberal age* (2010) 38–40.

57 See n. 38 above.

58 F. Ewald, ‘Insurance and risk’ in Burchell et al., op. cit., n. 26, p. 197.

59 R. Christison, ‘On the effects of opium eating on health and longevity’ (1832) 37 *Edinburgh Medical and Surgical J.* 123.

60 R. Christison, ‘An investigation of the deaths in the Standard Assurance Company’ (1854) 4 *J. of the Institute of Actuaries* 76.

61 *Old Bailey Proceedings Online*, 6 June 1870, trial of Richard Thomas Freedman (t18700606-526).

taking an amount of money from his pocket.⁶² A non-violent variation on this type of crime was also linked to the drug concept, as in the case of Joseph and Marie Kopelewitz, tried for administering a ‘stupefying drug’ to Abraham Freedman in order to coerce him into signing a valuable security.⁶³ This problem of ‘drugging’ was closely linked to the broader concern with poisoning that was prevalent at this time. The emerging new public health movement,⁶⁴ pioneered by Edwin Chadwick, which was tackling a range of threats to population health associated with industrialization, was one of the drivers for developing regulatory controls on ‘dangerous’ substances, through measures like the Arsenic Act of 1851⁶⁵ and the Pharmacy Act of 1868. In other words, during this period, public health was intertwined with this branch of the genealogy of the drug concept, a point of some significance from a contemporary viewpoint. At a broader level, the increasing attention given to protecting health and safety, under the heading of public health, has been understood as part of the wider development in the nineteenth century of a liberal political economy⁶⁶ and new ways of governing populations.⁶⁷ This is the other sense in which the ‘drug problem’ is ‘peculiarly liberal’,⁶⁸ as the invention of the drug concept is rooted in the early formation of the modern liberal state.

These two dimensions of the problem framework focus on the perceived psychoactive effects of ‘drugs’. In this sense, when Foucault writes of the genealogical approach to history that ‘the body is the inscribed surface of events’,⁶⁹ this is not a metaphor. These branches centre on the ways in which ingested substances are believed to act on the cellular biochemistry of the human body, influencing individual cognitive and affective processes and, in turn, behaviour. This emphasis on the material and bodily, however, has a somewhat ambiguous character in our genealogy as one of the core features of discourse in the last quarter of the nineteenth century was the continuing connection made between drugs and medical practice. Indeed, the pages of the *BMJ* were filled with accounts of the therapeutic uses of different drugs. Cocaine, for example, was described as a useful local anaesthetic,⁷⁰

62 *Old Bailey Proceedings Online*, 23 May 1881, trial of George Forman and others (t18810523-577).

63 *Old Bailey Proceedings Online*, 9 January 1893, trial of Joseph Kopelewitz and Marie Kopelewitz (t18930109-211).

64 G. Rosen, *A History of Public Health* (1958).

65 P. Bartrip, ‘A “Pennurth of Arsenic for Rat Poison”’: The Arsenic Act, 1851 and the Prevention of Secret Poisoning’ (1992) 36 *Medical History* 53.

66 P. Carroll, ‘Medical Police and the History of Public Health’ (2002) 46 *Medical History* 461.

67 This point is discussed by Foucault in his 1978 and 1979 Collège de France lecture courses – *Security, Territory, Population* and *The Birth of Biopolitics* – first published in English translation in 2007 and 2008 respectively.

68 See n. 53 above.

69 Foucault, op. cit., n. 12, p. 83.

70 *BMJ*, 6 December 1884, 1161.

including for treatment of diseases of the throat and nose⁷¹ and of eye problems,⁷² as well as for the relief of toothache.⁷³ The analgesic benefits of opium and opiates⁷⁴ were frequently referred to and, even in accounts that strongly emphasize their ‘dangers’, the legitimacy and value of their medical use was often staunchly defended at the same time.⁷⁵ A range of other substances that we might today most associate with use as an intoxicant were similarly discussed: for example, a letter to the *BMJ* in 1884 described the therapeutic use of amyl nitrite⁷⁶ as a drug for the relief of arterial tension.⁷⁷ Perhaps even more surprising were the references to the medicinal use of alcohol,⁷⁸ reinforcing the point that the sharp divide between alcohol and other drugs had not yet been made. In other words, we see here that the first meaning of ‘drug’ as a medicine is not effaced as the modern drug concept emerges during this period but, in fact, makes up a significant branch within its genealogy. Indeed, Braithwaite and Drahos explicitly locate the creation of what they term the ‘illicit drugs regime’ as part of a progressive splitting of the regulation of the pharmaceutical domain into five separate regulatory regimes (the others being for prescription drugs, non-prescription drugs, alcohol, and tobacco).⁷⁹ This helps us to understand some of the enduring ambiguities and blurred boundaries that persist between what counts as medical or non-medical use of some substances and the regulatory challenge this then presents.⁸⁰

A rather different dimension of the new problem framework emerging during this period operated at the other end of the telescope from the biochemical or cellular. A significant part of discussions of, and references to, opium in particular concerned neither its supposed therapeutic benefits nor its alleged damaging impact on individuals, but rather its place as a traded commodity within a global politico-economic order. Specifically, the opium trade in India and China was a preoccupying matter. Letters to the

71 *BMJ*, 13 December 1884, 1188.

72 *BMJ*, 6 December 1884, 1143; *BMJ*, 10 October 1896, 58.

73 *BMJ*, 16 April 1887, 862.

74 For example: *BMJ*, 20 September 1890, 690.

75 *Proceedings*, op. cit., n, 54, p. 12.

76 Commonly known as ‘poppers’ and used recreationally in many countries since the 1970s within dance music subcultures.

77 *BMJ*, 19 July 1884, 147.

78 *BMJ*, 5 February 1881, 217.

79 J. Braithwaite and P. Drahos, *Global Business Regulation* (2000) at 360.

80 For example, in the United States today, overdose deaths from legally prescribed opioid painkillers, such as oxycodone and hydrocodone, exceed those from use of heroin: R. Rudd et al., ‘Increases in Drug and Opioid Overdose Deaths – United States, 2000–2014’ (2015) 64 *Morbidity and Mortality Weekly Report (MMWR)* 1. To further illustrate these blurred boundaries, as well as ‘misuse’ by legitimate prescription holders, there is an extensive illicit market in these painkillers: M. Chapman et al., *Research on Illegal Prescription Drug Market Interventions. Report for the ONDCP* (2015).

Times from concerned readers, as well as editorials and leaders, appeared occasionally but consistently throughout the last three decades of the century. For example, a letter from George Campbell in 1881 presented a summary of many of the key points of the debate, from ‘considerations of revenue’ derived from taxation on Indian cultivation, to the impact on relations with China in the aftermath of the mid-century ‘opium wars’⁸¹ and the domestic economic effect in Britain of changing arrangements.⁸² As Carl Trocki⁸³ and others⁸⁴ have shown, colonial and international trade interests were inextricably bound up with the ‘opium question’ at this time. Indeed, as will be seen in the next section, in many respects, it is this part of the new problematization which becomes the most significant in the final stages of the assembly of the modern drug concept.

An interesting example of the importance of this dimension is the Society for the Suppression of the Opium Trade (SSOT) which was formed in London in November 1874 by a group of Quaker reformists.⁸⁵ This is sometimes interpreted as an equivalent to the ‘moralizing’ alcohol temperance movement which was approaching its high-water mark at this time, and the notion of ‘moral entrepreneurship’ as an important driver of drug prohibition has been a common trope in the historical literature.⁸⁶ Yet, it is telling that the SSOT was initially known as the Anglo-Indian Society, reflecting that its animating concern was the colonial and international trade dimension of the issue, as an insightful analysis by Brown makes very clear.⁸⁷ It is important to recognize, however, that this strand of the new problem framework did not

81 See P. Fay, *The Opium War, 1840–1842* (1975); E. Holt, *The Opium Wars in China* (1964). Economist Jeffrey Sachs describes the 1839–42 ‘opium war’ as the ‘first conflict of the modern capitalist era’ and as part of the process of the transformation to modern global capitalism: J. Sachs, ‘Twentieth-century Political Economy: A Brief History of Global Capitalism’ (1999) 15(4) *Oxford Rev. of Economic Policy* 91.

82 *Times*, 12 November 1881, 11.

83 C. Trocki, *Opium, Empire and the Global Political Economy: A Study of the Asian Opium Trade 1750–1950* (1999).

84 F. Dikotter, L. Laamann, and Z. Xun, *Narcotic Culture: A History of Drugs in China* (2004).

85 The broader role of Quakers and other religious dissenters during the eighteenth and nineteenth centuries in the development of the state as an agent of morality in the capitalist order is discussed in a strikingly original way by Foucault in his 1973 *Punitive Society* lecture course at the Collège de France: see S. Elden, ‘A More Marxist Foucault? Reading *La société punitive*’ (2015) 23(4) *Historical Materialism* 149.

86 The term was originally coined by sociologist Howard Becker to describe the role of Harry Anslinger, Commissioner of the Federal Bureau of Narcotics, in driving the development of the 1937 Marihuana Tax Act which was the first federal cannabis law in the United States: see H. Becker, *Outsiders: Studies in the Sociology of Deviance* (1963).

87 J. Brown, ‘Politics of the Poppy: The Society for the Suppression of the Opium Trade, 1874–1916’ (1973) 8(3) *J. of Contemporary History* 97.

develop in a linear or unbroken way and that, in fact, the direction of influence fluctuated considerably. Perhaps the starkest example of this is the Royal Opium Commission which reported in 1895.⁸⁸ This had been initiated in 1893 by Gladstone's Liberal administration and was viewed by campaigners like the SSOT as an important step forward in their cause and a sign of the growing momentum behind it. However, the final report unexpectedly concluded that the opium trade in India was actually not very harmful, which was a profound disappointment to the SSOT, although ultimately it proved to be only a postponement of action to restrict the trade. This is significant, of course, as we see that the economic dimensions of psychoactive commerce have been plagued by ambiguity and ambivalence from the start and this tension runs deep through the core of this branch of the genealogy of the drug concept. Indeed, economic and power imbalances between countries at different points in the commodity chain have arguably been one of the underlying forces shaping drug policy and drug markets throughout the last century.⁸⁹

The new problem framework had clearly coalesced by the end of the 1890s, so that the notion of a drug no longer solely referred to a medicine but now had a secondary meaning associated with vice and addiction, with criminality and danger, and with colonial and international trade interests. The template for the concept was largely set by this point, except in one important respect: it still also applied to alcohol. As will be explored in the next section, the decoupling of 'drugs' from alcohol – and, indeed, tobacco – would only finally be accomplished in the first two decades of the twentieth century, by which point the modern drug concept was fully assembled.

2. *Decoupling*

The decoupling process was uneven. In his presidential address to the SSI in April 1903, Dr Harry Campbell presented a wide-ranging discussion of the problem of 'inebriety', taking in alcohol, tobacco, and even tea and coffee.⁹⁰

88 For an analysis of the 1895 Report and its genesis, see J. Richards, 'Opium and the British Indian Empire: The Royal Commission of 1895' (2002) 36 *Modern Asian Studies* 375.

89 One example is the position of Afghanistan within the world heroin trade over the last 40 years, which cannot be fully understood without taking account of the perspectives of global political economy and international relations: see I. Haq, 'Pak-Afghan Drug Trade in Historical Perspective' (1996) 36 *Asian Survey* 945; P. Andreas, 'Illicit international political economy: the clandestine side of globalization' (2004) 11 *Rev. of International Political Economy* 641; A. McCoy, 'Can Anyone Pacify the World's Number One Narco-State? The Opium Wars in Afghanistan' (April 2010) *Asia-Pacific J.*, at <<http://apjpf.org/-Alfred-W.-McCoy/3339/article.html>>.

90 H. Campbell, 'The Study of Inebriety: A Retrospect and a Forecast' (1903) 1 *Brit. J. of Inebriety* 5.

He also included a short passage on ‘drug inebriety’ in which he discussed the problem of the ‘drug habit’ in a manner that we would largely recognize today, applying the term specifically to opium, cocaine, chloral, and ether. This indicated a clear demarcation between ‘drugs’ and other psychoactive substances, albeit in a presentation that expressly highlighted the connections between these different forms of inebriety. Within professional and scientific circles in the inebriety field at this time, this was quite a common pattern of framing the concept. For example, Campbell’s American counterpart, T.D. Crothers, Secretary of the American Association for the Study of Inebriety, noted in 1904 that ‘nearly all asylums for the insane [...] have inebriate wards where persons suffering from drink and drug neuroses are treated’.⁹¹ Yet, during this decade, it was also still common for alcohol to be described as a drug⁹² and, equally, for discussions of drugs to centre on their use as medicines, including in debates about the value of various drugs for the treatment of alcoholism and habitual drunkenness.⁹³ Even where the two were clearly distinguished, there was considerable variation in what came under the umbrella of the drug concept, with tea and coffee featuring with a regularity that is perhaps surprising to twenty-first-century eyes.⁹⁴ What Bancroft describes as the ‘modern mythic structure of the drug problem’ was clearly not yet fully formed at this point.⁹⁵

One of the tensions that is apparent in these halting steps towards decoupling was the balance between recognizing the similarities between substances – as underlined by the capaciousness of the Anglo-American⁹⁶ inebriety concept – and attempting to identify differences significant enough to justify differential responses. One approach to this was to focus on describing the different *effects* of substances, whilst acknowledging their habit-forming potential might be similar. A good example here was a policy statement issued in 1906 by the Lunacy Subcommittee of the British Medical Association which referred to ‘intoxicating liquor’, contrasted with ‘stimulant, sedative or narcotic drugs’.⁹⁷ Along the same lines, Harry Campbell’s

91 T.D. Crothers, ‘The Study of Inebriety in America’ (1904) 1 *Brit. J. of Inebriety* 281.

92 For example, in a paper given by the Deputy Medical Officer at Pentonville prison: W.C. Sullivan, ‘The Causes of Inebriety in the Female, and the Effects of Alcoholism on Racial Degeneration’ (1903) 1 *Brit. J. of Inebriety* 62.

93 R.W. Branthwaite, ‘The Second Norman Kerr Memorial Lecture. Inebriety: Its Causation and Control’ (1908) 5 *Brit. J. of Inebriety* 104.

94 For example, G.H.R. Dabbs, ‘A Note on the Inebriate in Making’ (1904) 1 *Brit. J. of Inebriety* 288.

95 A. Bancroft, *Drugs, Intoxication and Society* (2009) 22.

96 A recent historical comparative study has found that whilst the inebriety concept did not apply more widely across Europe during this period, there was, nevertheless, a common focus on ideas of national degeneracy and the weakening of racial ‘stock’: V. Berridge et al., ‘Addiction in Europe, 1860s–1960s: Concepts and Responses in Italy, Poland, Austria, and the United Kingdom’ (2014) 41 *Contemporary Drug Problems* 551.

97 Referred to in ‘Editorial’ (1906) 4 *Brit. J. of Inebriety* 3.

successor as SSI President, Thomas Claye Shaw, described in his 1908 presidential address the expanding remit of the SSI: ‘the scope of the Society has gone beyond the role played by alcohol, and has been extended to the drinking of ether, and the employment of narcotic proprietary medicines and intoxicating drugs.’⁹⁸ However, these fine distinctions between ‘intoxicating’, ‘narcotic’, and other effects were hard to sustain, particularly for those involved in clinical practice and research who were directly observing subjects ‘under the influence’ of these different substances. So how then was the decoupling of drugs from other psychoactives accomplished? More precisely, what were the forces at play which shaped this process?

In her magisterial historical survey of the field,⁹⁹ Virginia Berridge identifies the First World War as a critical moment of change in the positioning of different psychoactive substances. She charts how the disparate set of pre-war concerns about opium and cocaine¹⁰⁰ that formed the ‘problematization’ set out in the previous section, were then discussed at a series of international meetings between 1909 and 1912. This culminated in the 1912 Opium Convention agreed at the Hague but ‘progress’ then stalled, as there was limited appetite for implementing the Convention, with the principal exception of the United States which enacted the Harrison Narcotics Tax Act in 1914.¹⁰¹ Berridge describes how the outbreak of war then acted as an ‘external shock’ which revived and amplified the pre-war anxieties and accelerated international commitment to a new control system, leading eventually to implementation of the Hague Convention being discussed at the 1919 Paris Peace Conference and included as a requirement for signatories to the Versailles Peace Treaty under Article 295.¹⁰² The League of Nations, set up in 1920 with the principal mission of maintaining world peace, took on responsibility for drug control, with members agreeing under Article 23 of its founding Covenant to entrust it with the ‘general supervision over the execution of agreements with regard to [...] the traffic in opium and other dangerous drugs’.¹⁰³

This idea of war as an ‘external shock’ or as an engine for change in society is, of course, a familiar notion,¹⁰⁴ captured nearly 200 years ago by

98 T. Claye Shaw, ‘The Scientific Study of Inebriety’ (1908) 6 *Brit. J. of Inebriety* 2.

99 V. Berridge, *Demons: Our changing attitudes to alcohol, tobacco, & drugs* (2013).

100 Early meetings focused solely on opium and opiates and it was only in 1911 that cocaine was first introduced into the discussions by the British delegation. For an excellent account, see J. Mills, ‘Cocaine and the British Empire: The Drug and the Diplomats at the Hague Opium Conference, 1911–12’ (2014) 42 *J. of Imperial and Commonwealth History* 400.

101 The Harrison Act, which covered opium and coca, used the term ‘drug’ nearly 40 times in its twelve short sections.

102 Berridge, op. cit., n. 99, pp. 117–42.

103 ‘The Covenant of the League of Nations’ (1920) 1 *League of Nations – Official J.* 3.

104 See, for example, the work of British historian Arthur Marwick: A. Marwick, *The Deluge: British Society and the First World War* (1965).

the Prussian military theorist, Carl von Clausewitz in his famous aphorism that ‘war is the continuation of politics by other means’.¹⁰⁵ But this does not fully account for the decoupling process. Specifically, it can only partly answer what is arguably the key question: why did *these* substances become ‘drugs’ and not *those*? Here, we can turn to American historian David Courtwright’s landmark world history of 500 years of psychoactive commerce.¹⁰⁶ Courtwright argues that the different regulatory trajectories that substances have followed have been shaped over the long term by multiple factors and forces.¹⁰⁷ Two of the drivers he identifies – the association of a substance with ‘deviant’ or disliked groups, and perceptions that use of a particular substance may threaten the future of the collective – are central to understanding the decoupling process at the turn of the twentieth century. It was, for example, the association in the 1890s of cocaine use in Southern states in the United States with black people and the ‘lower classes’ which led to the adoption of local city and state-level ‘anti-cocaine’ ordinances that predated the federal Harrison Act of 1914.¹⁰⁸ As Gootenberg argues, the growing momentum behind ‘anti-cocainism’ was ‘specifically spurred on by American racism after 1900, a campaign born with the New Orleans and Atlanta race riots that equated cocaine with uppity Southern blacks and race-mixing drug parties.’¹⁰⁹ Similarly, an earlier city ordinance in San Francisco in 1875 had sought to curb opium smoking because of fears that Chinese men were using opium to lure white women into prostitution.¹¹⁰ In the United Kingdom, the same type of anxieties about Chinese immigrants in the East End of London corrupting white women in opium dens fuelled calls for punitive controls on opium in the first decade of the twentieth century.¹¹¹

The contrast with alcohol is instructive here. It is often forgotten that the very first international agreement to control a psychoactive substance

105 C. von Clausewitz, *On War* (1832).

106 D. Courtwright, *Forces of Habit: Drugs and the Making of the Modern World* (2001).

107 *id.*, pp. 166–73.

108 J. Spillane, *Cocaine: From Medical Marvel to Modern Menace in the United States, 1884–1920* (2000) 94–5; P. Gootenberg, *Andean Cocaine: The Making of a Global Drug* (2008) 191–3. See, also, D. Courtwright, ‘The Rise and Fall and Rise of Cocaine in the United States’ in *Consuming Habits: Drugs in history and anthropology*, eds. J. Goodman, P. Lovejoy, and A. Sherratt (1995) 206.

109 Gootenberg, *id.*, p. 193. An infamous headline in the *New York Times* on 8 February 1914 declared that ‘Negro cocaine “fiends” are a new Southern menace’.

110 E. Leong Way, ‘History of Opiate Use in the Orient and the United States’ (1982) 398 *Annals of the New York Academy of Sciences* 12.

111 V. Berridge, ‘East End opium dens and narcotic use in Britain’ (1978) 4 *London J.* 3. Berridge describes the largely unsuccessful attempts by London County Council to use local by-laws and regulations to curb opium dens in response to these fears, in a similar manner to the varied local anti-cocaine laws that emerged in some American states at this time (see n. 108 above).

actually applied to alcohol rather than opium: the Brussels General Act of 1890 sought to restrict the trade in ‘spirituous liquors’ within colonial Africa, as part of an anti-slavery drive.¹¹² Denise Herd has also shown that in the United States, for a time, the association of drink with racist stereotypes about Southern black men in particular, was as potent as it was for cocaine.¹¹³ However, this link began to wane for alcohol as the process of regulatory decoupling gathered pace, illustrating how central the association was to that process. Put simply, the sustained connection of the consumption of particular psychoactive substances with disliked or feared minority groups was a key element in the final assembly of the drug concept.

The targeting of deviant groups and anxieties about the security of the collective can also be usefully understood in a broader context. In an important body of work in the 1970s, much of which has only been published in English translation in the last few years, Foucault developed a provocative thesis on law, legal development, and power in modern societies.¹¹⁴ Inverting Clausewitz’s military aphorism, he argued that ‘politics is the continuation of war by other means’ and that the new template for power relations that emerged in the second half of the nineteenth century was that of ‘civil war’.¹¹⁵ Combating the ‘enemy within’ the social body became the core governmental task. He suggested further that law takes a central constitutive role within this social grid of power relations, a point developed more fully in recent work by Thornhill.¹¹⁶ Foucault identified a new form of ‘social defence law’ in which elements of both criminal and civil law were transformed into technologies for managing the population. Anxieties about racial purity and national degeneracy¹¹⁷ featured

112 L. Pan, *Alcohol in Colonial Africa* (1975).

113 D. Herd, ‘The Paradox of Temperance: Blacks and the Alcohol Question in Nineteenth-Century America’ in *Drinking: Behavior and Belief in Modern History*, eds. S. Barrows and R. Room (1991) 354.

114 For many years, the ‘expulsion of law’ thesis developed by Hunt and Wickham led to a relative neglect of Foucault in law and society scholarship (see M. Valverde, ‘Specters of Foucault in Law and Society Scholarship’ (2010) 6 *Annual Rev. of Law and Social Science* 45). Publication in the last decade of several lectures and lecture series that were previously unknown have made it apparent that throughout the 1970s law was, in fact, a central preoccupation of Foucault’s work and the ‘expulsion’ thesis is no longer tenable (for an incisive critique of the thesis, see C. Gordon, ‘Expelled questions: Foucault, the Left and the Law’ in *Re-reading Foucault: On Law, Power and Rights*, ed. B. Golder (2013) 13). Foucault’s key works on law from this period include: the 1973 Collège de France lecture course, *The Punitive Society*; the 1973 Rio lectures, *Truth and Juridical Forms*; the 1976 Collège de France lecture course, *Society Must Be Defended*; and the 1981 Louvain lectures, *Wrong-Doing, Truth-Telling*.

115 Foucault, id. (1976).

116 C. Thornhill, ‘Legal Revolutions and the Sociology of Law’ (2014) 23 *Social & Legal Studies* 491; Madsen and Thornhill, op. cit., n. 18.

117 D. Pick, *Faces of Degeneration: A European Disorder, c. 1848 – c. 1918* (1993).

strongly within this preoccupation with defending society from internal threats.

This gives us a distinctive perspective for understanding the prominence within the decoupling process of concerns about race and class (and, to a lesser extent, gender¹¹⁸). The creation of the modern drug concept, understood as an invented legal-regulatory construct, is a specific instance of a solution developed to address perceived problems or threats posed by certain deviant social groups. It offers another political technology within the general matrix of civil-war power relations at the turn of the twentieth century. The emergence of this new matrix has been identified within historical sociology as linked to a broader shift in politics and government during this period, often characterized as a transition to ‘welfare liberalism’.¹¹⁹ As that term suggests, this marked the starting point for the later development of welfare states in the middle of the twentieth century¹²⁰ and so has as one of its conditions of possibility the earlier creation of the administrative machinery of the modern state which can be traced as far back as the 1830s.¹²¹ In this sense, the genealogy of the drug concept is deeply connected with modern state formation during the nineteenth century, as societies grappled with the new governmental challenges posed by industrialization.¹²²

The centrality of the idea of ‘social defence’ to the new drug concept is nicely illustrated by a comment made in the *New York Times* in 1919 by Royal Copeland,¹²³ then President of the Board of Health for New York City and later a Senator: ‘In the underworld of New York you will find 10,000 drug addicts, and every crime of violence committed you may know has been perpetrated by one of them.’ ‘Drugs’, or more precisely the people who used them, were now seen as the ‘enemy within’, requiring strict regulatory

118 On gender, see M. Kohn, *Dope Girls: The Birth of the British Drug Underground* (1992); T. Seddon, ‘Women, harm reduction and history: Gender perspectives on the emergence of the “British System” of drug control’ (2008) 19 *International J. of Drug Policy* 99.

119 D. Garland, *Punishment and Welfare: A History of Penal Strategies* (1985).

120 D. Garland, ‘The Welfare State: A Fundamental Dimension of Modern Government’ (2014) 55 *European J. of Sociology* 327.

121 The classic historical account of this is O. MacDonagh, ‘The nineteenth-century revolution in government: a reappraisal’ (1958) 1 *Historical J.* 52. The argument that there is a connection between this growth of governmental capacity in the early Victorian period and the later establishment of collectivist welfare states in the twentieth century was first made in D. Roberts, *Victorian Origins of the Welfare State* (1960).

122 For a theoretical elaboration of how Foucauldian genealogy, despite its usual characterization as avoiding state theory, can in fact be deployed to develop deeper and richer accounts of state formation, see B. Jessop, ‘From micro-powers to governmentality: Foucault’s work on statehood, state formation, statecraft and state power’ (2007) 26 *Political Geography* 34.

123 *New York Times*, 31 March 1919, 8, col. 3.

control, with the drug concept a ‘menacing shibboleth [created] by means of the law’.¹²⁴ Speaking in the House of Commons debate on the 10 June 1920 on the Dangerous Drugs Bill which would create that ‘shibboleth’ in the United Kingdom, Dr Donald Murray, MP for the Western Isles, expressed a similar sentiment to Copeland, explicitly linking this new social threat to the development of a modern, industrialized, and increasingly urban society:

The drug habit is a matter that is well worth the attention of the Government, and I am glad they are beginning to take notice of this great evil in the social structure of our country. It is not only a great but a growing evil, and it seems to be growing *pari passu* with certain types of civilisation. We have not much of it in our country districts. As a rule these habits are learned, developed, and practised rather in the towns, especially in the bigger towns, amongst certain sections of the population, although it is not confined to any one section.

This underlines the point that the decoupling process and the invention of the drug concept represented one strand within a multi-faceted set of processes of state formation during what was a period of significant social change. It also illustrates the centrality of law and regulation to these ‘complex and contingent problems of political economy and statecraft’.¹²⁵ Murray, after all, uttered these words as a lawmaker in a legislative chamber of government, participating in the creation of a new regulatory concept.

Why, though, were alcohol and tobacco left within separate regulatory systems? As several historians have observed, one fundamental difference for alcohol was that the industry’s ‘size and fiscal importance in the western nations that dominated the world’s economic and diplomatic affairs’ meant it was never seriously in line to be brought within an international control system.¹²⁶ As Room suggests, the cultural embeddedness of alcohol in many key western countries eventually translated into what he terms a ‘generational revolt’ amongst young people against alcohol temperance from the late 1920s, so that any generalized demonization of drink would become almost impossible.¹²⁷ For tobacco, in a similar way, during exactly this period when a selection of substances were being brought under the drug label, this was a time of unprecedented expansion as the industry adopted new technologies for mass manufacture and what Howard Cox calls the ‘modern international cigarette’ was created.¹²⁸ The sheer scale of the industry and the geographical spread of the consumer market protected it from restrictive regulation at an international level.¹²⁹ An interesting comparison can be made with sugar, another agro-industrial consumer com-

124 S. Walton, *Out of It: A Cultural History of Intoxication* (2001) xxi.

125 Jessop, *op. cit.*, n. 122, p. 40.

126 Courtwright, *op. cit.*, n. 106, p. 190.

127 R. Room, ‘The movies and the wetting of America: The media as amplifiers of cultural change’ (1988) 83 *Brit. J. of Addiction* 11.

128 H. Cox, *The Global Cigarette: Origins and Evolution of British American Tobacco, 1880–1945* (2000).

129 Berridge, *op. cit.*, n. 99, pp. 103–8.

modity intertwined at this time with imperial and economic concerns. In 1902, the Brussels Sugar Convention was agreed, which was arguably the first modern multilateral international trade treaty.¹³⁰ Such was the economic importance of sugar to powerful imperial nations, notably Britain, that the purpose of the Convention was to provide a legal platform that would *facilitate* trade, primarily by regulating the structure of pricing. It is, in other words, the other side of the coin from the 1912 Hague Opium Convention which sought to *eliminate* trade. The regulatory decoupling of ‘drugs’ from other commodities was driven, in quite an important sense, by economics.¹³¹

We have seen then in this section how the decoupling process came to be completed by the end of the second decade of the twentieth century, at which point the modern drug concept was fully assembled. Prompted initially by colonial and domestic concerns about opium (and later cocaine), then reactivated by the ‘external shock’ of the First World War, and eventually taking on a distinctive form as a regulatory construct within a more general matrix of power relations, it is evident that this stage of our genealogy has multiple branches. We see good evidence here for an approach to genealogy that seeks to chart a ‘complex course of descent’ rather than a linear evolutionary process of development.¹³²

CONCLUSIONS

On 17 June 1971, in a special message to the United States Congress, Richard Nixon famously declared a ‘war on drugs’.¹³³ Often interpreted (and lamented) as the arrival of populist politics into mainstream drug policy, Nixon was in fact unwittingly reaching back to an idea deeply patterned in the genealogy of the drug concept. As we have seen, there was a strong nexus between war and drugs in that formative period a century ago, not only through the impact of the ‘external shock’ of the First World War but also the ways in which the decoupling of ‘drugs’ from alcohol and tobacco was a process shaped by the new matrix of power relations based on the template of civil war. In an important sense, the roots of the modern drug concept are *martial*.

When commentators today deprecate the racialized contours of this ‘war on drugs’, we can also hear the echoes of those earlier debates at the

130 M. Fakhri, *Sugar and the Making of International Trade Law* (2014); M. Fakhri, ‘The institutionalisation of free trade and empire: a study of the 1902 Brussels Convention’ (2014) 2 *London Rev. of International Law* 49.

131 See D. Courtwright, ‘Mr ATOD’s Wild Ride: What Do Alcohol, Tobacco, and Other Drugs Have in Common?’ (2005) 20 *Social History of Alcohol and Drugs* 113–14.

132 Foucault, *op. cit.*, n. 12, p. 81.

133 Nixon in fact referred only to a ‘war on heroin addiction’ but this subsequently developed into the ‘war on drugs’ slogan which persists to the present day.

beginning of the last century about Chinamen and ‘negro cocaine fiends’. From a genealogical perspective, Ira Glasser’s famous polemical claim 15 years ago that the enforcement of America’s drug laws has become the ‘new Jim Crow’ has a razor-sharp critical edge.¹³⁴ Further, as we have seen, not only is the deep history of the drug concept *racialized*, but it was also *colonial* interests that initially prompted Britain, the United States and other countries to begin the first international discussions about the opium trade. There could scarcely be a better illustration of the idea that genealogy concerns itself with the ‘disreputable origins’ and ‘unpalatable functions’ that are usually buried underneath a contemporary veneer of respectability.¹³⁵

Other features of the contemporary drug problem that we take for granted or see as ‘self-evident’ can also be identified as bearing traces of the past. As we have seen, the association of drugs with vice and immorality, for example, has a long heritage. Similarly, concerns that a drug habit seriously undermines an individual’s capacity to work productively, which have been repeatedly raised in recent years,¹³⁶ go all the way back to the ‘problem-izing’ turn at the end of the nineteenth century. Even the frequent calls by campaigning and reform groups for drugs to be treated as a ‘health’ rather than a ‘crime’ issue¹³⁷ in fact, and somewhat ironically, echo the debates about accidental poisoning led by the nineteenth-century pioneers of public health which provided the impetus for some of the first controls on opium.

Our genealogy, then, can shine a revealing light on some of the contours of the drug problem today. What, though, of the claim made in the introduction to this article that there is some practical significance to this genealogy for contemporary debates about drug law reform? As we have seen, the modern drug concept is, in a fundamental sense, a legal one which serves a distinctive function as a regulatory category. After 1920, the principal characteristic that substances under the ‘drug’ label have shared in common is the way they are regulated, rather than any intrinsic chemical or other properties. In this way, we can see that the drug concept is a regulatory construct that is aligned with a specific regulatory regime. It follows that a truly fundamental critique of that regime, one which can enable us to move beyond it, has to step outside the system of thought and the conceptual apparatus to which it is tied. Put simply, if we wish to create a new regulatory regime for the psychoactive substances we currently term ‘drugs’,

134 I. Glasser, ‘America’s Drug Laws: The New Jim Crow’ (2000) 63 *Albany Law Rev.* 703.

135 The phrases are from the introduction to Nikolas Rose’s PhD thesis, quoted in G. Kendall and G. Wickham, *Using Foucault’s Methods* (1999) 29.

136 See, for example, a study commissioned by the Department for Work and Pensions: L. Bauld, G. Hay, J. McKell, and C. Carroll, *Problem drug users’ experiences of employment and the benefit system* (2010).

137 The *Support. Don’t Punish* global advocacy campaign is a recent and high-profile example of this, at <<http://www.supportdontpunish.org>>.

we need first of all to construct them differently as regulatory objects.¹³⁸ Calls to decriminalize or legalize drugs may be seductive from certain political perspectives, and indeed may have some important policy purchase in the short run,¹³⁹ but do not form the full or complete basis for a sustainable means of escaping the prohibition paradigm. Instead, as the genealogy presented here helps us to see, it will ultimately be necessary to do the painstaking work of what Schwitters and colleagues¹⁴⁰ describe as ‘market definition’, that is, making explicit policy choices about how the markets in different psychoactive substances should be constituted and organized through specific legal and regulatory regimes.¹⁴¹

History tells us that when taking a long view, drug prohibition will probably turn out to be a ‘transitory period in human affairs’.¹⁴² Genealogy tells us that the modern notion of a drug is itself deeply embedded in the prohibition paradigm and implicated in its continuing survival. This is a theoretical lesson but one of profound practical significance. It will only be when the ‘false self-evidence’¹⁴³ of the drug concept is shaken hard enough that it falls apart, that we will finally see the arbitrary boundaries between intoxicants drawn a century ago disappear like markings ‘drawn in sand at the edge of the sea’.¹⁴⁴

- 138 For an interesting discussion of the connection between the ways that ‘regulatory objects’ are constructed and specific regulatory regimes, see E. Fisher, ‘Chemicals as Regulatory Objects’ (2014) 23 *Rev. of European, Comparative & International Environmental Law* 163.
- 139 Within Europe, the best known example of decriminalization is Portugal (see A. Stevens and C. Hughes, ‘What can we learn from the Portuguese decriminalization of illicit drugs?’ (2010) 50 *Brit. J. of Criminology* 999). In the Americas, there have been some recent developments in relation to cannabis legalization (for a comprehensive analytical overview, see J. Caulkins et al., *Considering Marijuana Legalization: Insights for Vermont and Other Jurisdictions* (2015)).
- 140 B. Schwitters et al., ‘The European regulation of food supplements and food fortification’ (2007) 19 *Environmental Law & Management* 19.
- 141 The theoretical basis for this point is the idea that regulation is constitutive of the markets it seeks to control and that the notion of markets as ‘naturally occurring’ phenomena prior to, or independent from, regulation is false: see C. Shearing, ‘A Constitutive Conception of Regulation’ in *Business Regulation and Australia’s Future*, eds. P. Grabosky and J. Braithwaite (1993) 67. In this sense, ‘prohibition’ is itself a type of regulatory regime which constitutes the market in a particular form. Hence, there is no escape from the requirement for policy makers to decide how we wish to organize different markets.
- 142 P. Dunleavy, ‘The State’ in *A Companion to Contemporary Political Philosophy. Volume Two*, eds. R. Goodin, P. Pettit, and T. Pogge (2007, 2nd edn.) 802.
- 143 Foucault, op. cit., n. 26, p. 75.
- 144 M. Foucault, *The Order of Things* (1970/2002) 422.