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BENNETT CAPERS & JEFFREY BELLIN

## Race, the Academy, and *The Constitution of the War on Drugs*

*The Constitution of the War on Drugs*

BY DAVID POZEN

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**ABSTRACT.** The war on drugs is widely viewed as a policy failure. Despite massive government intrusions on personal liberty, drug addiction, overdoses, and drug-related violence have only increased since the war was declared in 1971. David Pozen's new book, *The Constitution of the War on Drugs*, reveals a constitutional failure as well. Pozen chronicles a host of constitutional arguments that American litigants deployed to protect a "right" to use drugs with surprising, if fleeting, success. Pozen asks what might have been, exploring why the courts backtracked and effectively removed the Constitution as a meaningful obstacle to drug prohibitions.

This Review highlights, supplements, and critiques Pozen's important contribution to our understanding of the war on drugs. We begin with a look in the mirror, acknowledging the legal academy's own role in enabling the drug war. Next, we introduce alternate explanations for the judicial passivity that Pozen criticizes. Chief among these is race-making: the drug war helped its proponents shape the evolving meaning of race.

We also challenge Pozen's nuanced explanations for judicial resistance to substantive constitutional challenges. The constitutional terrain where litigants most frequently challenged the drug war was procedural: the Fourth Amendment. And in those battles, the Supreme Court proved to be an eager drug warrior, not an ambivalent conscript. The same pattern repeats itself throughout federal and state courts and across the broader "war on crime." Our critiques do not take away from Pozen's contribution—the unearthing of a forgotten history of early battles in the drug war where litigants and judges briefly pushed back on the now widely accepted notion that drug use and possession could be criminalized. But we situate his findings within a broad backdrop of race, crime, and, above all, the judiciary's eagerness to just say "yes" to the war on drugs.

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## INTRODUCTION

When, on June 11, 2024, a jury in Delaware returned a guilty verdict against Hunter Biden, the sitting President's son, it raised a host of questions. There were the expected questions, of course – the ones debated on news shows and in print columns. Was the prosecution politically motivated?<sup>1</sup> Was it really about the “rule of law” and the principle that no one is “above the law,” as the prosecutor claimed?<sup>2</sup> Or was it also political, especially since the conviction came on the heels of President Trump's criminal conviction on thirty-four counts of fraud a few months earlier?<sup>3</sup> There was also the question – before President Biden withdrew from the race and well before he pardoned his son and weathered the ensuing backlash<sup>4</sup> – about how this would impact the President's reelection bid.<sup>5</sup>

For us – two criminal-justice scholars – there were other questions. What does the “rule of law” mean when most crimes go unpunished and we give police and prosecutors such broad discretion to determine whom to charge and what to charge them with? And given the nature of the charges in this particular case – three gun-related charges – was this another example of overcriminalization and charge stacking? The three charges, after all, were based on the same underlying evidence: that, while a user of a controlled substance, Hunter Biden purchased

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1. See Andrew Prokop, *The Truth About Hunter Biden's Conviction*, VOX (June 12, 2024, 7:15 AM EDT), <https://www.vox.com/politics/354842/hunter-biden-guilty-politics-david-weiss> [<https://perma.cc/A52T-FZYP>].
  2. Associated Press, *Special Counsel Weiss Says No One 'Is Above the Law' After Hunter Biden Is Convicted on Federal Gun Charge*, PBS (June 11, 2024, 4:22 PM EST), <https://www.pbs.org/newshour/politics/watch-live-special-counsel-weiss-speaks-to-media-after-hunter-biden-convicted-on-federal-gun-charge> [<https://perma.cc/Q8YW-2M56>].
  3. See Press Release, Manhattan Dist. Att'y, District Attorney Bragg Announces 34-Count Felony Indictment of Former President Donald J. Trump (Apr. 4, 2023), <https://manhattanda.org/district-attorney-bragg-announces-34-count-felony-indictment-of-former-president-donald-j-trump> [<https://perma.cc/WDA5-557A>]; see also Ankush Khardori, *The Hunter Biden Case Is Solid. There's Something Rotten About It Too.*, POLITICO (June 7, 2024, 5:00 AM EDT), <https://www.politico.com/news/magazine/2024/06/07/hunter-biden-trial-truths-column-00162083> [<https://perma.cc/GAR3-WSCT>] (questioning the political motives animating Hunter Biden's prosecution).
  4. Michael D. Shear & Zolan Kanno-Youngs, *Biden Issues a 'Full and Unconditional Pardon' of His Son Hunter Biden*, N.Y. TIMES (Dec. 3, 2024), <https://www.nytimes.com/2024/12/01/us/politics/biden-pardon-son-hunter.html> [<https://perma.cc/62TB-4XRP>]; MJ Lee, Paula Reid & Michael Williams, *Democrats Left Fuming Over Biden's Decision to Pardon His Son—After He Repeatedly Said He Wouldn't*, CNN (Dec. 3, 2024), <https://www.cnn.com/2024/12/02/politics/biden-allies-disappointed-pardon/index.html> [<https://perma.cc/JTT3-HXSE>].
  5. Laura Barrón-López & Shrai Popat, *The Political Impact of Convictions Against Trump and Hunter Biden*, PBS (June 11, 2024, 6:53 PM EDT), <https://www.pbs.org/newshour/show/the-political-impact-of-convictions-against-trump-and-hunter-biden> [<https://perma.cc/5WKE-3QH3>].

a gun from a licensed firearms dealer and possessed that gun for eleven days, from October 12 to October 23, 2018, when his girlfriend threw the gun away.<sup>6</sup> Since there was no evidence to suggest he ever *used* the gun, let alone harmed anyone, the case also raised questions about the criminal law's turn from the harm principle<sup>7</sup> to an embrace of inchoate crimes and pre-crimes.<sup>8</sup> There was also the question of race. Many laws that regulate gun ownership were enacted, in part, to address White fears about Black gun ownership.<sup>9</sup> Separate and apart from the racial history of gun crimes, Hunter Biden's drug of choice was crack cocaine, a drug long associated with Black people.<sup>10</sup> Suddenly, crack cocaine had a White face. Would that change how people viewed the drug?

But there was also a question that initially escaped us, and probably most observers: *was Hunter Biden's conviction a violation of his right to use drugs?*<sup>11</sup> This question escaped us because the answer seemed so clear. *Right to use drugs? What right?* But as David Pozen explains in *The Constitution of the War of Drugs*,<sup>12</sup> such questions once would have been central to critiques of a case like Hunter Biden's. And those questions are still worth asking today.

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6. More specifically, Hunter Biden was charged with knowingly making a false written statement on the federal form gun purchasers are required to complete, namely that he was not an unlawful user of a narcotic drug (Count One); with knowingly making the same false representation to the dealer (Count Two); and with possessing the gun while knowing he was an unlawful user of a narcotic drug (Count Three). See Press Release, U.S. Dep't of Just., Grand Jury Returns Indictment Charging Robert Hunter Biden with Three Felonies Related to His Purchase of a Firearm (Sept. 14, 2023), <https://www.justice.gov/sco-weiss/pr/grand-jury-returns-indictment-charging-robert-hunter-biden-three-felonies-related-his-purchase-of-a-firearm> [https://perma.cc/ESG8-RBAK]; see also Indictment at 2-4, United States v. Biden, No. 23-00061-MN (D. Del. Sept. 14, 2023) (detailing these three counts).
  7. See JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 14 (John Gray ed., Oxford Univ. Press 1991) (1859).
  8. See generally Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001) (examining criminal law's growing focus on criminalizing and prosecuting threats of harm rather than actual harm).
  9. See, e.g., Pratheepan Gulasekaram, "*The People*" of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1561-70 (2010) (charting the racial anxieties behind U.S. laws regulating gun ownership); see also CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 159-60 (2021) (discussing the disparities between the government's treatment of Kyle Rittenhouse and Tamir Rice in the context of the Second Amendment).
  10. See DAVID POZEN, *THE CONSTITUTION OF THE WAR ON DRUGS* 79 (2024).
  11. As Jacob D. Charles has recently written, the legal academy does not give sufficient attention to the important role ancillary rights play in protecting broader constitutional rights. See Jacob D. Charles, *Ancillary Rights*, 173 U. PA. L. REV. (forthcoming 2025) (manuscript at 3-5) (on file with authors).
  12. POZEN, *supra* note 10, at 3-6.

Pozen's insightful new book reveals a blind spot in our conceptions of the war on drugs. And we say this as scholars who have written extensively about the drug war and the role of race in policing.<sup>13</sup> In part, the gap Pozen fills has to do with his particular academic background. Rather than taking on the war on drugs from the viewpoint of someone who practiced criminal law, or who teaches or writes on criminal law or procedure, Pozen comes at the drug war from a fresh, substantive-constitutional-law perspective. In doing so, Pozen reveals what he rightly describes as "a lost history of constitutional challenges" to drug laws, as well as the early assumptions that shaped those challenges.<sup>14</sup> For example, prior to the Supreme Court's decision in *Crane v. Campbell* in 1917,<sup>15</sup> "judicial precedent abounded for the proposition that the right to possess alcohol for private consumption was an inalienable right,"<sup>16</sup> and Pozen avers that most lawyers "took it as given that the Constitution [protected] drug users" as well.<sup>17</sup> Confronted with the rise of prohibitions and enforcement, litigants in the 1960s and 1970s claimed that the criminalization of personal drug use in the home interfered with their constitutional right to privacy.<sup>18</sup> They further argued that criminalization amounted to cruel and unusual punishment in violation of the Eighth Amendment,<sup>19</sup> denied them their implied right to pursue happiness,<sup>20</sup> and violated the freedom of religion and freedom of thought.<sup>21</sup> Scholars even suggested that the criminalization of drug use might violate the right to travel, since taking

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13. See, e.g., JEFFREY BELLIN, *MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER* 84-88, 97 (2023) [hereinafter BELLIN, *MASS INCARCERATION NATION*]; I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1246-52, (2017) [hereinafter Capers, *Race, Policing, and Technology*]; I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 U.C. DAVIS L. REV. 855, 903-10 (2015); Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1511-14 (2014); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 1-3, 7-14 (2011).

14. POZEN, *supra* note 10, at 11.

15. 245 U.S. 304, 308 (1917) (holding that "the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge").

16. See POZEN, *supra* note 10, at 3 (quoting Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 976 (1970)).

17. POZEN, *supra* note 10, at 3, 21, 23.

18. *Id.* at 28-35, 43.

19. *Id.* at 90-106.

20. *Id.* at 30-34.

21. *Id.* at 116-27.

drugs could be on par with taking a “trip.”<sup>22</sup> As Pozen points out, the 1960s and 1970s were, in many ways, “a time of constitutional ferment and fluidity in the area of drug regulation. Constitutional law had shielded alcohol users from moralizing persecutors before; perhaps it would do something similar for users of marijuana, cocaine, and other substances widely understood to be more benign than booze.”<sup>23</sup>

To be sure, most of these challenges failed. But what Pozen brings to our attention is the fact that these challenges were made and, even more importantly, that a number of them succeeded. At least for a while. The transience of those successes also presents an interesting story. Because it is not just that “the tidal wave [of successes] was swept back to sea.”<sup>24</sup> Nor is it simply that the decisions ruling in favor of recreational drug users were “overturned, minimized, or ignored by later courts.”<sup>25</sup> It is also the erasure. How is it that, in the space of a generation, the “possibility of constitutional drug rights moved from the mainstream to the margins”?<sup>26</sup> And how is it that the two of us, who have spent most of our academic careers writing about the war on drugs and mass incarceration, were for the most part unfamiliar with this history? And it is not just us: as Pozen writes, this period of “constitutional ferment” is now “unfamiliar even to most constitutional scholars.”<sup>27</sup> Now, “the very notion of drug rights . . . seem[s] strange, even absurd, to many lawyers, to the detriment of both historical knowledge and contemporary advocacy.”<sup>28</sup> Still, all this raises the question of how. How is this history absent from law-school curricula and, specifically, criminal-law casebooks, which already give drug crimes short shrift?<sup>29</sup> What explains this “constitutional amnesia”?<sup>30</sup> And at a time when, as Pozen puts it, “Americans are accustomed to seeing [the Constitution] at the center of debates over civil

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22. *Id.* at 17.

23. *Id.* at 5-6.

24. *Id.* at 6.

25. *Id.* at 5.

26. *Id.* at 6.

27. *Id.* at 11.

28. *Id.*

29. See Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1669-71 (2020) (observing that drug crime gets short shrift in most criminal-law casebooks). At least one recent casebook attempts to rectify this omission. See BENNETT CAPERS, ROGER A. FAIRFAX, JR. & ERIC J. MILLER, *CRIMINAL LAW: A CRITICAL APPROACH* 391-438 (2023).

30. POZEN, *supra* note 10, at 11.

liberties and civil rights,”<sup>31</sup> how is it that when it comes to drug advocacy, the Constitution is, well, missing in action?<sup>32</sup>

Of course, there’s much more to Pozen’s book, which is why we begin this Review, in Part I, with an overview. But from there, we turn to some of the things the book misses or obscures. Early on, Pozen makes clear that his book does not “tell a tale of heroes and villains.”<sup>33</sup> In Part II, we push back on that decision and reveal a key aspect that Pozen’s choice obscures: the legal academy’s silence and consequent complicity in the failure of constitutional challenges to drug prohibitions — a complicity that was likely further enabled by the academy’s racial homogeneity.

In Part III, we dig deeper into race. While we applaud Pozen for noting the importance of race in the history of drug regulation and constitutional challenges, there is an aspect he misses that is vital to understanding the war on drugs. It is not only that race played a role in determining which drugs were criminalized or which users and sellers were prosecuted; it is also that drug criminalization fit into a larger race-making project. It was a continuation of this country’s efforts, in the face of claims of equality, to mark some people as “more equal than others.”<sup>34</sup>

The heart of this Review, however, is in Part IV. There, we take on Pozen’s primary contention — that the courts could have enshrined “[l]egal protections for nonviolent drug users” in constitutional law — and the reasons he offers for why judges ultimately shrank from doing so.<sup>35</sup> Our discussion stretches Pozen’s theme in three directions. First, we apply Pozen’s lens to a part of the Constitution central to the drug war but notably absent from his narrative: the Fourth Amendment. Second, we extend Pozen’s critique beyond drugs, highlighting the courts’ passivity in the face of the panoply of post-1960s “tough on crime” policies, of which the drug war was only a part. Third, we suggest that the cases Pozen champions did not foreshadow a substantially different response to drug prohibitions but were instead minor variations on a theme of judges saying “yes” to the drug war. Our overall discussion suggests that Pozen’s focus on a narrow aspect of judicial decision-making, while informative, requires contextualization within the broader story of American courts, crime, and race. This additional context supplements and complicates Pozen’s insightful conclusions. Finally, in

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31. *Id.* at 2.

32. *See id.* at 6, 15.

33. *Id.* at 16.

34. This is a reference to the type of equality that exists at the end of George Orwell’s novel *Animal Farm*. *See* GEORGE ORWELL, *ANIMAL FARM* 112 (1946) (“All animals are equal, but some animals are more equal than others.”).

35. POZEN, *supra* note 10, at 9.



our Conclusion, we gesture toward the implications of Pozen's historical findings for the present.

Before we turn to Part I, there is one more thing to say. Since one of us is a firm believer that "subject position is everything in my analysis of the law,"<sup>36</sup> let's just say that one of us has smoked, inhaled, imbibed, and more. *I know of what I speak*. With that out of the way, on to the arguments.

## I. OVERVIEW

*The Constitution of the War on Drugs* begins with a sweeping condemnation of the broad array of policies colloquially known as the "war on drugs." Pozen points out that the drug war failed to deliver on its promise, "as rates of drug addiction, drug overdose, and drug-associated violence have only gone up since its inception."<sup>37</sup> Worse, the war on drugs caused "far greater harm than the problem it was meant to solve," undermining constitutional liberties and "fuel[ing] mass incarceration and racial subordination."<sup>38</sup> Pozen seeks to explain why the Constitution's protections did little to block this "travesty"<sup>39</sup> — "one of the most 'obviously defective and destructive' policies in modern American history."<sup>40</sup> The book's inquiry can be summarized succinctly: "[I]f the war on drugs has been so mean and misguided, why did the Constitution end up furnishing so little assistance to its victims, and what can this teach us?"<sup>41</sup>

The standard reaction to Pozen's argument is that the "Constitution does not prohibit legislatures from enacting stupid laws."<sup>42</sup> And, if that is right, the disconnect between the drug war's policy failings and its constitutionality is of little note. But Pozen reveals the fragility of that response. His book's primary contribution is the "recover[y] [of] a lost history of constitutional challenges to draconian drug laws"<sup>43</sup> — and their surprising, if fleeting, success. Pozen explains that his "aim has been to canvass every line of doctrine in which constitutional

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36. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991) ("Since subject position is everything in my analysis of the law, you deserve to know that it's a bad morning.").

37. POZEN, *supra* note 10, at 1.

38. *Id.* at 1-2.

39. *Id.* at 3.

40. *Id.* at 16 (quoting STEVEN WISOTSKY, *BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY* 173 (1990)).

41. *Id.*

42. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring) (quoting *Thurgood Marshall*); see also *Chandler v. Miller*, 520 U.S. 305, 328 (1997) (Rehnquist, C.J., dissenting) ("Nothing in the . . . Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly . . .").

43. POZEN, *supra* note 10, at 11.