

9-30-2011

The Politics Of Exclusion In California's Marijuana Reform Movement

Brooke Mascagni

Follow this and additional works at: <https://digitalcommons.law.udc.edu/udclr>



Part of the [Food and Drug Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Brooke Mascagni, *The Politics Of Exclusion In California's Marijuana Reform Movement*, 15 U.D.C. L. Rev. 33 (2011).

Available at: <https://digitalcommons.law.udc.edu/udclr/vol15/iss1/3>

This Article is brought to you for free and open access by Digital Commons @ UDC Law. It has been accepted for inclusion in University of the District of Columbia Law Review by an authorized editor of Digital Commons @ UDC Law.

THE POLITICS OF EXCLUSION IN CALIFORNIA'S MARIJUANA REFORM MOVEMENT

Brooke Mascagni*

INTRODUCTION

After the 2008 national elections, drug reform activists capitalized on the election of President Barack Obama and the Democratic Party's Congressional take-over to make marijuana legalization a national issue. By the November 2010 mid-term elections, Californians had voted on Proposition 19 ("Prop 19"), the state initiative to tax and regulate marijuana. If Prop 19 had passed, it would have made the personal consumption of marijuana legal for all adults twenty-one years and older. The initiative also would have granted local governments within California the power to regulate and tax the commercial production and sale of cannabis.

Despite its failure to win enough votes, the Prop 19 initiative arguably marked the first substantive statewide attempt to legalize cannabis since the federal government began its regulation in 1937. In fact, California's ballot measure garnered international press coverage as a symbol of the heated debate over marijuana consumption. Leading up to the 2010 elections, California State Director of the Drug Policy Alliance ("DPA"), Stephen Gutwillig, said that "the whole world was watching" the U.S.'s most populous state challenge the federal government's War on Drugs.¹ Because Californian public policy often influences political action in other U.S. states, the Prop 19 campaign and its opposition is an ideal case study for understanding the larger movement on U.S. marijuana policy reform.

On January 29, 2011, I attended *Marijuana Reform: Next Steps*, a post-election conference sponsored by the California National Organization for Reform of Marijuana Laws ("CaNORML") in downtown Berkeley. The conference was held approximately three months after the defeat of Prop 19, and leaders of CaNORML organized the Berkeley conference to bring marijuana reform activists together, hoping to build a strong coalition for the 2012 elections. While panelists represented various interests, including several members from the medical marijuana industry, Black and Latino racial justice organizations were glaringly underrepresented. In fact, even though the California chapters of the National Association for the Advancement of Colored People ("NAACP") and the

* Doctoral candidate, Political Science and Feminist Studies, University of California, Santa Barbara.

¹ Stephen Gutwillig, California State Director, Drug Policy Alliance, Panel Presentation at CaNORML conference in Berkeley, CA (Jan. 29, 2011).

League of the United Latin American Citizens (“LULAC”) officially endorsed Prop 19, they were curiously not present at the conference.

Deborah Peterson Small, founder of Break the Chains,² was one exception. In a conference that ran all day, Small was the only panelist speaking directly toward the issue of racial justice.³ While many speakers emphasized the importance of protecting medical marijuana patients, as well as the libertarian notion that smoking marijuana is an inherent right, Small’s presentation spoke to the greater problem of the contemporary legalization movement: organizers are sidelining the interests of poor people of color. She told a story of “crabs in a barrel” to subtly critique the self-interest present in the conference room. Because crabs are instinctively competitive and fight one another to get to the top, fishermen can keep their catch in a barrel without a lid. Crabs cannot see the fisherman who put them in this precarious position; rather, they can only recognize the crab ahead of them that is keeping them down. Small suggested movement activists abandon this “crab think” and use their privileges to advance the rights of all who are disenfranchised by the U.S. criminal justice system, particularly Black and Latino men.

In this paper, I present a theoretical political evaluation on what merits beneficial social movement activity that works toward ending the unjust War on Drugs. “Framing” generally refers to movement actors’ strategic efforts to create meaning relevant to a social movement’s goals.⁴ Studying the discursive strategies and framing processes of the Prop 19 campaign helps explain the dynamics of contemporary social movements on divisive social issues like drug use. Multiple messages were employed to support the legalization of marijuana in the 2010 November elections, yet a unifying strategy did not seem to emerge during the campaign. On the opposing side, I have observed elites in the medical marijuana community draw a line between consuming marijuana *medicinally* versus *recreationally*, arguing that protecting patients’ access to medicinal marijuana should be secured before full legalization. I interpret this discursive practice as prioritizing

2 *Background*, NEW DRUG POLICY (Mar. 10, 2011), <http://www.breakchains.org/background>. Break the Chains is a national organization “committed to educating and empowering communities of color to reverse the negative effects of punitive drug policies.”

3 While representatives from the Drug Policy Alliance (“DPA”) and Law Enforcement Against Prohibition (“LEAP”) were in attendance – two national organizations devoted to ending the War on Drugs – little time was allotted for the discussion of racial justice in their panel discussions. In fact, in his presentation, Nate Bradley (of LEAP) suggested that arguments for legalization based on racial justice are not as salient with members of law enforcement as the issues of safety, e.g. drug-free schools, and resource allocation. He argued that many cops would rather devote time and resources to “locking up really bad guys” than petty marijuana offenders, suggesting that police officers will be more willing to support marijuana legalization if organizers appeal to these beliefs.

4 David A. Snow, *Framing Processes, Ideologies, and Discursive Fields*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 380 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004).

the interests of an exclusive group of *patients* while neglecting the rights of the rest of the population. In this position paper, I argue that narrowly centering the legalization debate around the patients has marginalized the greater goals of racial justice and ending the prosecution of nonviolent drug offenders. The larger purpose of this essay is to advise anti-prohibition social activists across the nation of the ideological and moral drawbacks of failing to prioritize goals of social justice when writing future state initiatives.

In the first part of this essay, I outline the framing processes used in the Prop 19 campaign, demonstrating the competing interests involved in the movement for marijuana reform. In what movement organizers are now calling “the post-Prop 19 era,”⁵ many leaders in the pro-legalization camp, particularly CaNORML, have seemingly prioritized garnering support from members of the medical marijuana community for the 2012 elections. In the second section, I present a critical feminist analysis that demonstrates how the patient rhetoric operates in the contemporary marijuana reform debates. I conclude by suggesting that white privilege and the social construction of the patient through a colorblind lens diverts attention away from more inclusive goals of racial justice.

FRAMING PROCESSES

I have been following the California movement to legalize marijuana since the spring of 2010, traveling all over the state to observe movement activity, attend conferences, and conduct interviews. Key informants have included medical marijuana dispensary owners, members of law enforcement, and leaders of social movement organizations such as the DPA, NORML, Law Enforcement Against Prohibition (“LEAP”), Americans for Safe Access (“ASA”), Students for Sensible Drug Policy (“SSDP”), Marijuana Policy Project (“MPP”), and the Prop 19 campaign. In my research, I have observed social movement actors engage in multiple, competing discourses in framing their advocacy of/opposition to legalization. Narratives may better encapsulate the complexities of culture than print media, suggesting the important ways that stories and rhetorical devices operate in motivating action.⁶ I have relied on personal observations and interviews to guide the research process, recognizing that the discursive strategies employed by elites significantly shape the dynamics of a movement.

The U.S. federal government began regulating marijuana in 1937, and in 1971, President Richard Nixon escalated federal prosecution of marijuana with the declaration of the War on Drugs.⁷ Because the Controlled Substances Act (“CSA”)

5 This is the language used at the CaNORML conference in Berkeley, Cal. (Jan. 29, 2011).

6 Francesca Polletta, “*It was Like a Fever . . .*” *Narrative and Identity in Social Protest*, 45 *SOC. PROBS.* 137 (1998).

7 For a history of state and federal responses to medical marijuana, see Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?* 151 *U. PENN. L. REV.* 1787 (2003).

secures the legal status of marijuana as a dangerous drug, social movement organizers have experienced difficulties challenging drug laws through legislatures.⁸ As a result, marijuana reform activists have fought through the voter proposition process,⁹ likely the most effective way to challenge contemporary drug laws. Marijuana legalization in California has made its way into national policy debates through state initiatives and direct democracy campaigns.¹⁰

In the language of the social movement literature, a collective identity refers to activists' and followers' collective sense of "we."¹¹ Research on coalition building underscores the significance of collective identity, suggesting that successful movement mobilization depends on unifying groups "that had previously embraced a wide range of issues, around a clear single demand."¹² Multiple messages were employed to support the legalization of marijuana in the 2010 November elections, yet a unifying collective identity did not seem to emerge during the campaign. Richard Lee¹³ and the Prop 19 team were "constrained by a constantly shifting field of actual and potential coalitions,"¹⁴ because some marijuana reform activists split on their support of Lee. When he first circulated the idea of a ballot initiative, several social movement organizations hesitated to support the campaign, citing the midterm election year as bad timing.¹⁵ Once Lee and his team were able to gather enough signatures to place the measure on the ballot, organizations such as the DPA and MPP officially endorsed the initiative.¹⁶ Other organizations, such as the medical marijuana advocacy group, ASA, declined to endorse full legalization, citing patients' access to their medicine as the top priority.¹⁷

Medical marijuana reform activist, Dennis Peron, who played a meaningful role in the movement to legalize medical marijuana in 1996, negatively responded to Lee's initiative, arguing that "all the use of marijuana is medical," and anyone

8 *Id.* at 1793.

9 *Id.*

10 Stephen Gutwillig, California State Director, Drug Policy Alliance, Panel Presentation at CaNORML conference in Berkeley, CA (Jan. 29, 2011).

11 Robert Futrell & Pete Simi, *Free Spaces, Collective Identity, and the Persistence of U.S. White Power Activism*, 51 *SOC. PROBS.* 16, 16 (2004).

12 David Meyer & Catherine Corrigan-Brown, *Coalitions and Political Context: U.S. Movements Against Wars in Iraq*, 10 *MOBILIZATION* 327, 337 (2005).

13 Lee is founder of Oaksterdam University, the first college in the nation devoted to marijuana cultivation and education. Lee donated \$1 million of his personal finances to spearhead the Prop 19 campaign.

14 Meyer & Corrigan-Brown, *supra* note 12, at 338.

15 Conversation with Lindsay Robinson, Development Officer, Marijuana Policy Project, International Hemp and Cannabis Exposition, Cow Palace, San Francisco, CA (Sept. 25, 2010).

16 *Id.*

17 In addition to the ASA, MediCann, and Project CBD, among others, maintained similar positions.

who wants to use cannabis should obtain a recommendation from a doctor.¹⁸ To avert the popular prohibitionist claim that medical marijuana is a way to hide behind the law, Prop 19 strategists employed arguments other than the “marijuana is medicine” frame in their campaign for full legalization. In the 1970s, a community of people who supported the consumption of marijuana often worked on the same side. But in California’s 1996 medical marijuana campaign, activists were divided between social movement organizations that are primarily devoted to medical marijuana and others that promote a complete overhaul of national drug policy. In the modern marijuana reform debate in California, this group remains split: some push for full legalization, whereas others argue that marijuana should be legal only for medicinal purposes.

Multiple messages were utilized to support Prop 19 in the 2010 November elections, which include:¹⁹

- “Money-saving” frame: saving California taxpayers hundreds of millions of dollars a year by diverting attention away from marijuana offenses, allowing law enforcement to focus on serious, violent crimes
- “Money-making” frame: generating billions in state revenue through the taxation of cannabis
- “Violence” frame: reducing violence generated through the black market
- “Rights” frame: using marijuana is an individual right and should be regulated like alcohol
- “Treatment” frame: ending the incarceration of nonviolent drug offenders and offering treatment programs instead of jail or prison

Notably this list revolves around language involving the economy or individual rights, which is not unexpected considering the contemporary economic and political climate. The prospect of digging California out of a budget deficit through the taxation and regulation of marijuana is an appealing proposition for a wide group of voters, and a Public Policy Institute of California (“PPIC”) post-election survey found that the most common reason for supporting Prop 19 was that it would allow for marijuana to be taxed.²⁰

Although racial justice is not explicitly stated as a reason to support legalization by the Prop 19 campaign, ending the incarceration of nonviolent drug offenders is a goal officially endorsed by the proponents of the initiative. Funded by

18 Hadley Robinson, *Local Marijuana Advocate Says No on Prop 19*, S.F. CHRON., Sept. 22, 2010, available at http://www.sfgate.com/cgi-bin/blogs/inthemission/detail?entry_id=72933.

19 These are some of the arguments made by the Prop 19 campaign, DPA, LEAP, and SSDP, among others.

20 Mark Baldassare et al., *PPIC Statewide Survey: Californians and their Government*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Dec. 2010), available at http://www.ppic.org/content/pubs/survey/S_1210 MBS.pdf.

the DPA, the California NAACP, and the William C. Velasquez Institute, the 2010 Marijuana Arrest Research Project concludes that young Black and Latino males are disproportionately targeted for marijuana offenses in California, despite evidence that whites consume marijuana at higher rates than people of color.²¹ Levine, the primary author of the reports, has repeatedly argued that it is a fallacy to assume that marijuana offenses are only a tiny fraction of the injustices suffered in the U.S. War on Drugs.²² The Sentencing Project reports that almost 80% of the increase in drug arrests in the 1990s can be attributed to marijuana possession.²³ Low-level marijuana offenses may have serious consequences: once an individual is placed in the criminal justice system's database, he becomes what legal scholar Michelle Alexander calls a "permanent second-class citizen."²⁴ Possession of a very small amount of marijuana may disqualify persons from government assistance programs such as public housing and student loans.²⁵

Likewise, the DPA reports that youth who have been placed under the supervision of the U.S. criminal justice system have a far greater chance of future imprisonment.²⁶ Civil liberties groups such as the California chapter of the NAACP have cited arguments such as these in their endorsement of Prop 19; therefore, in theory, racial justice frames could mobilize voters, particularly people of color. According to the PPIC post-election survey, however, racial justice was generally

21 Harry G. Levine et al., *Arresting Blacks for Marijuana in California: Possession Arrests, 2006-08*, prepared by THE MARIJUANA ARREST RESEARCH PROJECT FOR THE DRUG POLICY ALLIANCE AND THE CALIFORNIA NAACP (Oct. 2010), available at [http://www.drugpolicy.org/sites/default/files/Arresting Blacks.pdf](http://www.drugpolicy.org/sites/default/files/Arresting%20Blacks.pdf); Harry G. Levine et al., *Arresting Latinos for Marijuana in California: Possession Arrests in 33 Cities, 2006-08*, prepared by THE MARIJUANA ARREST RESEARCH PROJECT FOR THE DRUG POLICY ALLIANCE AND THE WILLIAM C. VELASQUEZ INSTITUTE (Oct. 2010), available at http://www.drugpolicy.org/sites/default/files/ArrestingLatinos_English.pdf.

22 Interview by Russ Belville with Dr. Harry Levine, *NORML's Daily Audio Stash* (Mar. 7, 2011), available at <http://www.stash.norml.org/stash-for-tue-mar-8-2011>.

23 Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, THE SENTENCING PROJECT (May 2005), available at http://www.sentencingproject.org/doc/publications/dp_waronmarijuana.pdf.

24 MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE ERA OF COLORBLINDNESS* 13 (2010).

25 Notably, with the passage of Cal. S.B. 1449 (2010) the possession of 28.5 grams of marijuana or less became an infraction, rather than a misdemeanor. However, Levine points out that with this new classification, an infraction is still a criminal offense and may appear in a criminal database. Levine, *supra* note 21. Routine police stops in poor Black and Latino neighborhoods are not likely to change with this bill; after all, individuals without proper identification possessing small amounts of marijuana may be swept up, taken to a police station, and in the process, cited for "disorderly conduct" or "resisting arrest" (both criminal misdemeanors). *Id.* Further, failing to pay marijuana infractions remains a misdemeanor with the new legislation; because poor youth of color are less likely to be able to pay on time (or at all) their greater chance of entering the criminal justice system likely remains intact. *See id.*

26 Stephen Gutwillig, *The Racism of Marijuana Prohibition*, L.A. TIMES, Sept. 7, 2009, available at <http://www.latimes.com/news/opinion/opinionla-oew-gutwillig7-2009sep07,0,1308672.story>.

not a reason supplied for either supporting or opposing the proposition.²⁷ Indeed, I have observed that framing Prop 19 as a movement to end the mass incarceration of people of color was generally sidelined for the aforementioned goals concerning the budget and individual rights, as well as some of the oppositional discourse discussed below.

In my initial stages of research, I predicted that in the months leading up to California's 2010 election, the Religious Right would employ the strategic use of fear – in the *Reefer Madness*²⁸ tradition – through various media outlets. In California's 2008 Proposition 8 campaign, the anti-gay marriage voter measure, the Mormon Church and other Religious Right organizations bombarded the airwaves with messages of fear, suggesting scenarios such as gay teachers pushing an immoral “gay lifestyle” on children.²⁹ During the Prop 19 campaign, I presumed that prohibitionists would air War on Drugs commercials like the ones I grew up with: suggesting that if my brain was an egg, frying an egg in a skillet was equivalent to my brain on drugs. This expression of fear to mobilize people reveals the power of emotion in the political art of persuasion.³⁰ Yet to my surprise, influential conservatives such as Glenn Beck and Sarah Palin have endorsed the legalization of marijuana during the Prop 19 campaign, arguing that prosecuting petty marijuana offenses is a waste of taxpayers' money.³¹

Instead, some of the greatest opposition to Prop 19 came from an unlikely coalition: local, state, and federal law enforcement, California Big Alcohol, public health and educational programs, and medical marijuana advocates. Public Safety First, which sponsored the “No on 19” campaign, received top donations from the California Police Chief's Association (\$30,000), California Narcotics Officers Association (\$20,500) and the California Beer and Beverages Distributors (\$10,000).³² Moral opposition groups that advocate strict prohibition, as well as both Republican and Democratic elected officials, also endorsed “No.”³³ The oppositional campaign continually shifted its discursive strategies leading up to the

27 Baldassare, *supra* note 20.

28 *Reefer Madness* (1938) is an American propaganda film warning of the (unlikely) detrimental consequences that can result from marijuana consumption, including manslaughter, rape, suicide, and insanity. In 1971, NORML reintroduced the film to the public, and its laughable and absurd claims have made it a classic amongst anti-prohibitionists.

29 MORMON POLITICAL ACTIONS, http://www.mormonsfor8.com/?page_id=78 (last visited Mar. 10, 2011).

30 Jeff Goodwin et al., *Emotional Dimensions of Social Movements*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 413 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004).

31 *Yes on Prop 19, Control and Tax Cannabis*, COALITION FOR CANNABIS REFORM POLICY, <http://www.yeson19.com/node/type/video?page=1> (last visited Mar. 10, 2011).

32 Paul Armentano, *Alcohol Lobby Now Openly Spending Against California's Prop 19, in Alliance with Police Industrial Complex*, TEXAS NORML (Sept. 19, 2010), <http://www.texasnorml.org/?p=731>.

33 *Id.*

election,³⁴ initially emphasizing Prop 19's risk to public safety, but later settling on phrasing the initiative as a "jumbled, legal nightmare!"³⁵ Still, very little money was spent by the opposition, and the ability of the movement to shift the public's opinion on drug legalization is unclear.

Medical marijuana activists also warned of Prop 19's poor wording, hinting at the deleterious consequences the initiative would have for patients' safe access to their medicine.³⁶ Even though the passage of California's Prop 215 (1996) granted patients access to medicinal marijuana, marijuana dispensaries still experience federal raids by the Drug Enforcement Agency ("DEA") and opposition from local municipalities.³⁷ Consequently, some medical marijuana activists have utilized an emotional opportunity structure of fear similar to the strategies used by Religious conservatives in the anti-gay marriage campaign.

To illustrate, at the International Cannabis and Hemp Exposition³⁸ held in San Francisco approximately one month prior to the November elections, I witnessed raucous protests from opposition during the panel designed to provide a forum for a Prop 19 debate. The outcries from these medical marijuana advocates were so loud and unprofessional that the panel's moderator had a difficult time maintaining control.³⁹ As a result of this disruption, most of the time allotted to the panel debate was centered on protecting patients' safe access. Even though representatives from major medical marijuana advocacy groups such as ASA⁴⁰ did not take part in this heckling, I suspect their reluctance to officially endorse Prop 19

34 Interview with James Rigdon, Yes on 19 Field Director, Campaign Headquarters, Oakland, CA (Oct. 7, 2010).

35 No ON Prop 19, <http://www.noonproposition19.com> (last visited Mar. 11, 2011).

36 I have observed this language from several medical marijuana movement leaders, including Steph Sherer, Executive Director of ASA. Founded in 2002 in reaction to federal raids of medical marijuana patients in California, ASA is "the largest national member-based organization of patients, medical professionals, scientists and concerned citizens promoting safe and legal access to cannabis for therapeutic use and research." ASA has over 30,000 active members with chapters in over 40 states, www.safeaccessnow.org.

37 Kreit, *supra* note 7, at 1799.

38 The event was held at Cow Palace in San Francisco, Sept. 25-26, 2010.

39 From my own observations, these protests appeared to be led by Lanette Davies of Crusaders for Patients Rights, who is the co-founder of a medical marijuana dispensary in Sacramento, California, as well as a self-proclaimed "stoner against legalization," Dragonfly de la Luz; see Russ Belville, *Chaos Erupts Over Prop 19 at California Cannabis Expo*, THE NORML STASH BLOG, <http://www.stash.norml.org/chaos-erupts-over-prop-19-at-california-cannabis-expo> (last visited Mar. 10, 2011).

40 The reluctance of organizations like ASA to endorse legalization is congruent with their primary goal, to protect the rights of cannabis patients. See *About Us*, AMERICANS FOR SAFE ACCESS, <http://www.safeaccessnow.org/section.php?id=3> (last visited Mar. 10, 2011). Executive Director Sherer maintains that full legalization and medicinal marijuana are two distinct issues. As an observer of the state-wide movement to legalize cannabis for all adults, I would like to witness organizations like ASA recognize that the consumption of marijuana for medicinal and recreational use are not unrelated issues.

has provided an opening for these fringe medical marijuana groups to capitalize on the patient rhetoric in the legalization debate.

Social movement actors “produce” their collective action through the interaction and negotiation with their environment.⁴¹ The tendency of many medical marijuana organizers to distance their activity from the greater goal of legalization is dependent on differentiating between marijuana consumed “medicinally” and “recreationally.”⁴² Significantly, medical marijuana reform leaders have produced collective action within a shifting U.S. political and cultural environment that is gradually becoming receptive to medical marijuana use. According to the DEA, marijuana is still categorized as a Schedule 1 substance under the federal Controlled Substance Act (“CSA”). A controlled substance classified as Schedule 1 is considered to be the most dangerous and have no medicinal value, and in 2006, the Food and Drug Administration (“FDA”) declared that no scientific studies support the medical use of marijuana.⁴³

Yet at the state and local levels, medical marijuana activists have been successful in convincing the public of the medicinal benefits of cannabis. At the time of this writing, 16 U.S. states, in addition to Washington, D.C., have some form of a medical marijuana program, and activists in other states are working on similar measures for future elections. Numerous criminal justice scholars have written on the discrepancy between the potential medical benefits of marijuana and its Schedule 1 classification under the CSA.⁴⁴ More relevant to my argument is how activists in the medical marijuana community have successfully framed marijuana as medicine. The current political and social climate is more hospitable to the medical classification of marijuana, for a super-majority of Americans support its use for medicinal purposes.⁴⁵

Critically analyzing the discursive strategy of framing marijuana medicinally versus recreationally is important because I believe it has significant implications for future legalization initiatives, particularly in the November 2012 elections. The PPIC post-election survey reports that 7% of respondents who voted against Prop 19 said that “the initiative was poorly written.”⁴⁶ This is a curious statistic because on the very same poll, 11% of respondents who voted “no” support the issue of marijuana legalization overall, but not specifically Prop 19.⁴⁷ The pro-

41 Alberto Melucci, *The Process of Collective Identity*, in *SOCIAL MOVEMENTS AND CULTURE* 43 (Hank Johnston & Bert Klandermans eds., 1995).

42 AMERICANS FOR SAFE ACCESS, *supra* note 40.

43 *Marijuana has No Medical Use, FDA Says*, SEATTLE TIMES, April 22, 2006, available at http://www.seattletimes.nwsourc.com/html/nationworld/2002946072_pot22.html.

44 King & Mauer, *supra* note 23.

45 Gary Langer, *High Support for Medical Marijuana*, ABC NEWS, January 18, 2010, available at <http://www.abcnews.go.com/PollingUnit/Politics/medical-marijuana-abc-news-poll-analysis/story?id=9586503>.

46 Baldassare, *supra* note 20, at 9.

47 *Id.*

position only lost by a margin of 7%, which may suggest that voters who opposed Prop 19, yet endorse some form of legalization, may be swayed in future elections. Moreover, respondents who voted against Prop 19 because they believed the initiative was poorly written may have been influenced by the claim that the initiative would harm patients' access. Indeed, in post-election conferences sponsored by organizations such as the California chapter of NORML, DPA, and ASA, I have observed elite discourse centered on "protecting the patients" in future initiatives for legalization.⁴⁸ In the following section, I will explain how the rhetorical device of securing patients' rights has succeeded in the California marijuana legalization debate, as well as why racial justice activists need to challenge it.

MOVING FROM "PROTECTING THE PATIENTS" TO RACIAL JUSTICE

Fifteen years ago, with the support of medical marijuana activists from all over the state, California voters passed Prop 215, the Compassionate Use Act of 1996. By evoking compassion for patients, particularly very sick individuals diagnosed with AIDS and cancer, medical marijuana organizers successfully convinced voters of the many ways that cannabis can help treat the critically ill. There is no doubt in my mind of the validity of these claims; I have read numerous scientific studies, attended conferences, and heard testimonies from both patients and doctors on the valuable medicinal uses of marijuana.

In the contemporary California debate to legalize cannabis for all adults, proponents of medical marijuana have consistently relied on the same rhetorical strategies that were used to pass the Compassionate Use Act of 1996. By drawing attention away from other issues, a frame may indicate what is not important to social movement organizers.⁴⁹ In forums held closely after the Prop 19 contest, I have observed marijuana reform activists neglect the overlapping frames of racial justice and ending the criminalization of nonviolent drug offenders. Discourses privileging the rights of the patients over goals of racial justice may have negative consequences for building coalitions across racial and ethnic lines in future campaigns.

The very category of patients has been constructed in the social imaginary as an exclusive group of people, usually older adults with critical illnesses. I in no way wish to challenge the many individuals who fit this description and rightfully

48 A subsequent *Marijuana Reform: Next Steps for California* conference was held on Mar. 19, 2010 at the Ricardo Montalban Theatre in Hollywood, sponsored by multiple organizations, such as the DPA, MPP, CaNORML, and ASA. Notably, the DPA helped organized this conference, which included a panel on "expanding the state-wide reform coalition." Antonio Gonzalez, of the League of Latino Voters, sat on this panel, and greater attention was devoted to race/ethnicity. Nonetheless, securing patients' access to medical marijuana remained a dominant topic of the day.

49 Hank Johnston, *Verification and Proof in Frame and Discourse Analysis*, in *METHODS OF SOCIAL MOVEMENT RESEARCH* 64 (Bert Klandermans & Suzanne Staggenborg eds., 2002).

deserve safe and affordable access to their medicine. Due to the nature of their illnesses and conditions, posing an argument that critically ill patients are somehow privileged seems counterintuitive. Yet in the state of California, acquiring a doctor's recommendation for medicinal marijuana simply is not that cumbersome. There are innumerable conditions that can qualify legal access to medicinal marijuana, ranging from AIDS and cancer to sleep trouble and joint pain. Still, medical marijuana organizations perpetuate the illusion that patients are a specific category of people with terminal medical conditions that deserve the public's (and policymakers') pity. For example, an ASA email sent out to members on April 21, 2011 called on supporters to urge President Obama to end federal interference with medical marijuana dispensaries, and to "legitimize medical cannabis for the *sick and dying* across the country."⁵⁰ Drawing what I consider an artificial line between marijuana use for medicinal and recreational purposes is more of a political strategy than a concern for public health.

In her panel presentation at the CaNORML conference in Berkeley, Steph Sherer of the ASA cautioned the legalization campaign to not "piggyback" on the medical marijuana community's success.⁵¹ Fearful that full legalization will bring more intrusion from the federal government, Sherer has been a strong proponent of treating medical marijuana and legalization for all adults as two separate issues. The reality, however, is that the line between people who "need" marijuana and who "want" marijuana is blurred.⁵²

By examining this issue through a critical feminist lens, I suggest that the language of protecting the patients is gendered⁵³ and ageist⁵⁴ because the discourse evokes dependence and pity for an exclusive group of people. Feminist theorist Elizabeth Spelman's analysis of Hannah Arendt⁵⁵ and Linda Brent's⁵⁶ perspectives on employing compassion for political purposes demonstrates the drawbacks of using this type of language in the contemporary anti-prohibition movement. In *On Revolution*, Arendt argues that discourses involving compassion – which often turn into pity – reinforce differences between the sufferer (the

50 Posting of Steph Sherer, Americans for Safe Access, info@safeaccessnow.org, to Americans for Safe Access email list (Apr. 21, 2011) (on file with author).

51 Steph Sherer, Executive Director, American's for Safe Access, Panel Presentation at CaNORML Conference in Berkeley, CA (Jan. 29, 2011). I am not suggesting that some of the concerns of Sherer and other medical marijuana organizers are illegitimate. The passage of Prop 19 surely would have enticed federal intrusion, as would any anti-drug prohibition bill that undermines the federal CSA. I do question prioritizing the rights of an exclusive group of people over other nonviolent drug offenders, especially poor people of color.

52 Russ Belville, *NORML's Daily Audio Stash* (Mar. 7, 2011), available at <http://www.stash.norml.org/stash-for-tue-mar-8-2011>.

53 I use "gendered" because it implies stereotypical feminine traits, such as emotional, weak, and dependent.

54 I use "ageist" to draw attention to the ways that this rhetoric is biased toward older adults.

55 Hannah Arendt (1906-75) was a prominent Western political theorist.

56 19th century abolitionist Harriet Jacobs wrote under the pseudonym, Linda Brent.

patient) and the non-sufferer (the voting public).⁵⁷ The creation of differences results in an “insider-outsider” relationship, hindering coalition building and greater movements for social justice.⁵⁸ Arendt therefore argues that rhetorical devices evoking compassion and pity do not belong in political life.⁵⁹ In her analysis of Harriet Jacobs’ memoir of her life as a slave, Spelman argues that the genius of Jacobs’ writing is her ability to provoke outrage at the violent and inhumane behavior of slave owners as opposed to prioritizing compassion for slaves.⁶⁰ Applying Spelman’s logic to the debate on marijuana legalization, ending marijuana prohibition would be better served by evoking outrage at the systematic racism of the U.S. criminal justice system than encouraging compassion (which often turns into pity) for medical marijuana patients. While she opposes pity in public debates, Arendt praises solidarity in political spaces, suggesting that public discourses should focus on our shared humanity rather than on a strategy of pity for the sick.⁶¹ Spelman’s analysis highlights the powerful role that emotion operates in our political lives. The medical marijuana industry’s strategy of privileging patients’ pain over others ultimately divides the greater movement to end the U.S. War on Drugs.

Although most panelists at the CaNORML conference in Berkeley asserted that all of the movement organizers need to work together, many of the same speakers argued to secure patients’ access first. I have observed this type of contradictory speech since I first started following the Prop 19 campaign. It seems that many movement organizers feel compelled to engage with the “compassion for patients” discourse in order to build a coalition for 2012. What troubles me most is that by focusing on the patients, the goal of racial justice gets lost. As Deborah Peterson Small of the racial justice organization Break the Chains argues, prohibition is not about the right to smoke marijuana; it is about social control.⁶² Social critics argue that the U.S. government is not truly engaged in a War on Drugs; it is a war on people, predominantly those persons of color living in inner-cities that have largely been abandoned by the federal government.⁶³ By labeling people of color “criminals,” we have not ended the racial discrimination characterized by Jim Crow; we have “merely redesigned it.”⁶⁴ Following Harriet

57 HANNAH ARENDT, *ON REVOLUTION* (Penguin Classics 2006) (1977); ELIZABETH V. SPELMAN, *FRUITS OF SORROW: FRAMING OUR ATTENTION TO SUFFERING* 65-66 (1997).

58 Philip M. Kayal, ‘*Morals, Medicine, and the AIDS Epidemic*,’ 24 J. RELIGION & HEALTH, 218 (1985).

59 ARENDT, *supra* note 57.

60 LINDA BRENT, *INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF* (1861); SPELMAN, *supra* note 57, at 79.

61 ARENDT, *supra* note 57.

62 Deborah Peterson Small, Founder, Break the Chains, Panel Presentation at CaNORML conference in Berkeley, CA (Jan. 29, 2011).

63 Thomas B. Roberts, *When the Drug War Hits the Fan*, PHI DELTA KAPPAN 58 (1991).

64 ALEXANDER, *supra* note 24, at 2.

Jacobs' example, I would like to see more marijuana reform activists in California provoke outrage at the mass incarceration of nonviolent drug offenders, especially racial and ethnic minorities.

The discussion above demonstrates how the discourse of protecting the patients operates in the contemporary legalization movement. In my concluding section, I suggest that white privilege and the social construction of the patient through a colorblind lens produces a debate that treats racial justice as a secondary issue.

THE POLITICS OF PRIVILEGE

In all of the interviews I have conducted and in all of the conferences I have attended, I have noticed that the patient rhetoric discussed in this paper primarily comes from a place of white privilege. I generally do not hear a person of color prioritize the protection of patients when discussing the legalization of marijuana in California.⁶⁵ Sociologist George Lipsitz argues that public policy and private prejudice work together to benefit white members of society while discriminating against people of color.⁶⁶ More specifically, criminologists suggest that a U.S. prison industrial complex operates "to ensure the subordinate status of a group defined by race."⁶⁷ As a matter of fact, the aforementioned reports from the Marijuana Arrest Research Project support the claim that poor Black and Latinos, particularly young males, are disproportionately targeted by the U.S. criminal justice system, despite lower reported levels of marijuana use.⁶⁸ Despite the plethora of research available, many medical marijuana activists seem disconnected from the issue of racial and ethnic difference. Feminist scholar Peggy McIntosh is well-known for describing the societal benefits of whiteness as an *invisible knapsack of privilege*.⁶⁹ She suggests that many white people do not realize the systematic privileges of what it means to be born white in this country; hence, it is invisible. Drawing on McIntosh, many of the medical marijuana advo-

65 One exception includes a young Black woman known as "Dragonfly De La Luz," who has led an online campaign, "Stoners against legalization." See Dragonfly De La Luz, *Read This Before You Vote*, STONERS AGAINST THE PROP. 19 TAX CANNABIS INITIATIVE, <http://www.votetaxcannabis2010.blogspot.com/p/read-this-before-you-vote-prop-19.html> (last visited Mar. 10, 2011). Several organizers within the marijuana reform movement (both Prop 19 advocates as well as medicinal marijuana organizations) have discredited many of her allegations, and I do not believe devoting space to the content of Dragonfly De La Luz's arguments is of value. What is relevant to this paper, however, is her success in evoking fear and confusion regarding the passage of Prop 19. See Russ Belville, *Tossed Salad: Dragonfly de la Luz Supports Misdemeanors for 80% of California's Cannabis Consumers*, THE NORML STASH BLOG, <http://www.stash.norml.org/tossed-salad-dragonfly-de-la-luz-supports-misdemeanors-for-80-of-californias-cannabis-consumers> (last visited Mar. 10, 2011).

66 GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 106 (rev. & expanded. ed. 2006).

67 ALEXANDER, *supra* note 24, at 13.

68 Levine, *supra* note 21.

69 Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (1988).

cates seem to carry around this invisible knapsack of white privilege, prioritizing the social construction of the patient over the interests of people of color.

Theorizing about white privilege does not suggest that opposition from medical marijuana advocates is completely disingenuous. I trust that many activists from medical marijuana organizations such as the ASA believe that their effort to protect the patients is an altruistic goal. However, some medical marijuana leaders have framed the debate from a privileged position in order to protect a socially constructed group of patients. Indeed, the absence of a national or state registry on medical marijuana patients results in confusion regarding the social location of persons with doctor recommendations. In other words, social identity markers such as race/ethnicity, class, gender, sexuality, age, and ability of persons with medical marijuana access are largely unknown. While the public is led to believe that patients are primarily critically ill older adults, this construction of the patient in the social imaginary lacks a race or ethnicity. Therefore, the goal of protecting patients through a colorblind lens ignores the harmful ways that race and ethnicity produce inequalities in this country.

In the contemporary post-civil rights era, many critical race scholars suggest that white supremacy has been repackaged as colorblind.⁷⁰ This “new racism” allows people who benefit from white privilege to passively ignore racial justice without engaging in blatant discrimination characterized by the days of Jim Crow.⁷¹ Sociologist Michelle Brown argues that the U.S. public’s knowledge of persons targeted by the criminal justice system is socially constructed from a distance.⁷² This “distanced citizen” – who often benefits from white and class privilege – is not likely to prioritize the needs of poor people of color.

Pro-legalization organizers in the state of California will fail to substantively outreach to communities of color if they allow colorblind frames to dominate the anti-prohibition discourse. In fact, both during the Prop 19 campaign as well as in post-election conferences, I have witnessed a lack of considerable outreach to communities of color. Social movement organizations working to end prohibition and the unjust War on Drugs can only succeed by building a strong coalition across racial and ethnic boundaries. How we treat disadvantaged groups in the U.S. is an indication of the democratic breadth of society.⁷³ When writing future anti-prohibition state initiatives, we should direct our attention to fighting for the dignity and rights of all human beings.

70 HOWARD WINANT, *THE NEW POLITICS OF RACE: GLOBALISM, DIFFERENCE, JUSTICE* 5 (2004).

71 *Id.*

72 MICHELLE BROWN, *THE CULTURE OF PUNISHMENT: PRISON, SOCIETY, AND SPECTACLE* 8 (2009).

73 LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 14 (2002).