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

The Constitution of the War on Drugs
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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?[1] Was it really about the "rule of law" and the principle that no one is "above the law," as the prosecutor claimed?[2] 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?[3] There was also the question — before President Biden withdrew from the race and well before he pardoned his son and weathered the ensuing backlash[4] — about how this would impact the President's reelection bid.[5]

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

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.[6] 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[7] to an embrace of inchoate crimes and pre-crimes.[8] 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.[9] 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.[10] 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?*[11] 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*,[12] 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 [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.[13] 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.[14] For example, prior to the Supreme Court's decision in *Crane v. Campbell* in 1917,[15] "judicial precedent abounded for the proposition that the right to possess alcohol for private consumption was an inalienable right,"[16] and Pozen avers that most lawyers "took it as given that the Constitution [protected] drug users" as well.[17] 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.[18] They further argued that criminalization amounted to cruel and unusual punishment in violation of the Eighth Amendment,[19] denied them their implied right to pursue happiness,[20] and violated the freedom of religion and freedom of thought.[21] Scholars even suggested that the criminalization of drug use might violate the right to travel, since taking

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."[22] 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."[23]

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."[24] Nor is it simply that the decisions ruling in favor of recreational drug users were "overturned, minimized, or ignored by later courts."[25] 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"?[26] 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."[27] 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."[28] 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?[29] What explains this "constitutional amnesia"?[30] And at a time when, as Pozen puts it, "Americans are accustomed to seeing [the Constitution] at the center of debates over civil

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,"[31] how is it that when it comes to drug advocacy, the Constitution is, well, missing in action?[32]

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."[33] 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."[34]

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.[35] 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,"[36] 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."[37] 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."[38] Pozen seeks to explain why the Constitution's protections did little to block this "travesty"[39]—"one of the most 'obviously defective and destructive' policies in modern American history."[40] 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?"[41]

The standard reaction to Pozen's argument is that the "Constitution does not prohibit legislatures from enacting stupid laws."[42] 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"[43]—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.

challenges to drug bans made any headway."[44] The cases he uncovers built on a loose foundation of judicial resistance to alcohol prohibition, such as *Commonwealth v. Campbell*, where the Kentucky courts voided an alcohol prosecution on the ground that "what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen."[45] The rationale shifted across time and jurisdictions. But the strain of judicial resistance to drug prohibitions remained. For example, the Michigan Supreme Court overturned a marijuana conviction in 1972 in *People v. Sinclair*, with three justices concluding "that the Michigan legislature's 'erroneous classification' of marijuana as a narcotic violated the Equal Protection Clause" and three justices concluding that "Sinclair's sentence amounted to cruel and unusual punishment in violation of the Eighth Amendment."[46] Pozen reports: "'With the advent of such cases as *People v. Sinclair*,' two attorneys wrote in the *Notre Dame Lawyer* shortly after the decision, 'it seems only a matter of time before marijuana statutes will begin to fall.'"[47] Pozen's canvass—a significant contribution to the literature on the war on drugs—takes up the bulk of the book, with five of its seven chapters cataloguing constitutional successes and subsequent reversals in distinct doctrinal arenas.

Chapter 1 discusses the "most common constitutional challenges," which were "founded on principles of liberty, privacy, and the pursuit of happiness."[48] These challenges yielded "a series of constitutional victories in the late 1960s and early 1970s."[49] Pozen emphasizes the opportunity for these successes to snowball in the wake of *Griswold v. Connecticut*[50] and the "new jurisprudence of personal autonomy."[51] But, in his most provocative theme, he argues that the judges who championed this jurisprudence refused to apply it to the drug war for strategic reasons. "It was in the drug cases of the 1970s, as much as anywhere, that the judiciary repudiated any reading of *Griswold* as establishing a 'general right of privacy.'"[52] When constitutional law threatened it, Pozen argues, "the war on

44. *Id.* at 138.

45. Commonwealth v. Campbell, 117 S.W. 383, 385 (Ky. 1909); POZEN, *supra* note 10, at 21-22, 22 n.72.

46. POZEN, *supra* note 10, at 33 (citing People v. Sinclair, 194 N.W.2d 878, 887, 894-95, 905-06 (Mich. 1972)).

47. *Id.* at 34 (quoting Hyman M. Greenstein & Paul E. DiBianco, *Marijuana Laws—A Crime Against Humanity*, 48 NOTRE DAME L. REV. 314, 327 (1972)).

48. *Id.* at 43.

49. *Id.* at 31.

50. 381 U.S. 479 (1965).

51. POZEN, *supra* note 10, at 27.

52. *Id.* at 38 (quoting *Griswold*, 381 U.S. at 530).

drugs was rescued not by right-wing radicals but by progressive jurists desperate to defend the New Deal settlement."[53] Specifically, Pozen argues that judges who championed the privacy-rights decisions worried about "the specter" of *Lochner v. New York*—a 1905 "anticanonical" case, discredited across the political spectrum for "second-guessing elected officials' efforts to protect public health and welfare."[54] To safeguard the budding right to privacy against critiques that it was *Lochner* reborn, judges limited its reach. Pozen argues that this strategy was misguided and suggests other ways that courts could have embraced drug rights while distinguishing *Lochner*. For example, the Supreme Court could have interpreted the privacy cases "as vindicating interests that bear on drug use, such as the right to be let alone, to control one's body, or to reach one's own decisions on sensitive personal matters."[55] And he notes that the Court's limits made little sense: "[I]t is hard to see why striking down a marijuana ban would have been any more Lochnerian than striking down a contraception ban."[56]

Subsequent chapters cover less successful constitutional inroads. Chapter 2 chronicles constitutional challenges based on federalism and rational-basis equal-protection review.[57] And again, these victories were short-lived, overcome by judges' (including liberals') growing enthusiasm for "the expansion of federal regulatory authority."[58] Courts struggled to push back on drug prohibitions as irrational or solely of local concern when the overarching trend was toward "judicial deference to legislative and executive judgments about which social problems to tackle in which ways."[59]

Chapter 3 highlights potential race-based equal-protection challenges. Pozen views the lack of successful challenges on these grounds as a missed opportunity given the "large body of scholarship" that reveals the racist beliefs that fed into determinations of "which drugs—among the countless chemicals that could prove dangerous to some users at some doses in some settings—will be criminalized."[60] Specifically, Pozen argues that legislators criminalized opiates out of "[h]ostility toward Chinese immigrant labor" in the late 1880s; cocaine, which was "identified . . . with Black males and with violence against whites"; and

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53. *Id.* at 11.

54. *Id.* at 37 (discussing Lochner v. New York, 198 U.S. 45 (1905)); *see also* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417 (2011) (describing *Lochner* as "once famously indefensible").

55. POZEN, *supra* note 10, at 38.

56. *Id.* at 41.

57. *Id.* at 44.

58. *See id.* at 59.

59. *Id.*

60. *Id.* at 68-69.

marijuana, which had been "the target of racialized appeals" and identified "with Mexican Americans as well as African Americans" in the 1910s, 1920s, and 1930s.[61]

Chapter 4 takes on constitutional challenges grounded in the Eighth Amendment's prohibition of "cruel and unusual punishments."[62] A glimmer of potential on this terrain came from the 1962 ruling in *Robinson v. California*.[63] In *Robinson*, the Supreme Court struck down a law that made it a crime to be addicted to narcotics.[64] The Court characterized addiction as an illness and emphasized that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[65] But, as Pozen explains, *Robinson* turned out to be a dead end. The case was limited to a set of one: prohibiting the criminalization of a person's status rather than an act such as possessing or using drugs.[66]

Chapter 5 moves to largely unsuccessful First Amendment challenges, including those based on religious practices that involved prohibited drugs, and attempts to "foreground freedom of thought as a constitutional value."[67]

Chapter 6 "zooms out to consider broader institutional and sociological features of the constitutional order that have constrained possibilities for resistance to the war on drugs."[68] Here, Pozen explains how the norms of American constitutional debate hobbled attacks on drug criminalization. For example, a core failing of the drug war is that it fails to reduce both the supply and the demand for drugs.[69] A debate about drug prohibitions' policy merits in the courts, Pozen contends,

> would have revealed [these] flaws in the harshest light. Under virtually any version of welfarist analysis, punitive prohibitionism has been a

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61. *Id.* at 69-70.

62. *Id.* at 90.

63. 370 U.S. 660 (1962).

64. *Id.* at 667.

65. *Id.*

66. *See* POZEN, *supra* note 10, at 96-99; *cf.* BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 138 ("A logical extension of the principle that a person cannot be criminally punished for being addicted to drugs is that an addict cannot be criminally prosecuted for possessing drugs. But the courts never made that connection."). Just last Term, the Supreme Court cast aspersions on *Robinson*, suggesting that the case was barely even authority for its narrow holding. City of Grants Pass v. Johnson, 603 U.S. 520, 546 (2024) ("Nor, in the 62 years since *Robinson*, has this Court once invoked it as authority to decline the enforcement of any criminal law . . . .").

67. POZEN, *supra* note 10, at 116-17.

68. *Id.* at 137.

69. *See id.* at 139-40; BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 175-76.

> spectacular failure. Across time periods and jurisdictions, researchers have found that this regulatory approach yields little benefit for reducing dangerous drug behaviors — and is more often associated with *increases* in such behaviors — while imposing massive costs both in direct financial terms and in terms of fueling crime, corruption, incarceration, and social marginalization.[70]

But, as Pozen explains, courts follow a strong "norm against 'policy arguments'" in constitutional litigation.[71]

Pozen concludes his account by exploring potential paths to constitutional reform.[72] He seems conflicted here, stating: "Perhaps, then, courts and constitutional law are not the best institutions in which to press the case against punitive drug laws."[73] But he nevertheless discusses two possibilities — leaning into originalism and embracing "proportionality review."[74] Pozen argues that the kind of historical evidence now in vogue at the Supreme Court might favor constitutional arguments against drug prohibition: "[O]riginalism is capable of generating many surprising outcomes, including protections for drug offenders."[75] He also praises proportionality review — a judicial effort "to assess intrusions on rights against the public good they are said to serve" — which is common in other countries: "Proportionality review provides a framework in which all sides to these disputes can be heard and, crucially, in which policy failures can be identified and less restrictive options considered."[76]

Throughout the book, Pozen describes his approach as "internalist" or "legalist," centering conventional legal arguments, and specifically those "[i]nternal to constitutional law."[77] Rather than focusing on "social, political, and cultural factors that make certain legal paths more or less likely," Pozen highlights the "role played by articulated principles, reasoned distinctions, institutional competencies — on the logic of the law and the ways it shapes and constrains paths of changes."[78] This perspective meets judges on their turf, exploring how they

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70. POZEN, *supra* note 10, at 139-40.

71. *Id.* at 139; *see also* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 746 (2021) (noting that policy arguments are "seen as out of bounds in debates over the Constitution's meaning").

72. POZEN, *supra* note 10, at 159.

73. *Id.* at 172.

74. *Id.* at 164, 166.

75. *Id.* at 164 ("Originalism . . . enables a number of new arguments against punitive prohibitionism.").

76. *Id.* at 166, 172.

77. *Id.* at 6-7.

78. *Id.* at 6.

could have reined in the drug war using traditional constitutional logic and reasoning.

Having provided this overview, we now turn to what Pozen misses and obscures.

II. HEROES AND VILLAINS

Early on, Pozen asserts that his history of the constitutional challenges to the criminalization of drug use, though it offers some "unflattering assessments," is not "a tale of heroes or villains."[79] While this assertion might seem minor, Pozen's decision to disclaim heroes and villains impoverishes the story he tells. To be sure, the heroes are perhaps obvious: the plaintiffs and lawyers who sought to protect individual rights, and the courts that recognized those rights. But to our minds, what is more interesting, and what Pozen's framing obscures, is the story of the villains. Among the villains, we include the courts that quickly overturned or backtracked from successful challenges. And we include the executive-branch officials, legislators, police officers, and prosecutors who, as discussed in Part III, all actively worked with those courts to create the breathtaking policy shifts that powered the war on drugs.[80] But most interesting to us is the role the legal academy played, and didn't play, in this state of affairs. In many ways, one of the villains was us.

Put differently, in a book by a law professor on constitutional challenges to the war on drugs, the legal academy itself gets a pass. In Pozen's telling, the academy, and the professors who taught there, were not even bit players.[81] But criminal law as we know it owes a significant debt to the legal academy, and indeed to professors at the very school where Pozen teaches. And if we had to categorize these professors and the academy as either heroes or villains in this story, we would choose the latter. To explain what we mean, we first turn to the Model Penal Code, and then more generally to the legal academy.

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79. *Id.* at 16.

80. *See infra* Part III.

81. Indeed, the only professor in David Pozen's book who stands out for at least thinking about constitutional challenges is Pozen's colleague who, in one seminar, explored whether "tripping" on psychedelic drugs should be protected by the right to travel. The professor is not named. POZEN, *supra* note 10, at 17.

A. The Model Penal Code and Drugs

The Model Penal Code (MPC) has been called "one of the great intellectual accomplishments of American legal scholarship of the mid-twentieth century"[82] and "one of the most successful law reform projects in American history."[83] As every student of American law knows, it is "the principal text in criminal law teaching"[84] and the "point of departure for criminal law scholarship."[85] Even though no jurisdiction has adopted it word for word, more than forty states recodified their codes based on it.[86] The MPC's influence can be felt even in non-MPC jurisdictions.[87] Simply put, its influence is enormous. "[M]uch of American criminal law derives from it, one way or another,"[88] and it is "key to American criminal law."[89]

The MPC did not materialize out of thin air. Although the project did not get off the ground until the 1950s—it was delayed during World War II[90]—its origin story goes back to the 1930s. That was when the American Law Institute (ALI), an organization founded to "promote the clarification and simplification of the law and its better adaptation to social needs,"[91] decided to turn its attention

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82. Gerard E. Lynch, *Revising the Model Penal Code: Keeping it Real*, 1 OHIO ST. J. CRIM. L. 219, 219 (2003).

83. *Id.* at 220. Gerald E. Lynch adds, "[I]t sparked a wave of legislation that lasted over a decade. It produced revised, modernized penal codes in a substantial majority of the states, all recognizably derived from the work of Wechsler and his colleagues, and nearly all adopting the structure and many of the formulations they invented." *Id.*

84. Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 521 (1988). "Essentially every criminal law coursebook in widespread use in American law schools reprints the [Model Penal Code (MPC)], rather than any state's actual code, as the one example of an integrated criminal code students are exposed to in substantial completeness." Lynch, *supra* note 82, at 220; *see also* Ristroph, *supra* note 29, at 1648 ("[N]early every criminal law casebook published since 1962 has featured the MPC prominently.").

85. Kadish, *supra* note 84, at 521.

86. MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 6 (2002).

87. For example, courts in non-MPC jurisdictions "frequently draw on the Code's analysis to elucidate unsettled issues, such as the mental state requirements of particular offenses, even if they end up rejecting the particular solution proposed by the Code drafters." *Id.* at 7; *see also* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007) (describing the MPC as "the closest thing to being an American criminal code").

88. DUBBER, *supra* note 86, at 6.

89. *Id.* at 1.

90. Robinson & Dubber, *supra* note 87, at 323.

91. *Certificate of Incorporation*, AM. L. INST. (Feb. 23, 1923), https://www.ali.org/sites/default/files/2024-09/certificate-of-incorporation.pdf [https://perma.cc/WMP9-LDJ9]; *see also*

to American criminal law. The ALI—this "club of Great Men of the Law"[92]—"concluded that American criminal law was in desperate need of reform."[93] "The problem with criminal law," as Kimberly Kessler Ferzan recently put it, "was that it had too many problems."[94] Faced with this morass, the ALI decided that, unlike in other areas of law like torts and contracts, a "mere 'restatement' of the law" would not do.[95] "What was needed was a fresh start in the form of *model codes*."[96]

The ALI tasked Columbia Law School professor Herbert Wechsler with heading the project.[97] Keenly aware "of irrationality in existing law,"[98] Wechsler and his colleagues "imposed structure on chaos wherever they turned."[99] The end result was a code that has been called comprehensive, pragmatic, and a "scholarly compendium of the best thinking of its era about criminal law."[100] It

The Story of ALI, AM. L. INST., https://www.ali.org/about-ali/story-line [https://perma.cc/A4RG-B3VM] (documenting the history of the American Law Institute (ALI), including the development of the MPC).

92. Markus D. Dubber, *The American Law Institute's Model Penal Code and European Criminal Law*, *in* SUBSTANTIVE CRIMINAL LAW OF THE EUROPEAN UNION 209, 217 (André Klip ed., 2011).

93. *Id.* at 219.

94. Kimberly Kessler Ferzan, *From Restatement to Model Penal Code: The Progress and Perils of Criminal Law Reform*, *in* THE AMERICAN LAW INSTITUTE 293, 294 (Andrew S. Gold & Robert W. Gordon eds., 2023); *see also* Robinson & Dubber, *supra* note 87, at 323 ("[The ALI] judged the existing law too chaotic and irrational to merit 'restatement.'").

95. DUBBER, *supra* note 86, at 8.

96. *Id.*

97. The choice of Herbert Wechsler was significant. In fact, together with another Columbia Law School professor, Jerome Michael, Wechsler had already sketched out what comprehensive reform might look like for homicide. Jerome Michael & Herbert Wechsler, *A Rationale for the Law of Homicide: I*, 37 COLUM. L. REV. 701, 701-02 (1937); Jerome Michael & Herbert Wechsler, *A Rationale for the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1262-63 (1937).

98. Ristroph, *supra* note 29, at 1648.

99. DUBBER, *supra* note 86, at 17. The task they took on was herculean. As a judge (and Columbia Law School professor), Gerald E. Lynch observed:

> Surveying hundreds of years of common-law evolution in the criminal law, identifying underlying principles, and formulating rules that represented the best of the thinking of judges who had grappled over that period with the violent and destructive results of the unruly passions of humankind, the drafters of the Code, marshaled by the incredible energy, formidable intelligence, and sheer will of the great Herbert Wechsler, developed an intellectually coherent approach to this mass of material, and created a body of rules not only doctrinally consistent, but drafted for easy adoption by legislative bodies.

Lynch, *supra* note 82, at 219.

100. Lynch, *supra* note 82, at 220.

has been said that "the ingenuity of the code is breathtaking."[101] We don't disagree, at least with respect to the "general part" that lays out eighteen general provisions on matters such as actus reus, mens rea, causation, complicity, inchoate crimes, excuses, and justifications. But it is the "special part" that shows how the ALI and the academy stood aside at the crucial moment Pozen highlights—when draconian drug prohibitions might have been stopped in their tracks.

In the special part, the drafters offered model definitions for crimes. To the casual observer, this special part might also seem comprehensive. It covers almost everything, ranging from "Offenses Involving Danger to the Person" (e.g., homicide, assault, reckless endangering, threats, kidnapping, and sexual offenses) to "Offenses Against Property" (e.g., arson, burglary, trespass, theft, forgery, and fraud) to "Offenses Against Public Administration" (e.g., bribery and corruption, perjury, obstruction of justice, and abuse of office) to "Offenses Against Public Order and Decency" (e.g., disorderly conduct, loitering, and public indecency).[102] But absent from the special part is any mention of drug offenses. Notwithstanding that Congress had recently enacted the first mandatory-minimum sentencing law with the Boggs Act,[103] which had the effect of targeting "Black and Mexican American 'pushers' who allegedly supplied heroin and marijuana to innocent white teenagers,"[104] and notwithstanding the growing number of drug prosecutions, including in Harlem, the predominantly Black neighborhood adjacent to where Wechsler taught,[105] the MPC included no mention of drug possession. Or drug use. Or drug distribution. These topics, serious enough to warrant contributions in the pages of this very journal in 1953,[106] are absent from the Code, appearing only in a note at the end of a section on

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101. Ferzan, *supra* note 94, at 302.

102. *See* MODEL PENAL CODE, *Table of Contents, Part II—Definition of Specific Crimes* (AM. L. INST., Proposed Official Draft 1962).

103. Boggs Act, ch. 666, 65 Stat. 767 (1951) (amending the Narcotic Drugs Import and Export Act, 21 U.S.C. § 174).

104. Matthew D. Lassiter, *America's War on Drugs Has Always Been Bipartisan—And Unwinnable*, TIME (Dec. 7, 2023, 10:00 AM EST), https://time.com/6340590/drug-war-politics-history [https://perma.cc/96G5-ZGZS].

105. As early as 1957, a U.S. Attorney was referring to Harlem as the "dope capital" of the world. *US Attorney Calls Harlem 'Dope Capital,'* N.Y. AMSTERDAM NEWS, Nov. 30, 1957, at 31, 31. Even though prosecutions of Black people were common, the real concern was protecting White youth. Matt Kautz, *The State Versus Harlem*, GOTHAM CTR. FOR N.Y.C. HIST. (Apr. 11, 2019), https://www.gothamcenter.org/blog/the-state-versus-harlem [https://perma.cc/K94Q-6HTA]. Tellingly, New York State responded to the rise in heroin use by establishing six drug-treatment centers in the state, but none was established in the majority-Black community of Harlem, the supposed epicenter of drug use. *Id.*

106. *See* Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L.J. 736, 736 (1953); Comment, *Narcotics Regulation*, 62 YALE L.J. 751, 752-59 (1953).

obscenity, which dryly advises: "[A] State enacting a new Penal Code may insert additional Articles dealing with special topics such as narcotics . . . ."[107]

To be sure, it is possible the drafters "left narcotics prohibitions out of their Code" because they viewed "the whole sordid subject as beneath their notice."[108] This is what Gerald E. Lynch speculates.[109] It is also possible that they simply did not want to weigh into the debate about the constitutionality of these "crimes." If Wechsler himself is to be believed, drug "crimes" and a few others were omitted "due to lack of time or in the view that they [were] better treated in a regulatory statute placed outside the Penal Code."[110] Whatever the motivation, the silence speaks volumes—especially when one considers that, in other matters, Wechsler "was not averse to rethinking substantive crimes."[111]

The silence speaks louder still when one considers that the Advisory Committee—comprised of "esteemed state and federal judges, prosecutors and defense lawyers, directors of prisons, criminologists, psychologists, and code reformers"[112]—thought of themselves as progressive.[113] For example, although the MPC is silent on the issue of race, concerns about racial discrimination clearly informed their thinking about many provisions, including provisions relating to the prosecution of sexual offenses, long known to be discriminatory.[114] On constitutional grounds, the drafters were willing to take a forward-looking stance in

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107. MODEL PENAL CODE § 251.4 note on additional articles (AM. L. INST., Proposed Official Draft 1962).

108. Lynch, *supra* note 82, at 232.

109. *Id.*

110. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1429 (1968).

111. Ferzan, *supra* note 94, at 303.

112. *Id.* at 300.

113. Among other things, on the pages of the *Yale Law Journal*, Wechsler advocated for federal antilynching legislation. *See* Herbert Wechsler, Book Review, 44 YALE L.J. 191, 193 (1934) (reviewing JAMES HARMON CHADBOURN, LYNCHING AND THE LAW (1933); and ARTHUR FRANKLIN RAPER, THE TRAGEDY OF LYNCHING (1933)). Anders Walker observes that "Wechsler also lamented 'the political impotence' that black voters suffered under poll taxes, literacy tests, and other modes of disenfranchisement." Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017, 1022 (quoting Weschler, *supra*, at 191).

114. *See* MODEL PENAL CODE § 213.6 (AM. L. INST., Proposed Official Draft 1962) (providing that sexual-crimes convictions cannot be based "upon uncorroborated testimony of the alleged victim"). To be sure, some of these "progressive" provisions still harmed women. And even with respect to race, blind spots existed. *See* Luis E. Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 GEO. MASON L. REV. 605, 608-09 (2018).

other areas, such as the death penalty and the criminalization of same-sex sex.[115] If the goal was to rationalize criminal law, impose order where there was chaos, and conform criminal prohibitions to social needs, the ALI's silence on drugs was both tragic and a missed opportunity. The MPC offered no guidance on some of the era's most important questions: how, and whether, policymakers should deploy criminal law to address the problem of drug *use*, and, most importantly, whether criminalization of drug use was even constitutional.[116] Instead, as the drug war dawned, legislators and other policymakers seeking guidance on how to approach the problem of drugs were deprived of "the best thinking of [the] era about criminal law."[117]

We imagine that some readers might resist our suggestion that the villains in the story of the constitutional challenges to the war on drugs included the legal academy and, more specifically, the drafters of the MPC. And maybe to some, "villain" is too strong a word. But given that the ALI's project was always a normative one,[118] we think the word fits. It wasn't just an abstraction—the "law," as Pozen puts it—that "failed to head off one of the most 'obviously

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115. *See* MODEL PENAL CODE § 213.2 cmt. at 372 (AM. L. INST. 1980) (discussing the considerations that caused the original reporters of the MPC to "recommend no criminal penalties for consensual sexual relations conducted in private"); *see also* Ferzan, *supra* note 94, at 303 (framing the MPC as "aim[ed] at conduct that constitutes harm to others, not enforcement of private morality"). As Lynch notes, "Many of the drafters of the MPC opposed capital punishment." Lynch, *supra* note 82, at 232. To cut back on the imposition of the death penalty and curtail the discrimination inherent in its application, the drafters settled on structured jury discretion, then a novel approach. *Id.* Eventually, after the U.S. Supreme Court invalidated the carrying out of three death sentences in *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), the Court gave its approval to structured jury discretion in *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976). In doing so, the MPC's approach "essentially [became] the law of the land in jurisdictions that continue to use the death penalty." Lynch, *supra* note 82, at 232. More recently, the ALI took a bolder stand and voted to withdraw its provision on the death penalty after forming an ad hoc committee to opine on its constitutionality, concluding that there were "too many obstacles, both structural and institutional, to administering the death penalty in a nonarbitrary way." *The Story of ALI, supra* note 91.

116. This isn't to say that Wechsler was entirely silent on the topic of narcotics. In writings about the MPC, he used narcotics trafficking as an example to explain how the MPC's provisions on conspiracy would operate. *See* Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 979-85 (1961).

117. Lynch, *supra* note 82, at 220.

118. *Id.*; DUBBER, *supra* note 86, at 8; Ristroph, *supra* note 29, at 1646 (observing that Wechsler "had a specific vision of wise legislation in mind," which would "come through in the Model Penal Code"). Alice Ristroph adds that as a result of the MPC's prominence in criminal-law casebooks, "the course called 'criminal law' in American law schools instructs students in a specific normative model." Ristroph, *supra* note 29, at 1648.

defective and destructive' policies in modern American history."[119] It was also the architects and interpreters of the law, including those from the legal academy.

Of course, all of this raises the question whether things might have turned out differently had Wechsler and the rest of the ALI taken a stand. Might the criminalization of the use of marijuana at least, once conveniently (and falsely) described by the U.S. Commissioner of Narcotics as "one of the most dangerous and depraving narcotics known,"[120] have lost its steam and legal imprimatur? It is possible we would have ended up in the same position we are in now, where police can make 1.5 million drug arrests in one year;[121] where racial disparities in drug enforcement seem to be a feature, not a bug; and where the collateral consequences include not only disenfranchisement, but also wealth extraction, including from family members who experience the harms of criminalization as "shadow defendants."[122] As Paul Butler observed, it may be that "the system is working the way it is supposed to."[123] But then again, had the ALI and the wider legal academy taken a stance, such as supporting the constitutional challenges Pozen proffers, they might have contributed momentum to those fighting the lonely, early battles against the war on drugs.

B. The American Law Institute, the Legal Academy, and Race

There is another thing to say about the silence of Wechsler, the ALI, and the rest of the academy during this period—something that touches on race, the focus of Part III of this Review. Pozen acknowledges that the criminalization of drugs—or rather, the criminalization of some drugs and the noncriminalization of others—has always been raced. This is not a new phenomenon, and it certainly predates the infamous 100-to-1 ratio of crack cocaine to powder cocaine during the 1980s. As Pozen recognizes, one can see it with the criminalization of opium in the late 1800s, which he argues was spurred by anti-Chinese hostility,

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119. Pozen, *supra* note 10, at 3 (quoting Steven Wisotsky, Beyond the War on Drugs: Overcoming a Failed Public Policy 173 (1990)).

120. *The Early Years*, U.S. Drug Enf't Admin. 19 (2018), https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf [https://perma.cc/KHZ9-E5PH].

121. *Drug Arrests Stayed High Even as Imprisonment Fell from 2009 to 2019*, Pew Charitable Trs. (Feb. 15, 2022), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019 [https://perma.cc/FDP6-Q2JK].

122. *See generally* Mariam A. Hinds, *The Shadow Defendants*, 113 Geo. L.J. (forthcoming 2025) (describing the significant contributions and sacrifices family members—and particularly female family members—make in support of incarcerated individuals).

123. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 Geo. L.J. 1419, 1456 (2016).

and in the criminalization of marijuana and anti-Mexican sentiments.[124] And of course, today's decriminalization campaigns only fully come into focus when one acknowledges, as Pozen does, "the 'whitening' of certain drugs' popular image."[125]

Pozen also acknowledges that the *enforcement* of drug laws has been raced. It has "disproportionately swept Black and Brown individuals into the criminal system."[126] There is a reason Michelle Alexander describes the war on drugs as a feature of "the New Jim Crow."[127]

But for Pozen, these race effects raise a curious question—or, as Pozen puts it, "a curious absence."[128] He writes:

> The late 1960s and early 1970s, then, turned out to be the most favorable period in U.S. history for bringing claims of unconstitutional racial discrimination. This was the exact same period in which litigants brought a "tidal wave" of constitutional challenges to prohibitory drug laws. Criminal defendants and civil liberties organizations attacked these laws again and again under the First Amendment, the Eighth Amendment, the Due Process Clause, and the Equal Protection Clause itself (when alleging that drugs had been misclassified). But they hardly ever attacked them for being enacted or enforced in a racial discriminatory manner.[129]

"Nor," Pozen adds, "did the drug laws' many critics in the legal profession press this argument in any sustained fashion,"[130] notwithstanding that the "constitutional question all but asks itself: is this consistent with the guarantee of equal protection of the laws?"[131] While this strikes Pozen as curious, it shouldn't. The absence of racial-discrimination claims makes sense when one considers the Whiteness of most law schools at the time. This again implicates the ALI that worked on the MPC—those "esteemed state and federal judges, prosecutors and defense lawyers, directors of prisons, criminologists, psychologists, and code

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124. POZEN, *supra* note 10, at 69-70.

125. *Id.* at 70.

126. *Id.* at 71.

127. MICHELLE ALEXANDER, THE NEW JIM CROW 5-6 (2010) (describing the history and impact of the war on drugs).

128. POZEN, *supra* note 10, at 75.

129. *Id.* (footnote omitted).

130. *Id.* at 77.

131. *Id.* at 73.

reformers,"[132] that "club of Great Men of the Law,"[133] who it is safe to say were racially monolithic.[134] And it implicates who was learning the law and who was teaching the law. Even today, law schools are viewed as "white spaces,"[135] and the law is described as "the least diverse profession in the nation."[136] This was even truer in the 1950s and 1960s, the period when the MPC was drafted and when constitutional challenges to prohibitions against drug use were germinating. Ivy League law schools like Columbia, from which Wechsler hailed, were essentially racial monopolies[137] until the late 1960s, when a few schools made an effort to recruit Black students.[138]

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132. Ferzan, *supra* note 94, at 300. Interestingly, Paul H. Robinson and Markus D. Dubber describe the committee as "remarkably diverse." Robinson & Dubber, *supra* note 87, at 323. It is safe to assume they are referring to the members' professional diversity, not their racial or gender diversity.

133. Dubber, *supra* note 92, at 217.

134. For a list of Advisory Committee members who worked on the MPC, see Frank P. Grad, *The A.L.I. Model Penal Code*, 4 CRIME & DELINQUENCY 127, 127 n.4 (1958). On efforts of the ALI to increase its diversity, see ANDREW S. GOLD, THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY 16 (2023). Unfortunately, as an author of this Review can attest from personal experience, there is a lack of diversity in the ALI. Professor Capers is a member of the ALI, and between 2012 and 2022 served as an adviser to ALI's multiyear project to reform the sexual-assault provisions of the MPC. Throughout that process, which involved dozens of advisers, Professor Capers was often the only Black adviser in the room.

135. Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 13 (2021).

136. *See, e.g.*, Casey C. Sullivan, *What's the Least Diverse Profession in America? The Law*, FINDLAW (Mar. 21, 2019), https://www.findlaw.com/legalblogs/greedy-associates/whats-the-least-diverse-profession-in-america-the-law [https://perma.cc/7NCM-UNWC] ("When it comes to being the whitest, malest profession in America, the law has everyone else beat."); Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST. (May 27, 2015, 8:25 AM EDT), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that [https://perma.cc/RA65-K8JW]. Vernellia Randall puts it more bluntly, calling law the "whitest profession." Vernellia Randall, *2004 The Whitest Law School Report*, RACE, RACISM & THE LAW (Mar. 8, 2021), https://racism.org/2004-introduction [https://perma.cc/BU7P-BR7X] ("In many ways, institutional discrimination in law schools is about maintaining the legal profession as 'The Whitest Profession.'").

137. *Cf.* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2385 (2021) (using the term to explore how insiders promogulated college-admission rules); Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 754 (2000) ("First, [Whites] enacted both formal Jim Crow segregation laws and informal exclusionary policies to preclude nonwhites from attending law school. Second, they adopted admissions standards and moved legal education to the university setting, in order to drive out alternative forms of legal education serving people of color and immigrants.").

138. *See* Ernest Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069, 1077; William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 11 (2003).

The story of James Meredith is telling. Meredith, who a few years earlier had desegregated the University of Mississippi, enrolled at Columbia Law in 1965, as the school recruited Black applicants to keep up with the efforts of Harvard Law School.[139] Meredith's enrollment was significant enough that it was covered in the *New York Times*.[140] But he was one of only ten Black students in his law-school class.[141] (Of the approximately two thousand law students who attended Columbia Law in the 1950s, approximately five were Black. The year that Meredith enrolled, the class that had just graduated had only two Black students out of a class of 252.[142]) With respect to teaching, Columbia did not hire its first Black professor, Kellis Parker, who taught contracts, until 1972.[143] This was ten years after the MPC was completed, and generations after racially discriminatory drug laws first emerged. In other words, Pozen's query about the lack of race-based equal-protection challenges during this period has at least one obvious answer: the paucity of Black lawyers and thinkers in a position to make those arguments. We don't mean to suggest that race "*fully* determines the scope of one's normative views."[144] But race does shape the way one might view, interpret, and push back against the law.[145] By analogy, consider how the admission of women like Ruth Bader Ginsburg to law school changed the trajectory of equal-protection

139. *James Meredith '68: A Racial Justice Pioneer*, COLUM. L. SCH. (Sept. 1, 2020), https://www.law.columbia.edu/news/archive/james-meredith-68-racial-justice-pioneer [https://perma.cc/8XGU-97PM].

140. *James Meredith Registers at Columbia Law School*, N.Y. TIMES, Sept. 14, 1965, at 20, 20.

141. *James Meredith '68: A Racial Justice Pioneer*, *supra* note 139. There is some discrepancy about the number, as the footnote below reveals.

142. Class years from 1950 to 1962 had a total of seven Black students, and never more than one per year; class years from 1963 to 1969 saw between two and eight Black students per year. Email from Irina Kandarasheva, Curator of Rare Books & Special Collections, Columbia L. Libr., to Bennett Capers, Prof. of L., Fordham Univ. Sch. of L. (Aug. 8, 2024, 2:32 PM) (on file with authors).

143. *Celebrating Professor and Civil Rights Activist Kellis E. Parker*, COLUM. L. SCH. (Apr. 9, 2024), https://www.law.columbia.edu/news/archive/celebrating-professor-and-civil-rights-activist-kellis-e-parker [https://perma.cc/35D8-HF79]. To our knowledge, Columbia Law has never had a Black faculty member teach criminal law.

144. Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig, *Introduction* to CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND LAW 1, 6 (Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig eds., 2022) (emphasis added).

145. *See* I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 21 (2006).

jurisprudence.[146] Or how having LGBT students like Evan Wolfson and Mary Bonauto changed the trajectory of LGBT rights.[147]

How might the path and development of constitutional challenges to drug prohibitions—which, again, were always raced—have been different had there been more Black lawyers and Black law professors to make these challenges? How might Black lawyers and Black law professors have shaped earlier challenges based on the right to privacy, given their own experience with being subjected to "heightened scrutiny,"[148] with being the "panoptic sort,"[149] and with being "always already suspect"?[150] Long circumscribed in their movement—think sundown towns,[151] think the need Black people had for a Green Book,[152] think again about police surveillance[153]—how might Black lawyers and Black law professors have built arguments around the right to travel? Or given that it was Black people and other people of color who disproportionately faced the brunt of harsh punishments, how might those lawyers and professors have thought and argued differently, and perhaps more successfully, about drug prohibitions and cruel and unusual punishment? Or pushed back against the Court's cramped, parsimonious, status-quo-maintaining, color-blind reading of the

146. Brenda Feigen, *Memoriam: Justice Ruth Bader Ginsburg*, 134 HARV. L. REV. 882, 887 (2021).

147. *From DOMA to Marriage Equality: How the Tide Turned for Gay Marriage*, NPR (July 9, 2015, 1:20 PM ET), https://www.npr.org/2015/07/09/421462180/from-doma-to-marriage-equality-how-the-tide-turned-for-gay-marriage [https://perma.cc/2A9M-YM27].

148. Capers, *Race, Policing, and Technology*, *supra* note 13, at 1290.

149. This is a play on Oscar H. Gandy, Jr.'s term about database marketing. *See generally* OSCAR H. GANDY, JR., THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION (2021) (describing how businesses and the state use surveillance technology in order to monitor individuals, develop profiles, and sort individuals by presumed economic or political value, including by race in some instances).

150. Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1363 (2015) ("[W]hen it comes to men of color, we are always already suspect.").

151. *See generally* JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005) (describing towns where African Americans were barred through local ordinances, signs, or informal means).

152. For more on the *Green Book*, a book carried by Black motorists to know places where they could eat and stay during Jim Crow, see Meagen K. Monahan, *The Green Book: Safely Navigating Jim Crow America*, 20 GREEN BAG 2D 43, 43 (2016); and Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1263 (2020).

153. *See, e.g.*, Tracey Maclin, *Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1296 (1990) (describing police intruding on an individual right to privacy based on personal bias); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 67 (2009) (describing increased surveillance of African American drivers); Monica Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 690 (2020) (discussing "heavy police surveillance in race-class subjugated neighborhoods").

Equal Protection Clause? Or pressed different arguments entirely—for example, by invoking the Thirteenth Amendment to challenge the mass incarceration of Black and Brown people on drug charges?[154] More broadly, if we may borrow and elaborate upon Paul Gowder's recent concept, how might these voices have "blackened" the Constitution for the better?[155] True, it is impossible to know.[156] But certainly it speaks volumes that *United States v. Clary*—perhaps the most full-throated judicial examination of racism in criminal punishment and rebuke to the "100-to-1" sentencing disparity between crack cocaine and powder cocaine,[157] and an opinion that Pozen cites at length[158]—was authored by a Black

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154. *See generally* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019) (arguing that while the Thirteenth Amendment's Punishment Clause has been used to justify the "modern slavery" of prison labor, it can also be interpreted to prohibit it in many circumstances, including through a strictly textualist construction); Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012) (examining the practical utility of using the Thirteenth Amendment to reach doctrinal outcomes that protect affirmative constitutional rights).

155. PAUL GOWDER, CONSTITUTIONAL DEMOCRACY FOR TIME TRAVELERS: A CRITICAL RACE AFROFUTURIST MANIFESTO (unpublished manuscript) (on file with authors) (arguing that "we retroactively read the legal and political understandings of oppressed and subordinated groups into constitutional interpretation as if they had had a voice in its enactment" and in doing so "blacken" the Constitution to make it more democratic); *see also* Paul Gowder, *Constitutional Sankofa*, 112 GEO. L.J. 1437, 1440 (2024) (arguing for a "constitutional *Sankofa*," a Black-centric "interpretation of the constitutional past," "rooted in the insights of critical race theory").

156. Indeed, this *what if* question about the past also prompts an equally pressing question about the future, given the Court's decision in *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 230-31 (2023), which bars the direct consideration of racial diversity in university admissions. The decision seems to have already resulted in reduced numbers of racial minorities at universities and law schools, including Yale Law School. *See* Chris Tillen, *Law School Sees Drop in Diversity Post-Affirmative Action*, YALE DAILY NEWS (Oct. 4, 2024, 3:21 AM), https://yaledailynews.com/blog/2024/10/04/law-school-sees-drop-in-diversity-post-affirmative-action [https://perma.cc/QMV5-8AZU]. As Justin Driver recently observed about falling minority admission rates, "We stand on the cusp of what I fear will become a lost generation of Black students at many leading colleges." Anemona Hartocollis & Stephanie Saul, *At 2 Elite Colleges, Shifts in Racial Makeup After Affirmative Action Ban*, N.Y. TIMES (Aug. 30, 2024), https://www.nytimes.com/2024/08/30/us/black-enrollment-affirmative-action-amherst-tufts-uva.html [https://perma.cc/H4RK-XT2M]. Put differently, the harm from reduced minority enrollment is not just to those students who are denied admission, or even to nonminority students who no longer reap the benefit of learning from more diverse students. The potential harm is to the law itself.

157. 846 F. Supp. 768, 796-97 (E.D. Mo. 1994). In his decision, Judge Cahill found that the 100-to-1 sentencing disparity was unconstitutional. *Id.* at 797. The Eighth Circuit quickly reversed. United States v. Clary, 34 F.3d 709, 714 (8th Cir. 1994).

158. POZEN, *supra* note 10, at 82-85.

judge, Clyde S. Cahill.[159] The same observation could be made about *State v. Russell*,[160] the case that preceded *Clary* and that Pozen also cites at length.[161] *Russell* began when Pamela G. Alexander, the first Black woman judge in Minnesota,[162] dismissed on equal-protection grounds the drug charges against the Black defendants before her.[163] Let us state it again: the relative absence of Black lawyers and professors prior to the 1970s matters, and we are living with that absence today.[164]

III. THE WAR ON DRUGS AND RACE-MAKING

It should go without saying that any story on the war on drugs in this country would be incomplete without discussing race. Pozen, to his credit, recognizes this. Race matters in the telling of which drugs were criminalized. Race matters in the telling of which drug users and drug distributors were deemed criminal. And as we explored in Part II, race matters in the telling of which constitutional challenges to drug prohibitions were advanced in court, and who advanced them. Of course, all of this continues into the present. One could even say, as Michelle Alexander has, that race, or rather racial subordination, has been the motivating factor in the war on drugs.[165] After the ratification of the Thirteenth Amendment abolishing slavery except as criminal punishment, the South passed

159. It is also telling that Judge Cahill, in addressing the requirement of discriminatory intent, relied on the work of a Black law professor, the critical race theorist Charles R Lawrence, III. *See Clary*, 846 F. Supp. at 779-82 (citing Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987)). For more on Judge Cahill, see Alvin A. Reid, *Judge Cahill Remembered for 'Character, Compassion*,' ST. LOUIS AM. (Oct. 6, 2005), https://www.stlamerican.com/news/local-news/judge-clyde-cahill-remembered-for-character-compassion [https://perma.cc/W36J-WZD2].

160. 477 N.W.2d 886 (Minn. 1991).

161. POZEN, *supra* note 10, at 82-85.

162. For more on Judge Alexander, see Evan Frost, *ChangeMakers: Pamela Alexander, First Black Woman Judge in MN, Sees Gaps and Opportunities*, MPRNEWS (Feb. 19, 2019, 4:00 AM), https://www.mprnews.org/story/2019/02/18/changemakers-witness-of-rape-sparks-life-long-interest-in-law-for-retired-judge-pamela-ale [https://perma.cc/QX9C-VR3N].

163. *Russell*, 477 N.W.2d at 887 (discussing the trial court's decision).

164. *See* Stephanie Saul & Anemona Hartocollis, *Black Student Enrollment at Harvard Law Drops by More than Half*, N.Y. TIMES (Dec. 16, 2024), https://www.nytimes.com/2024/12/16/us/harvard-law-black-students-enrollment-decline.html [https://perma.cc/E9HA-MG8U] (noting that "[t]he number of Black students entering Harvard Law School dropped sharply" after the Supreme Court's decision in Students for Fair Admissions, Inc. v. Harvard, 600 U.S. 181 (2023)).

165. ALEXANDER, *supra* note 127, at 223-24 (describing "the racial politics that gave birth to the War on Drugs," which was part of a "new caste system thinly veiled by the cloak of colorblindness").

a rash of laws, known as Black Codes, to target Black people, institute convict leasing, and create "slavery by another name."[166] In a similar way, one could say that much of the country used the war on drugs, eventually at least,[167] to target Black people and other minorities, counter racial advancements made during the 1960s with the Civil Rights Acts, and recreate Jim Crow.[168]

Here, we build upon the work of critical race theorists to advance a less familiar argument about the connection between the war on drugs and race: the criminalization of drug use in this country was also part of a race-making project. Understood this way, race becomes more than a footnote, or addendum, or even chapter in the war on drugs. It is central to it, both as a means and as an end. It, too, is part of the *constitution*—as in "the way in which a thing is constituted or made up"[169]—of the war on drugs.

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166. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008) (examining a deliberate system of neoslavery and racial criminalization). Consider two examples of this criminalization. One, southern states "aggressively passed vagrancy laws" to arrest and convict Black people, as Risa Goluboff has extensively documented. RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 115 (2016); *see also* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 93-95 (First Harper Perennial Modern Classics ed. 2015) (1988) (describing the Black Codes as "part of a broad effort to employ state power to shape the new social relations that would succeed slavery"); Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 383-84 (2022) (detailing the emergence of the Black Codes, including criminalization of "vagrancy"). Two, states made it a crime to break an employment contract—a crime that usually applied to contracts entered into by Black tenant farmers. For more on this practice, see Aziz Z. Huq, Note, *Peonage and Contractual Duty*, 101 COLUM. L. REV. 351, 360-63 (2001); and David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at* United States v. Classic, 90 YALE L.J. 741, 761 (1981), which observes that almost all federal antipeonage prosecutions involved White farmers and Black farm tenants. This crime continued to be prosecuted well into the twentieth century, resulting in the Supreme Court case *Bailey v. Alabama*, 219 U.S. 219 (1911). Both of these crimes, though race-neutral on their face, had a specific goal: to recreate a slave economy. *See* GOLUBOFF, *supra*, at 166 ("[V]agrancy laws, among others, were used to return black Americans to a state as close to slavery as legally and practicably possible.").

167. Initially, as George Fisher persuasively argues, antidrug laws and prosecutions were much more about protecting White people. *See* GEORGE FISHER, BEWARE EUPHORIA: THE MORAL ROOTS AND RACIAL MYTHS OF AMERICA'S WAR ON DRUGS 221-27 (2024) (arguing that the nation's early drug laws "were laws about whites"). Either way, race was inseparable from the war on drugs. Race was at its core.

168. ALEXANDER, *supra* note 127, at 246 ("When those behind bars are taken into account, America's institutions continue to create nearly as much racial inequality as existed during Jim Crow.").

169. *Constitution*, 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 489 (Lesley Brown ed., 1993) (1973).

To explain what we mean by race-making, it helps to take a step back. As critical race theorists have long argued, this country's history, including its legal history, is only fully intelligible through the lens of race.[170] At the same time, as critical race theorists have long pointed out, race is largely a social construct.[171] Race itself has little, if any, biological significance. "Rather, it is the social meaning that we attach to race (skin color, difference in phenotype) that invests it with meaning."[172] Or as Kendall Thomas put it years ago, race should be thought of as a verb more than a noun, since we constantly make and remake race.[173] And more often than not, this race-making is done to seize — and maintain — power.

At its most extreme, race-making paved the way for this country to justify slavery, and to engrave it in the Constitution with, among other things, its clause describing an enslaved Black person as three-fifths of a person.[174] Understood this way, it allowed the "most radical claims for freedom and political equality [to be] played out in counterpoint to chattel slavery, the most extreme form of

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170. *See* Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Introduction* to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1, 2 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).

171. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992) ("Critical race theory begins with a recognition that 'race' is not a fixed term. Instead, 'race' is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle."); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 774 (1994) ("'[R]ace' is neither a natural fact simply there in 'reality,' nor a wrong idea, eradicable by an act of will."); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby — LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1605-06 (1997) ("Race . . . is there and not there, race is a reality and a social construction. Race is quite like the 'Tar-Baby.' You punch the Tar-Baby, you think you have got him, but instead you become stuck."). Perhaps no critical race theory (CRT) scholar has explored this issue more deeply than Ian Haney López. *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 2 (10th Anniversary ed. 2006) (describing the "legal construction of race"). In the criminal-justice context, CRT scholars have gone a step further by showing how policing contributes to the social construction of race. *See, e.g.*, Capers, *supra* note 153, at 53-56.

172. *See, e.g.*, Capers, *supra* note 153, at 53.

173. *See* Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 61 (Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlé Williams Crenshaw eds., 1993) (quoting Kendall Thomas, Comments at the Duke Law School Conference Frontiers of Legal Thought (Jan. 26, 1990)); *see also* Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1262 (2011) (describing the "institutional, structural and ideological reproduction of racial hierarchy").

174. *See* U.S. CONST. art. I, § 2, cl. 3 (apportioning House representatives to the states based on "the whole Number of free Persons" and "three fifths of all other Persons"), *amended by* U.S. CONST. amend. XIV, § 2.

servitude."[175] After Emancipation and the ratification of the Fourteenth Amendment—which nominally granted citizenship to newly freed Black people—race-making permitted the instantiation of a type of second-class citizenship. And the Supreme Court placed its imprimatur on this classification when it embraced the fiction of "separate but equal" in *Plessy v. Ferguson*.[176] All of this should be understood as race-making.

But race-making exists in more subtle ways as well. For example, it exists when we think someone will be smarter, or faster, or less susceptible to pain, or more likely to commit a crime, because of biological race. In some ways, it even existed when President Trump questioned the race of his opponent, Vice President Kamala Harris, in this most recent presidential campaign,[177] or casually referred to jobs involving menial labor as "Black jobs,"[178] or suggested, but with "the faintest patina of ambiguity,"[179] that immigrants from the southern border are prone to commit murder because he believes "it's in their genes."[180]

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175. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 1 (1991).

176. 163 U.S. 537, 551-52 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."). The precise language of "separate but equal" was used by Justice Harlan in his dissent. *Id.* at 552 (Harlan, J., dissenting).

177. Marianne LeVine, Jeff Stein, Abbie Cheeseman & Isaac Arnsdorf, *Trump Portrays Harris as Foreign, Echoing Past Attacks on Democrats of Color*, WASH. POST (Aug. 19, 2024, 6:56 PM EDT), https://www.washingtonpost.com/politics/2024/08/19/trump-speech-pa-event-dnc [https://perma.cc/SGY9-9VML].

178. Maya King, *What's a 'Black Job'? Trump's Anti-Immigration Remarks Are Met with Derision*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/black-job-trump-immigration.html [https://perma.cc/AZ7M-R9MW].

179. Ali Breland, *Donald Trump Flirts with Race Science*, ATLANTIC (Oct. 7, 2024), https://www.theatlantic.com/technology/archive/2024/10/donald-trump-migrants-race-science/680187 [https://perma.cc/F69K-AXY8]. The ambiguity stems from Trump's language. Trump stated that "13,000" of those crossing the southern border were murderers, "[a]nd they're now happily living in the United States." *Id.* He then added, "You know, now, a murderer, I believe this, it's in their genes. And we got a lot of bad genes in our country right now." *Id.* The comment, associating immigrants crossing the southern border with "bad genes," generated national media attention. In response, a campaign spokesperson stated Trump "was clearly referring to murderers, not migrants." Michael Gold, *Trump's Remarks on Migrants Illustrate His Obsession with Genes*, N.Y. TIMES (Oct. 9, 2024), https://www.nytimes.com/2024/10/09/us/politics/trump-migrants-genes.html [https://perma.cc/3S4C-2TYP].

180. Gold, *supra* note 179; *see also* Daniel Vergano, *Trump's Racist Rants Against Immigrants Hide Under the Language of Eugenics*, SCI. AM. (Oct. 14, 2024), https://www.scientificamerican.com/article/trumps-racist-rants-against-immigrants-hide-under-the-language-of-eugenics [https://perma.cc/PZ9J-PAQY] (reporting on Trump's comments on immigrants and genetics); Philip Bump, *Saying Immigrants Bring 'Bad Genes' Echoes Trump's History—and the World's*, WASH. POST (Oct. 7, 2024, 12:05 PM EDT), https://www.washingtonpost.com/politics/2024/10/07/trump-finally-just-says-that-some-immigrants-are-genetically-inferior

And race-making existed, and exists still, in the demonization of certain drugs and drug users. First, as Kimani Paul-Emile demonstrates in her forthcoming book, *The Real War on Drugs: Battles over Drug Regulation and How They Changed America*, the war on drugs furthered a larger effort to undergird race with biological meaning.[181] And not just biological meaning, but hierarchical meaning: it was a way to preserve, and naturalize, White advantage.

Consider alcohol. At the same time that the consumption of alcohol was normalized—the time during which "the right to possess alcohol for private consumption was an inalienable right"[182]—White elites portrayed the consumption of alcohol by Black people as a problem *because of race*.[183] Elites promulgated the belief that Black people were constitutionally incapable of holding their liquor. They also promulgated the belief that alcohol made the otherwise "fairly docile and industrious" Black person "turbulent and dangerous and a menace to life, property, and repose of the community,"[184] and that alcohol "transformed the black male into a rapist."[185] In short, they advanced the image of the "liquor crazed Negro."[186] This image not only supported efforts to regulate the sale of alcohol to Black people, which Virginia, Alabama, and Tennessee did;[187] it also, as Paul-Emile makes clear, "helped galvanize the Southern delegation in Congress to push for passage of the 18th Amendment, which banned the sale of alcohol."[188] But the larger point here is that this image also advanced the belief that Black people were biologically different.

Later, a similar campaign was deployed with respect to Black people and cocaine. In the nineteenth century, cocaine use was common, both for medical uses

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[https://perma.cc/E7CV-PWZX] (same); Emmy Martin, *Trump on Immigrants: 'We Got a Lot of Bad Genes in Our Country Right Now,'* POLITICO (Oct. 7, 2024, 12:23 PM EDT), https://www.politico.com/news/2024/10/07/trump-immigrants-crime-00182702 [https://perma.cc/GW2D-PWUP] (same).

181. KIMANI PAUL-EMILE, THE REAL WAR ON DRUGS: BATTLES OVER DRUG REGULATION AND HOW THEY CHANGED AMERICA (forthcoming) (manuscript at 26-46) (on file with authors).

182. 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)).

183. PAUL-EMILE, *supra* note 181 (manuscript at 30-34).

184. Denise A. Herd, *Prohibition, Racism and Class Politics in the Post-Reconstruction South*, 13 J. DRUG ISSUES 77, 83 (1983). Perhaps needless to say, the "community" meant the White community.

185. JAMES A. MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY 299 (2003).

186. Paul S. George, *Policing Miami's Black Community*, 57 FLA. HIST. Q. 434, 439 (1978).

187. DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 50 (2007).

188. PAUL-EMILE, *supra* note 181 (manuscript at 32).

and more recreationally as a stimulant.[189] And its over-the-counter use was acceptable. Indeed, until 1903, it was one of the ingredients in Coca-Cola—hence the name.[190] One could even buy cocaine chewing gum over the counter.[191] But when that acceptance waned, elites again turned to the fiction of biological racial difference as a way to support regulation. While the use of cocaine by White people might be harmless enough, the use of cocaine by Black people was a different story. "In the negro," claimed one prominent physician, "this intoxication frequently becomes a homicidal frenzy—not the purposeless delirium of the ordinary lunatic, but the cool, calculating, diabolical mania of the fiend."[192] Another physician opined:

> Sexual desires are increased and perverted, peaceful negroes become quarrelsome, and timid negroes develop a degree of "Dutch courage" that is sometimes almost incredible. A large proportion of the wholesale killings in the South during recent years have been the direct result of cocaine and frequently the perpetrators of these crimes have been hitherto inoffensive, law-abiding negroes. Moreover, the negro who has once formed the habit seems absolutely beyond redemption.[193]

It was even suggested that "the cocaine-sniffing negro" was "invulnerable to bullets."[194] All of this was race-making. All of this contributed to the notion that White people and Black people were fundamentally, and biologically, different; that there was such a thing as Black blood and White blood;[195] that there was a reason to fear miscegenation and insist on the "one-drop" rule.[196] And coupled with other turn-of-the-century propaganda, it supported efforts to turn

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189. David F. Musto, The American Disease: Origins of Narcotic Control 3 (3d ed. 1990) (noting that both opiates and cocaine were "popular—if unrecognized—items in the everyday life of Americans").

190. Tim Madge, White Mischief: A Cultural History of Cocaine 9 (2001); Clifford D. May, *How Coca-Cola Obtains Its Coca*, N.Y. Times, July 1, 1988, at D1, D1.

191. *See The Story of Coca-Cola Chewing Gum*, Martin Guide to Coca-Cola Memorabilia, https://www.earlycoke.com/coca-cola-chewing-gum [https://perma.cc/ZR75-ZTSY] (describing the history of Coca-Cola gum).

192. Edward Huntington Williams, Alcohol, Hygiene, and Legislation 33 (1915).

193. David F. Musto, Drugs in America: A Documentary History 363 (2002).

194. Fisher, *supra* note 167, at 267 (quoting Edward Huntington Williams, *Negro Cocaine "Fiends" Are a New Southern Menace*, N.Y. Times, Feb. 8, 1914, at 12, 12).

195. *See, e.g.*, Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 Mich. L. Rev. 1161, 1163 (1997); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 Yale L.J. 1473, 1476-77 (2003); Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1737 (1993).

196. Harris, *supra* note 195, at 1737 (quoting F. James Davis, Who Is Black? 5 (1991)).

Northerners against Black people, and to abandon Reconstruction in favor of a Lost Cause ideology.[197]

This race-making extended to other groups as well. Native Americans were incorrigibly attracted to "[f]irewater."[198] And the Irish "race" was prone to drunkenness—hence the term "paddy wagon."[199] But the last example we turn to involves Asians, race-making, and the regulation of opium. Here, too, those favoring regulation of the "Asiatic vice" invoked biological race as a justification for criminalizing opium use.[200] Borrowing from the playbook that had proved successful in the past, they argued that Chinese people were constituted differently and thus responded to opium differently than White people.

But this time, rather than arguing it was the "other" who lost control and became unruly, advocates for regulation argued that it was White people. Asians, it was claimed, were "not so easily affected by the pipe."[201] An 1871 treatise, *Opium and the Opium-Appetite*, added, "The peoples of the Orient generally, being of the phlegmatic cast more, are able to bear with more certain impunity than Europeans, not stimuli only but narcotics as well, be these alcoholic liquors or opium or tobacco."[202] The *San Francisco Examiner* even noted that "Chinamen seem able to thrive on [opium]."[203] However, "to a white man it means moral, mental and physical ruin. It saps the vigor of our race."[204] The influential social

197. Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution, at xxi-xxiii (2019).

198. Robert J. Miller & Maril Hazlett, *The "Drunken Indian": Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 Ariz. St. L.J. 223, 225 n.5 (1996) (quoting Patricia D. Mail & David R. McDonald, Tulapai to Tokay: A Bibliography of Alcohol Use and Abuse Among Native Americans of North America 17 (1980)).

199. Ndjuoh MehChu, *Policing as Assault*, 111 Calif. L. Rev. 865, 874-75 (2023) (quoting Derecka Purnell, Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom 10 (2021)).

200. *The Country's First War on Drugs: SF vs. Opium*, S.F. Exam'r (June 11, 2015), https://www.sfexaminer.com/news/the-country-s-first-war-on-drugs-sf-vs-opium/article_4a63c2f4-a37a-5bf9-8cfa-e627c6e9c757.html [https://perma.cc/69UZ-8QPP].

201. Timothy A. Hickman, *Drugs and Race in American Culture: Orientalism in the Turn-of-the-Century Discourse of Narcotic Addiction*, 41 Am. Stud. 71, 86 (2000) (quoting William Rosser Cobbe, Doctor Judas, A Portrayal of the Opium Habit 125-26 (Chicago, S.C. Griggs & Co. 1895)).

202. Alonzo Calkins, Opium and the Opium-Appetite: With Notices of Alcoholic Beverages, Cannabis Indica, Tobacco and Coca, and Tea and Coffee, in Their Hygienic Aspects and Pathologic Relations 132 (Philadelphia, J.B. Lippincott & Co. 1871).

203. *The Opium Bill*, S.F. Exam'r, Mar. 3, 1889, at 4, 4.

204. *Id.*

reformer Jacob A. Riis was even blunter, writing, "[W]oe unto the white victim upon which ['the Chinaman's'] pitiless drug gets his grips."[205]

And as was true of past campaigns against alcohol and cocaine use, campaigners also invoked the need to protect the purity of White women. This time, the fear was not so much that women would be raped by a "cocaine-crazed negro" or "negro drug 'fiend.'"[206] It was that White women, visiting opium dens, would lose their sense of reason and allow themselves to be defiled.[207] Even Chinese restaurants were cast as places of danger where opium flowed freely, and where Chinese men lured White women, using opium "as a trap for young girls."[208] As one newspaper put it in 1904, "Many a young girl received her first lesson in sin in Chinese restaurants."[209] Congressional testimony at the time is also revealing. One physician complained of places where "enormous quantities of opium [are] consumed" and Chinese men have girls, some "of [good] family," now as their concubines, doing "nothing at all but smok[ing] opium day and night."[210] The result was a rash of laws making it a crime to keep an opium den, visit an opium den, or use opium,[211] as well as efforts to ban "young white girls" from entering Chinese restaurants.[212] The target of these laws, George Fisher argues in his own recent book on the war on drugs, was actually White people, not Asians.[213] As he puts it, "[L]awmakers acted to protect the morals of their

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205. Jacob A. Riis, How the Other Half Lives: Studies Among the Tenements of New York 95 (New York, Charles Scribner's Sons 1890).

206. *See* Edward Huntington Williams, *Negro Cocaine "Fiends" Are a New Southern Menace*, N.Y. Times, Feb. 8, 1914, at 12, 12.

207. Fisher, *supra* note 167, at 231-44. George Fisher doubts that miscegenation was the real concern but acknowledges that there was concern that White women, having taken opium, would allow themselves to be defiled. *Id.*

208. Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 Duke L.J. 681, 699 (2018) (quoting *Rescued from Opium Den*, Daily Ardmoreite (Ardmore, Okla.), Nov. 26, 1908, at 2, 2).

209. *Id.* at 702-03 (quoting *Chinese Dens of Iniquity That Are Well Protected by the Authorities*, Bridgeport Herald, Aug. 28, 1904, at 11, 11).

210. *Importation and Use of Opium: Hearing on H.R. 25240, H.R. 25241, H.R. 25242, and H.R. 28971 Before the H. Comm. on Ways & Means*, 61st Cong. 71 (1910) (statement of Dr. Christopher Koch, Vice President, State Pharmaceutical Examining Board of Pennsylvania).

211. Fisher, *supra* note 167, at 6 n.10.

212. Chin & Ormonde, *supra* note 208, at 713 (quoting *Officers Keep Eye on Restaurants*, Wash. Times, Aug. 6, 1909, at 13, 13).

213. Fisher, *supra* note 167, at 218 ("[A]uthorities largely tolerated opium smoking among the Chinese while anxiously combatting it among whites.").

own kind while disregarding the morals of others."[214] Fisher says the same of the country's first anticocaine laws.[215] This only strengthens our point that all of this was race-making. The villain, in any telling, was "the Chinaman" who, again, could smoke opium "with little worse effect upon himself."[216] And the ones to be protected were White women. Indeed, White women were protected for race-making in a literal sense: as the Court put it in the 1908 decision *Muller v. Oregon*, White women were necessary to "the strength and vigor of the race" and the "well-being of the race."[217]

While these examples so far may seem distant—a relic of earlier times—the connection between the criminalization of certain drugs and race-making can in fact be found more recently. One has only to recall the racialization of crack cocaine as Black, even though the government's own data found that two-thirds of crack cocaine users were White or Hispanic.[218] Or how the "media pedaled to the American public a fear-mongering, racist narrative of predominantly black 'crack baby mothers'"[219] and portrayed Black users as "highly dangerous, hopelessly pathological, and *intrinsically* criminal."[220] At the same time, White users tended to be portrayed as victims or naifs. Consider this rather sympathetic portrayal from the *New York Times* of White users of crack cocaine:

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214. *Id.* at xvi. He later adds, "American lawmakers sought to save *their* people and the morals of their community and their children—hence the horror and rapid response when lawmakers discovered dens peopled by whites and especially by respectable women and youth." *Id.* at 265. As Fisher recognizes by italicizing "their," a core problem was that elected lawmakers viewed "their people" to be those of the same race.

215. *Id.* at 270 ("[E]vidence shows that most early anti-cocaine laws, like early laws against opium dens, were *laws about whites*.").

216. *Id.* at 222 (quoting RIIS, *supra* note 205, at 95).

217. 208 U.S. 412, 421, 422 (1908). That the Court had in mind White rather than Black women was obvious, especially given the recent history of slavery, under which Black women worked long hours without any concern at all for their "special physical organization." *Id.* at 419-20 n.1. Not to mention that, until 1926, Oregon's constitution banned "free negro[es]" from migrating to the state, or even visiting. OR. CONST. art. XVIII (repealed 1926); *see also* Greg Nokes, *Black Exclusion Laws in Oregon*, OR. ENCYC. (May 17, 2024), https://www.oregonencyclopedia.org/articles/exclusion_laws [https://perma.cc/B5F5-HQZ5]. For more on *Muller v. Oregon* and race, see Capers, *supra* note 145, at 16-18.

218. Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, ACLU 1 (Oct. 2006), https://www.aclu.org/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf [https://perma.cc/2YD9-GPJP] (stating that in 2003 more than sixty-six percent of crack-cocaine users in the United States were White or Hispanic).

219. Andrew Goulian, Marie Jauffret-Roustide, Sayon Dambélé, Rajvir Singh & Robert E. Fullilove III, *A Cultural and Political Difference: Comparing the Racial and Social Framing of Population Crack Cocaine Use Between the United States and France*, 19 HARM REDUCTION J. art. no. 44, at 2 (2022).

220. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 791 (2020) (emphasis added).

> [P]rimarily middle-class people with no criminal records . . . are buying the potent form of cocaine. . . . Almost all of the arrested drivers and passengers were white, . . . had no previous criminal records and appeared to regard themselves as law-abiding citizens . . . . They expressed shock that they would lose their cars . . . . They also said that the punishment was far out of proportion to the offense.[221]

This race-making comes into even-sharper focus when one considers the opioid crisis, which is often perceived as "fundamentally about white people"[222] and which in turn prompted a kinder, gentler response emphasizing treatment rather than criminalization.[223] But race-making goes beyond the more sympathetic public response to opioid users. Race-making is also integral to how opioids were categorized in the first place, a point David Herzberg makes in his book *Happy Pills in America: From Miltown to Prozac*.[224] As Herzberg suggests, the real difference between prescription drugs and illicit drugs is not in the physical or psychoactive effects, but in the social meaning we attach to them, a social meaning that can turn on race.[225] Julie Netherland and Helena Hansen add, "The drug war operates because of a reciprocal relationship between the criminalization of blackness and the decriminalization of whiteness."[226] The historian Donna Murch is equally blunt: "The opioid crisis would not have been possible without the racial regimes that have long structured both illicit and licit modes of consumption."[227]

To make this point clearer, it helps to note that the opioid crisis, by most accounts, began with the use of prescription opioids. It also helps to note that the marketing of prescription opioids, most notably Oxycontin, followed on the heels of President Reagan's aggressive "second" war on drugs targeting crack cocaine, racialized as Black and marked as illicit.[228] But whereas crack cocaine and the Black people who used and distributed it were demonized, opioids were

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221. Peter Kerr, *Car Seizures Alter Selling of Crack*, N.Y. Times, Jan. 21, 1987, at B1, B1-2.

222. Bridges, *supra* note 220, at 789.

223. *Id.*

224. David Herzberg, Happy Pills in America: From Miltown to Prozac 122-25, 133-37 (2010).

225. *Id.* at 137.

226. Julie Netherland & Helena Hansen, *White Opioids: Pharmaceutical Race and the War on Drugs That Wasn't*, 12 Biosocieties 217, 219 (2017).

227. Donna Murch, *How Race Made the Opioid Crisis*, Bos. Rev. (Apr. 9, 2019), https://www.bostonreview.net/forum/donna-murch-how-race-made-opioid-crisis [https://perma.cc/QC7T-VKTP].

228. *Id.*

normalized, and new users were viewed simply as good people seeking pain relief.[229] One could even say the Reagan Administration gave pharmaceutical companies free rein by ushering in a period of corporate deregulation and reduced government oversight and by allowing, for the first time, pharmaceutical companies to engage in direct-to-consumer advertising.[230] Without oversight, Purdue Pharma marketed Oxycontin knowing that the pills were more addictive than it was leading the public to believe, and knowing that individuals were "crushing them and then snorting, injecting, or swallowing them in order to get an intense, heroin-like high."[231] All of this facilitated White innocence and Black guilt, which continued even when White people, addicted to prescribed opioids, turned to the "black market" to feed their habit. Indeed, as Murch points out, even the "linguistic convention of 'white' and 'black' markets points to how steeped our ideas of licit and illicit are in the metalanguage of race."[232]

And, of course, race-making is implicated in the opioid crisis, and our kinder, gentler response to it, in other ways.[233] One of the reasons the opioid crisis is associated with White people is because Purdue "directed advertisements to overwhelmingly white suburban and rural areas,"[234] which supported their positioning of the drug as licit and nonaddictive and White opioid users as "the antithesis of 'hardcore' (nonwhite) urban drug users targeted by the Wars on Drugs."[235] As a result, Purdue "both benefited from and reinforced the racial ideology underwriting" of the war on drugs.[236] Add to this that doctors were more likely to prescribe opioids to White people than to Black people,[237] perhaps due

229. As Khiara M. Bridges points out in her comparison of how opioid users were portrayed compared to users of crack cocaine, despite sympathetic portrayals of White opioid abusers, "one was hard pressed to find narratives that described the black persons dependent on crack cocaine as turning to drugs to cope with trauma, or mental health issues, or personal tragedy, or poverty." Bridges, *supra* note 220, at 791.

230. Murch, *supra* note 227.

231. Bridges, *supra* note 220, at 788. In 2007, Purdue admitted to wrongdoing and pleaded guilty. Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES (May 10, 2007), https://www.nytimes.com/2007/05/10/business/11drug-web.html [https://perma.cc/3EN7-FX6M].

232. Murch, *supra* note 227.

233. This is not to suggest that we disagree with the "kinder, gentler response" response. But we do disagree that a "kinder, gentler response" had been applied to drug crises that involved racial minorities.

234. Murch, *supra* note 227.

235. *Id.*

236. *Id.*

237. Nancy E. Morden, Deanna Chyn, Andrew Wood & Ellen Meara, *Racial Inequality in Prescription Opioid Receipt—Role of Individual Health Systems*, 385 NEW ENG. J. MED. 342, 346-48 (2021).

to the assumption that Black people experience pain less than White people.[238] As Netherland and Hansen point out, even the turn to Suboxone as a medication to treat opioid addiction—in 2000, the Drug Addiction Treatment Act was passed, allowing doctors to prescribe it from their offices[239]—involved racialization, albeit through coded language.[240] The drug was deemed necessary to treat "suburban" users *and* to protect them from the stigma associated with treatments such as methadone, which was associated with "urban" users.[241] Perhaps most importantly, throughout the opioid crisis—or at least while it was viewed as "fundamentally about white people"—the addictive nature of the opioids was seen as the problem, not the users themselves. Through this legerdemain, opioid users remained deserving of compassion and a public-health response. By contrast, with respect to drugs marked as illicit and associated with people of color, the users tended to be marked as the ones who were to blame, who reflected "a moral failure that warrants punishment,"[242] who were, again, "intrinsically criminal."[243] All of this relies and builds on precedent that biological race matters—that race has deep biological significance.

Allow us a final example of how the criminalization of and racialization of certain drugs fits into a race-making project. In a forthcoming article, Osagie K. Obasogie examines a not-uncommon defense from police officers facing death-in-custody charges. The defense is that the decedent was experiencing "excited delirium," causing the decedent to become overly agitated and stressed, bringing on his own death.[244] As Obasogie puts it, police officers, medical examiners, and coroners essentially argue that excited delirium "can lead some people to spontaneously die through no fault but their own."[245] Unsurprisingly, this defense seems to have particular purchase in cases involving Black decedents. And as Obasogie points out, excited delirium itself has its own origin story, which is very much tied to ideas about how Black men physically respond to drugs.[246]

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238. Kelly M. Hoffman, Sophie Trawalter, Jordan R. Axt & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, False Beliefs About Biological Differences Between Blacks and Whites*, 113 PNAS 4296, 4300 (2016).

239. Drug Addiction Treatment Act of 2000, Pub. L. No. 106-310, 114 Stat. 1222.

240. Netherland & Hansen, *supra* note 226, at 230.

241. *Id.*

242. Bridges, *supra* note 220, at 789.

243. *Id.* at 791.

244. Osagie K. Obasogie, *Excited Delirium, Policing, and the Law of Evidence*, 138 HARV. L. REV. (forthcoming 2025) (manuscript at 6) (on file with authors).

245. *Id.*

246. *See id.* at 15-16.

Never mind that there is little science to support the existence of "excited delirium."[247]

The point of the discussion thus far is not simply that the war on drugs was part of a "war" to make race salient and invest it with meaning. Nor is the point simply that this "biologically different" fiction buttressed arguments of White superiority and White supremacy. The larger point is that all of this also served to police race. It was a way to engage in subtle messaging about what it means to be Black, what it means to be Asian, and most importantly, what it means to be White. To be White could mean having a scotch at the end of the day, or a martini with lunch. But it did not include drinking to excess, at least not in public, which was associated with Irish immigrants and other "ethnic Whites."[248] It did not include smoking marijuana, long associated with Mexicans and Black people. (There is a reason the antimarijuana film *Reefer Madness* had an all-White cast and targeted White youth.[249]) And being White did not include patronizing an opium den, or for a while at least, even Chinese restaurants. After all, "to be an [opium] addict was to be like the Chinese" and "to be Chinese was to be like an addict."[250] These days, we think of the state's police power as plenary, as allowing the state to police anything that impacts the health, safety, welfare, and morals of the general public.[251] But we suggest this misapprehends the reach of the state's police power. Police power, at least in this country, has always extended to policing race itself.

All of this adds necessary complexity to the relationship between race and drug prohibitions that Pozen sketches. It also leads to a larger point still. We suggested earlier that race is central to the war on drugs, "both as a means and as an end."[252] And that criminalization of drug use also functioned to reify the notion of biological race, and to police race. And that this, too, "is part of the *constitution*—as in 'the way in which a thing is composed or made up'—of the

247. *Id.* at 6-7.

248. *Cf. Prohibition: A Case Study of Progressive Reform*, LIBR. CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/prohibition-case-study-of-progressive-reform [https://perma.cc/XQN5-5Q9G] (noting that the temperance movement, from the 1850s onward, "focused much of its efforts on Irish and German immigrants"); Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 LAW & SOC. INQUIRY 411, 429-30 (1999) (discussing the "association of new immigrants with intemperance and its evils").

249. REEFER MADNESS (G&H Productions 1936).

250. Hickman, *supra* note 201, at 87.

251. *See* POZEN, *supra* note 10, at 24; *see also* Chi., Burlington & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 592-94 (1906) ("We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.").

252. *See supra* text accompanying note 169.

war on drugs."[253] But the larger point has to do with another pernicious effect of race-making. The pernicious effect of race-making is that it allows us to see that our jails and prisons are overwhelmingly Black and Brown, but lulls us into attributing such disparities to inherent criminality and individual failure. Race-making allows us to see a war on drugs, but lulls us into not seeing the racial logics in the war, and into not asking what in critical race theory is often called "the other question"[254]: who benefits from the war, who does not, and why?[255] Indeed, with respect to the war on drugs, race-making lulls us into not seeing our own acquiescence in a system that marks some drugs as licit (whether it's alcohol, which causes about 178,000 deaths a year,[256] or prescription opioids, responsible for almost 15,000 deaths in 2018 alone[257]) and marks other drugs as illicit (such as marijuana, which is hardly associated with mortality at all[258]).

And race-making is not limited to criminalization and demonization of certain drugs and drug users. Indeed, surfacing the role race-making played in the war on drugs brings into sharper focus the role race-making has played, and continues to play, in our criminal system in general. It was, for example, explicit in the study of phrenology, which suggested African phenotypes signify criminal tendencies.[259] Going a step further, race-making has naturalized inequality more broadly. Recall that race-making was used to justify American slavery and to engrave in the Constitution that an enslaved Black person should be counted as three-fifths of a person. Now, race-making—again the process of entrenching the idea that race has biological significance that indicates character or intelligence or athletic ability or criminality—helps explain and naturalize economic

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253. *Supra* note 169 and accompanying text.

254. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

255. *Cf.* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 905 (2018) (asking "the other question" with respect to evidentiary issues).

256. Nat'l Inst. on Alcohol Abuse & Alcoholism, *Alcohol-Related Deaths and Emergencies in the United States*, NAT'L INSTS. HEALTH (Nov. 2024), https://www.niaaa.nih.gov/alcohols-effects-health/alcohol-topics-z/alcohol-facts-and-statistics/alcohol-related-emergencies-and-deaths-united-states [https://perma.cc/5N77-MH3L].

257. Nana Wilson, Mbabazi Kariisa, Puja Seth, Herschel Smith IV & Nicole L. Davis, *Drug and Opioid-Involved Overdose Deaths—United States, 2017-18*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 20, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6911a4.htm [https://perma.cc/LK8Q-66PW].

258. *See* NAT'L ACADS. OF SCIS., ENG'G & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 217-44 (2017) ("It is unclear whether and how cannabis use is associated with all-cause mortality or with occupational injury.").

259. *See* GINA LOMBROSO-FERREO, CRIMINAL MAN, ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO 10-24 (Patterson Smith 1972) (1911).

inequality. Indeed, as recently as 2017, the majority of White people in the country agreed with the proposition that "blacks who can't get ahead are mostly responsible for their own condition," according to a Pew Research poll.[260] Race-making helps explain and naturalize the fact that "[t]he median Black household in America has around $24,000 in savings, investments, home equity, and other elements of wealth. The median White household: around $189,000."[261] One could even say it can be deployed to explain and naturalize the need for affirmative action—that Black and Brown people *need* a leg up in admissions because they *naturally* score lower on admissions tests, rather than that we've created and maintained systems of unequal wealth and education and advantage that result in unequal scores and systems that the Court turned a blind eye to in *Students for Fair Admissions v. Harvard*.[262] In our day-to-day lives, race-making naturalizes the disparities that are at once stark and taken for granted—for example, the fact that in an upscale restaurant, the patrons are likely to be of one race and the kitchen staff of another. All of this owes much to race-making. It is on par with thinking there are "Black jobs."

In short, the reach of race-making adds another layer of complexity to the question Pozen ultimately asks, which is what advocates for drug rights can do going forward. Indeed, it prompts a question in response: can we have true drug freedom—the right to use drugs (at least harmless drugs), the right to happiness, the right to privacy, the right to freedom of thought, the right to trip, the right to whatever—without first undoing race? To be sure, this is a larger question than can be answered in this Review. So we first turn to another hurdle that explains why the right to drugs did not take.

IV. THE FOURTH AMENDMENT, ALASKA, AND THE WAR ON CRIME

At this point we return to Pozen's primary inquiry: why didn't the Constitution slow the drug war? The primary contribution of *The Constitution of the War on Drugs* is showing that the reflexive answer offered by judges and commentators—that "courts are charged with enforcing constitutional protections and may not take policy positions on the war on drugs"[263]—is unconvincing. Pozen not

260. *The Partisan Divide on Political Values Grows Even Wider*, PEW RSCH. CTR. 34-35 (Oct. 5, 2017), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2017/10/10-05-2017-Political-landscape-release-updt..pdf [https://perma.cc/FNV4-RGEQ].

261. Doug Irving, *What Would It Take to Close American's Black-White Wealth Gap?*, RAND (May 9, 2023), https://www.rand.org/pubs/articles/2023/what-would-it-take-to-close-americas-black-white-wealth-gap.html [https://perma.cc/2MA5-PFQP].

262. 600 U.S. 181, 229-31 (2023).

263. United States v. Easley, 293 F. Supp. 3d 1288, 1309 (D.N.M. 2018) (citing Florida v. Bostick, 501 U.S. 429, 439 (1991)), *rev'd*, 911 F.3d 1074 (10th Cir. 2018).

only highlights constitutional arguments that could have pushed back on the war on drugs, but he also catalogues cases where courts accepted these arguments. And he suggests that if these cases had stuck in the 1960s and 1970s, "[l]egal protections for nonviolent drug users could have been established and then entrenched to some degree against subsequent political change."[264] Pozen concludes: "It didn't have to be this way. . . . Constitutional law could have denied the worst excesses of the war on drugs, instead of becoming ever more defined by them."[265]

This Part extends Pozen's theme in three directions to illustrate how his findings fit into the broader landscape of crime and constitutional law. The expansions each invite a variation on the book's title. The first Section—"The Fourth Amendment of the War on Drugs"—argues that Pozen's critique applies even more forcefully to judicial interpretation of the Fourth Amendment, a portion of the Constitution left out of his analysis but directly applicable to the drug war. Second, "The Constitution of the War on Crime" extends the discussion beyond drugs. The judicial passivity Pozen critiques also appears in the courts' response to the panoply of "tough on crime" policies that began in the 1960s and fueled the phenomenon that would come to be labeled "mass incarceration." And third, "The Alaska Constitution of the War on Drugs" questions whether the cases Pozen identifies were, as he suggests, a promising spark smothered by judicial reactionaries. This Section reframes these cases as modest variations on the courts' overall theme of saying "yes" to the drug war.

These three alternate angles reveal that, while Pozen's findings offer insights beyond his narrow focus, that focus comes at a cost. Pozen's critique of the courts can also be directed at their interpretation of a constitutional provision (the Fourth Amendment) that was entwined with the most invasive aspects of the drug war. His critique also resonates throughout American criminal law. This suggests that Pozen's narrow explanations for the judicial tendencies he observes—which do not explain the same judicial behavior in closely related contexts—don't go deep enough. Further, an exploration of Alaska's response to drug use suggests that the intriguing cases Pozen exhumes from the historical record are modest outliers, not a pathway to a different reality. Pozen holds up an Alaska Supreme Court ruling as a model of what could have been if the courts pushed back on drug prohibitions. But despite the continuing authority of that case, the drug war in Alaska deviates only slightly from the drug war in the rest of the country.

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

265. *Id.* at 160.

A. The Fourth Amendment of the War on Drugs

Pozen's criticism of judicial passivity resonates with criminal-law scholars and especially procedure scholars like us who study constitutional limits on policing. Much of criminal-procedure scholarship over the past decades consists of a chorus of critiques of the Supreme Court's anemic enforcement of the Fourth, Fifth, and Sixth Amendments—and alternative visions of what might have been.[266]

Pozen is aware of the overlap. Specifically, he recognizes that *The Constitution of the War on Drugs* omits a "large number of constitutional challenges, brought mainly under the Fourth Amendment and its guarantee against 'unreasonable searches and seizures.'"[267] He chooses instead to "focus . . . on the substantive challenges to the drug laws themselves."[268] Pozen stresses that this focus gets to "the heart of the matter."[269] "Logically and legally, prohibition precedes policing."[270] Pozen is right about that. But assessing the clash between the drug war and the Constitution without the Fourth Amendment is like drawing conclusions about World War II by looking only at the battles in the Pacific. There are lessons to be learned, to be sure, but those lessons must be interpreted in light of the broader context.

Given its importance, Pozen could be clearer about where to situate the Fourth Amendment in the Constitution-of-the-war-on-drugs landscape. On the one hand, Pozen suggests that the courts did push back on the drug war in procedure opinions. He says, "[T]he justices have issued many more, and more liberal, rulings on questions of how crimes may be investigated and prosecuted than on questions of how they may be defined and punished."[271] Citing a classic article by William J. Stuntz, Pozen suggests that his narrative fits Stuntz's observation that "the Court skimps on substance so that it can splurge on procedure."[272] But Pozen later softens the point, arguing that "[s]cholars of criminal procedure sometimes say that courts have created a 'drug exception' to the Bill of Rights, relaxing restrictions on police and prosecutors when illicit chemicals

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266. *See, e.g.*, Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 2 (2015) (critiquing Fifth and Sixth Amendment doctrine as "in a state of collapse"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (critiquing the Fourth Amendment's "current doctrinal mess").

267. POZEN, *supra* note 10, at 13.

268. *Id.*

269. *Id.* at 14.

270. *Id.*

271. *Id.* at 113.

272. *Id.* (citing William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 72-73 (1997)).

are at issue."[273] In this discussion, he suggests that "the drug cases look less exceptional than representative" of judges' general reluctance to obstruct the war on drugs.[274] We agree. As explained below, Fourth Amendment cases offer powerful insight into Pozen's themes—maybe too powerful.

In terms of alternative paths for the drug war, the Fourth Amendment presents the largest constitutional *what if*. The Amendment prohibits unreasonable "searches" and "seizures."[275] This made the drug war vulnerable to Fourth Amendment challenge for three reasons. The first is that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."[276] Drug possessors and sellers easily blend into the surroundings, unlike, say, bank robbers or arsonists. To deter drug possession and sale meaningfully, police must surveil and stop lots of people in lots of places, often without clear cause. Second, the Fourth Amendment becomes increasingly demanding as searches become "excessively intrusive."[277] Drugs are small. With the help of a plastic bag, they can be hidden anywhere—and we mean anywhere.[278] That means effective searches for drugs tend to be intrusive. Third, the standard remedy for Fourth Amendment violations is fatal to drug prosecutions. Under the "exclusionary rule," any "[e]vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion."[279] For many drug cases, that makes a constitutional violation the end of the road. While the government can prosecute a murder without introducing the murder weapon, it is exceedingly difficult to prosecute a drug crime without drugs.

Robust judicial enforcement of the Fourth Amendment would have hobbled the drug war. But the opposite turned out to be true as well. Once judges charted pathways around Fourth Amendment barriers, drug cases basically proved themselves.[280] In sharp contrast to "civilian cases," a run-of-the-mill drug

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273. *Id.* at 159.

274. *Id.*

275. U.S. CONST. amend. IV.

276. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

277. City of Ontario v. Quon, 560 U.S. 746, 764 (2010); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009).

278. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985) (crafting a constitutional test for searches to detect if a "traveler is smuggling contraband in her alimentary canal"); Eckert v. Dougherty, 658 F. App'x 401, 404 (10th Cir. 2016) (analyzing probable cause to search a person's "anal cavity").

279. Segura v. United States, 468 U.S. 796, 804 (1984).

280. *See, e.g.*, *Twenty-Second Report: 2003-2004 to the Legislature and Supreme Court*, ALASKA JUD. COUNCIL, at L-18 (2005), https://ajc.alaska.gov/publications/docs/biennial/22ndReport.pdf [https://perma.cc/FJ45-EYS9] ("Offenses witnessed by police, like most Driving and Drug

prosecution relies on professional witnesses—that is, police—who show up to court as part of their job and testify in a practiced manner carefully calibrated to convince jurors.[281] And there is not much convincing needed. "The police stop someone, search their car, backpack, pockets, and the like, and find a bag of drugs . . . . That's the whole case in under twenty words."[282] That is one reason why, even in cities, the conviction rate in filed cases is consistently higher for drug crimes (69%) than for other crimes, including more serious offenses like sexual assault (56%) and robbery (60%).[283]

It is not an overstatement to say that the drug war's fate turned on how the Supreme Court interpreted the Fourth Amendment. And the idea behind the "drug exception" that Pozen references is that the courts interpreted the Fourth Amendment to enable rather than hinder the war on drugs.

No line of cases illustrates the Fourth Amendment's drug exception better than the law of the drug dog. The doctrine arises out of a 1983 case, *United States v. Place*, where police at LaGuardia Airport "expos[ed]" Raymond Place's luggage "to a narcotics detection dog."[284] The Supreme Court deemed the resulting dog sniff a "*sui generis*" feature of the investigative landscape that was neither a "search" nor "seizure" and so did not need to be reasonable under the Fourth Amendment.[285] As Justice Brennan pointed out in a later dissent, this meant that "law enforcement officers could release a trained cocaine-sensitive dog . . . to roam the streets at random, alerting the officers to people carrying cocaine."[286]

The dog-sniff cases are important in part because they authorize police to unleash dogs on the American populace and search for drugs under the fiction that this is not a "search." But the reason this line of cases truly stands out is because Fourth Amendment doctrine pointed so clearly to the opposite conclusion. The Supreme Court could easily have deemed police officers' use of trained dogs to sniff people and their possessions for hidden drugs to be "searches." The ordinary meaning of the term "search"—"an examination of an object or space to uncover information"—comfortably covers this drug-detection tactic.[287] History offers additional support. The colonists would likely have had little patience with royal hounds sniffing colonial trunks for smuggled tea.

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offenses, generally resulted in higher conviction rates on the most serious charge than offenses not witnessed by police.").

281. *See* BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 118-19.

282. *Id.*

283. *See id.* at 118 (summarizing statistics from nonfederal prosecutions).

284. 462 U.S. 696, 706 (1983).

285. *Id.* at 707.

286. United States v. Jacobsen, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting).

287. Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 238 (2019).

The answer is even clearer under the Court's expansive "search" definition. *Katz v. United States* famously defines a "search" as a government action that invades a "reasonable expectation of privacy."[288] People reasonably expect the contents of their closed bags to remain private.[289] The Court in *Place* sidestepped this *reasonable* expectation of privacy by requiring an expectation of privacy to be not only reasonable but "legitimate."[290] That move doomed people like Place because, the Court later noted, an expectation of privacy from drug dogs is not "legitimate" since drugs are "contraband."[291] The upshot of these cases is that if the government directs a dog to sniff your luggage to see what is inside, that's a "search" *unless* it is a "narcotics dog" sniffing for drugs. Creative, right? And notice that, unlike the cases Pozen highlights, it was *the government* that needed the Court to expand the boundaries of the prior case law. The Court complied, crafting a now-longstanding "*sui generis*" doctrine shielding drug dogs from Fourth Amendment scrutiny.[292]

There is insufficient space to catalogue the drug war's other Fourth Amendment wins, even just those at the Supreme Court. But a few notable cases stand out. In *California v. Greenwood*, officers acting on a tip about "narcotics trafficking" rummaged through trash a homeowner left on the curb.[293] In *Illinois v. Wardlow*, officers "patrolling an area known for heavy narcotics trafficking" stopped a person who ran after seeing them.[294] In *California v. Hodari D.*, police officers chased and tackled a youth who during the pursuit "tossed away what

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288. 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see also id.* at 352-53 (majority opinion) ("The Government's activities . . . violated the privacy upon which [Katz] justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

289. *See* Arkansas v. Sanders, 442 U.S. 753, 764 (1979) ("[T]he very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them."); United States v. Chadwick, 433 U.S. 1, 11 (1977) (finding a suspect could have a reasonable expectation of privacy in a footlocker).

290. *Place*, 462 U.S. at 706.

291. Illinois v. Caballes, 543 U.S. 405, 408 (2005) ("[A]ny interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'" (quoting *Jacobsen*, 466 U.S. at 123)); *Jacobsen*, 466 U.S. at 123 ("Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest.").

292. *See* Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871, 913-18 (2016) (describing "The Law of Drug Dogs").

293. 486 U.S. 35, 37, 40 (1988).

294. 528 U.S. 119, 121 (2000).

appeared to be a small rock" of suspected cocaine.[295] In *United States v. Drayton*, three officers boarded a stopped Greyhound bus to question each passenger and ask for consent to search, "as part of a routine drug and weapons interdiction effort."[296] And in *California v. Ciraolo*, police chartered a plane to fly over a person's home after receiving an anonymous tip that "marijuana was growing in [his] backyard."[297]

All these cases illustrate the squandered potential of the Fourth Amendment as a check on the drug war. In every one of these cases, the lower court had ruled that the police violated the Fourth Amendment, directed that the resulting evidence be suppressed, and, in the instances where the defendant had been convicted below, ordered the conviction reversed.[298] And in response, in each instance, the Supreme Court granted certiorari, reversed the appellate court, and reinstated any underlying convictions.[299] In these and other cases, the Court steadily eliminated Fourth Amendment obstacles, paving the way for the millions of annual arrests that fueled the drug war.

Pozen understandably excludes the Fourth Amendment cases from his inquiry since those cases are frequently discussed in criminal-procedure scholarship and the legal questions are distinct. But these cases offer important lessons for Pozen's exploration of judges' reluctance to deploy constitutional provisions to slow the drug war. They indicate that the Supreme Court's support of the drug war went beyond an unwillingness to deploy contested constitutional provisions like substantive due process, freedom of thought, or the right to pursue happiness. When asked to apply the Fourth Amendment to reduce the abuses of the drug war, the Court did not need to distinguish *Lochner*, jeopardize the New Deal consensus, or craft novel constitutional theories. All it had to do was apply precedent, text, and history. And the Court blinked.

Cases such as *Place* cause commentators not just to criticize judicial passivity in the face of the drug war, as Pozen does, but to suspect judges' motives. Justice Stevens, dissenting nine years after *Place* in another case upholding a contested drug search, stated, "No impartial observer could criticize this Court for

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295. 499 U.S. 621, 623 (1991).

296. 536 U.S. 194, 197 (2002).

297. 476 U.S. 207, 209 (1986).

298. People v. Greenwood, 227 Cal. Rptr. 539, 542-43 (Ct. App. 1986), *rev'd*, 486 U.S. 35 (1988); People v. Wardlow, 678 N.E.2d 65, 67-68 (Ill. App. Ct. 1997), *aff'd*, 701 N.E.2d 484 (Ill. 1998), *rev'd*, 528 U.S. 119 (2000); *In re* Hodari D., 265 Cal. Rptr. 79, 86 (Ct. App. 1989), *rev'd sub nom.* California v. Hodari D., 499 U.S. 621 (1991); United States v. Drayton, 231 F.3d 787, 791 (11th Cir. 2000), *rev'd*, 536 U.S. 194 (2002); People v. Ciraolo, 208 Cal. Rptr. 93, 98 (Ct. App. 1984), *rev'd*, 476 U.S. 207 (1986).

299. *Greenwood*, 486 U.S. at 39; *Wardlow*, 528 U.S. at 123; *Hodari D.*, 499 U.S. at 623, 629; *Drayton*, 536 U.S. at 200; *Ciraolo*, 476 U.S. at 210.

hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime."[300] This sentiment—common among scholars—overwhelms Pozen's more subtle explanations. Scholars who refer to a "drug exception" to the Fourth Amendment accuse judges of refraining from applying the Constitution to block the drug war even when clear constitutional text and precedent commanded otherwise.[301] The Fourth Amendment cases are not easily explained by the types of factors Pozen centers: constitutional ambiguity, a narrow legalistic lens, poor litigation strategies, or progressive political calculations. If the courts carved a drug *exception* into the Fourth Amendment, it suggests that judges were drug warriors too.

While the Supreme Court's willingness to bend the Fourth Amendment to facilitate the drug war is an indirect indicator that the Justices generally supported drug prohibitions, there are more direct signs. Policy arguments are generally frowned upon in constitutional litigation,[302] yet the Court frequently references the underlying drug war in its Fourth Amendment cases. And those references generally sound like endorsements, not critiques:

- The public "has a compelling interest in detecting those who would traffic in deadly drugs for personal profit."[303]
- "The Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to 'the veritable national crisis in law enforcement caused by smuggling of illicit narcotics.'"[304]

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300. California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting); *cf.* Florida v. Bostick, 501 U.S. 429, 440 (1991) (Marshall, J., dissenting) (criticizing the "'new and increasingly common tactic in the war on drugs': the suspicionless police sweep of buses in interstate or intrastate travel" (quoting United States v. Lewis, 921 F.2d 1294, 1295 (D.C. Cir. 1990))).

301. *See, e.g.*, Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 757 (2002) ("Yet scholars and jurists have recognized that the Constitution seems to bend when the criminal procedure rights of drug offenders are at stake."); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 926 (1987) ("In drug enforcement, most anything goes.").

302. *See* POZEN, *supra* note 10, at 139.

303. United States v. Place, 462 U.S. 696, 703 (1983) (quoting United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring)).

304. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989) (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).

- "We can take judicial notice that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country."[305]
- "Deterring drug use by our Nation's schoolchildren" is "important—indeed, perhaps compelling . . . ."[306]

Perhaps the most telling indication that the judiciary did not share Pozen's premise "that the war on drugs has been a policy fiasco"[307] came in a dissent by Justice Marshall. In a 1989 case that upheld suspicionless drug testing for railroad employees, Marshall directly addressed policy. He urged his colleagues to strike down a legally flawed testing regime even though they all agreed that the drug war was "good public policy." Marshall wrote: "The issue in this case is not whether declaring a war on illegal drugs is good public policy. The importance of ridding our society of such drugs is, by now, apparent to all."[308]

The idea that the judiciary supported the drug war as a policy matter complicates Pozen's nuanced analysis. Pozen bases his book on the "premise" that the drug war was a total failure.[309] And we agree with him that "no serious scholar disputes that the war has been 'a failure by any objective measure.'"[310] But the war on drugs got going and kept going because other people disagreed. Why didn't judges use the Constitution to block this terrible policy? Perhaps the answers can be found in Pozen's "internalist" analysis.[311] But another answer, suggested by the Fourth Amendment cases, is that judges did not view the drug war as bad policy at all.

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305. Block v. Rutherford, 468 U.S. 576, 588-89 (1984).

306. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995); *see also* United States v. Drayton, 536 U.S. 194, 205 (2002) ("[B]us passengers answer officers' [drug sweep] questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.").

307. POZEN, *supra* note 10, at 14-15 ("The book proceeds from a pair of premises, namely, that the war on drugs has been a policy fiasco and that it is instructive to ask why constitutional law fell out of the reform picture.").

308. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

309. POZEN, *supra* note 10, at 15.

310. *Id.* (quoting William J. Chambliss, *Drug War Politics: Racism, Corruption, and Alienation*, *in* CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 295, 315 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003)).

311. *Id.* at 8 (noting that "judges declared that they had no choice").

B. The Constitution of the War on Crime

Pozen criticizes the courts for their hesitancy to apply the Constitution to push back on punitive drug policies. The prior Section extends this critique to the Fourth Amendment, an important part of the Constitution left out of Pozen's narrative. This Section extends the analysis in two more directions. It argues that Pozen's critique applies more broadly than the war on drugs—and beyond the Constitution. Judges were also reluctant to get in the way of the broader war on crime within which the drug war was only one component. And their reluctance expanded beyond constitutional rulings, finding purchase anywhere that judges had discretion.

In a 2023 book, *Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How It Can Recover* (also reviewed in this journal), one of us explored the punitive turn in American criminal law that began in the 1970s.[312] The book chronicles the changes in laws and policies that led to this nation's unprecedented incarcerated population, which, by 2019, numbered over two million people.[313] One part of the story neatly parallels Pozen's narrative. *Mass Incarceration Nation* notes that the country's Founders, alarmed by political prosecutions in England, built a series of protections into federal and state constitutions.[314] The book flags the "great irony that Mass Incarceration arose in a country whose founding documents included such seemingly powerful obstacles to criminal prosecution."[315] The puzzle is solved, the book posits, through the recognition that "rights must be interpreted. And almost every step of the way, modern judges interpreted these rights in a manner that expanded the reach of the criminal law."[316] Pozen's critique of the judicial nonapplication of constitutional provisions to the drug prohibitions parallels this theme.

But this was a group project. To achieve any policy goal through criminal law, legislators, police, prosecutors, and judges must cooperate. One could add that even we, the people, were induced to cooperate.[317] Substantial changes require consensus because any one of the institutional actors can block the others.

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312. *See* BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 31-66; Brandon Hasbrouck, *Prisons as Laboratories of Antidemocracy*, 133 YALE L.J. 1966, 1975-76 (2024) (reviewing BELLIN, MASS INCARCERATION NATION, *supra* note 13) (commenting that *Mass Incarceration Nation* "demonstrat[es] each policy choice's contribution to the trend through a wealth of statistical evidence").

313. BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 13.

314. *Id.* at 134.

315. *Id.*

316. *Id.*

317. I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 666-67 (2018).

Thus, the sharp increase in prison populations that started in the 1960s can best be explained by the emergence of an unusual consensus among Democrats and Republicans[318] and across institutional actors.[319] Pozen understandably focuses on judges, for his questions are of a constitutional nature. But when it comes to criminal law, judges are part of a complex fabric of both institutional and non-institutional actors, and judges do a lot more than call balls and strikes.

The consensus that nurtured the "war on crime" (and mass incarceration) spun off a variety of related phenomena, including the "war on drugs." As with crime policy generally, the generals of the drug war were state and federal legislators who enacted punitive drug laws and funded the growth in penal infrastructure: more police and more prisons. Next, police—who, at least according to one of us, "wield the greatest discretion in the American criminal justice system"[320]—eagerly embraced the war on drugs. Annual drug arrests steadily rose, reaching 583,000 per year in 1980 and 1.6 million per year in 2010.[321] Prosecutors joined in, translating drug arrests into drug convictions, and accepting "the policy decision made by police and legislatures that drug crimes were worth the increased resources being devoted to them."[322] Judges were next. They doled out significant penalties to people who were convicted of drug offenses or who tested positive for drugs while on parole or probation.[323] And finally, Americans were convinced to fear drug use, to "just say no," to assist the police, to see racial disparities as normal, and to participate in the institutions that waged the drug war.[324] The upshot was dramatic: as Mona Lynch and Anjuli Verma document,

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318. BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 39 ("[O]n the crime issue, there was little division. Republicans consistently called for harsher criminal laws. Democrats agreed. No one with sufficient political power remained to get in the way.").

319. *Id.* at 93 ("If someone asks why there are so many people in prison, one can point to any of the actors involved: legislators, police, prosecutors, judges, parole boards, and so on. After all, each actor could dramatically decrease the number of folks in prison. But in a system with numerous on- and off-ramps, it is misleading to highlight one ramp while ignoring the others. Keeping people moving down the prison road requires the cooperation of all the actors.").

320. Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1245 (2020). *But see* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1571 (2020) (arguing that the power of police and other actors "pales in comparison to that of prosecutors").

321. *See* Jeffrey Bellin, *A World Without Prosecutors*, 13 CALIF. L. REV. ONLINE 1, 3-4 (2022) (relying on the Bureau of Justice Statistics Arrest Data Analysis Tool).

322. BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 111.

323. Pew Ctr. on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms*, PEW CHARITABLE TRS. 3 (June 2012), https://www.pewtrusts.org/-/media/assets/2012/06/06/time_served_report.pdf [https://perma.cc/J627-JR2F] (presenting data that indicated drug-crime offenders in 2009 served an average of 2.2 years before release, a thirty-six percent increase from an average time served of 1.6 years for similar offenders in 1990).

324. Capers, *supra* note 317, at 664; Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 261-66 (2019).

the number of people incarcerated in this country for drug convictions rose from an estimated 41,000 in 1980 to an estimated 464,300 in 2012.[325]

The war on drugs, like the war on crime, had such dramatic effects precisely because all the institutional actors were "on the same page."[326] For example, one cannot read much into a federal judge's sentence under a mandatory-guideline system, like the thirty-year sentence initially issued to Freddie Booker for dealing crack cocaine.[327] But when the Supreme Court subsequently made the federal sentencing guidelines discretionary in the case that bears his name, Booker saw little benefit.[328] On resentencing, the trial judge imposed the same sentence, this time applying judicial discretion rather than the now-advisory guidelines.[329]

Legally speaking, there are important differences between police arresting a million more people for drug violations each year; legislatures enacting draconian, sometimes mandatory, sentences for drug offenses;[330] juries convicting and imposing lengthy prison terms even in marijuana cases;[331] judges imposing lengthy sentences for drug crimes or probation violations;[332] and the Supreme Court refusing to invalidate those sentences as "cruel and unusual" punishment under the Eighth Amendment (or other constitutional provisions).[333] But at the core, these are all the same story. And all these things together make up "the war on drugs." Pozen is right that judges interpreted various sources of law to facilitate rather than obstruct the war on drugs. But that is only a small part of a story of remarkable consensus across actors and decision points. And what is true for the war on drugs is true for the war on crime.

Once we situate judicial resistance to the creative constitutional arguments Pozen highlights within this broader landscape, it becomes hard to put much

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325. Mona Lynch & Anjuli Verma, *The Imprisonment Boom of the Late Twentieth Century: Past, Present, and Future*, *in* THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT 3, 9 (John Wooldredge & Paula Smith eds., 2018).

326. BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 8 ("After the 1970s, a new consensus emerged with all of the law enforcement actors gravitating toward the same punitive methods. With everyone on the same page, the system's expanding focus and increased severity collided with ongoing crime to fill prisons and jails.").

327. United States v. Booker, 543 U.S. 220, 227 (2005).

328. *Id.*

329. United States v. Booker, 149 F. App'x 517, 518 (7th Cir. 2005) (affirming Booker's thirty-year sentence).

330. Harmelin v. Michigan, 501 U.S. 957, 961-62, 996 (1991).

331. Hutto v. Davis, 454 U.S. 370, 371 (1982) (per curiam) (reviewing a jury sentence of forty years for selling marijuana).

332. State v. Flynn, 675 S.W.2d 494, 498-99 (Tenn. Crim. App. 1984).

333. *Hutto*, 454 U.S. at 375.

stock in the "internalist" reasons Pozen identifies for the courts' passivity.[334] Perhaps Pozen's drug-war-specific explanations map onto this broader arena. Just as the courts protected progressive victories and deferred to state power by refusing to extend constitutional protection to drug use, judges protected their gains by refusing to interfere in a broadly popular war on crime. But even if the answers are similar, the context is much broader. Judges—like everyone else—weren't just reluctant to interfere in the drug war. They were reluctant to interfere in the "war on crime" generally. And this placed them within a broad political consensus that spanned institutional actors and sources of law. Adding these pieces to the puzzle Pozen is trying to solve brings out a different picture. For the most part, judges were eager participants, not reluctant observers, in the war on drugs, just as they were willing "foot soldier[s]" in the war on crime.[335] And that might be all it takes to explain their resistance to the creative application of amorphous constitutional provisions that could have blocked drug prohibitions.

C. The Alaska Constitution of the War on Drugs

What of the parallel universe Pozen uncovers? If judges supported the war on drugs, why did they initially rule against it in the cases Pozen foregrounds? The rulings Pozen details could reflect exciting first steps toward an alternate reality—one that was tragically quashed by the factors he highlights and that is waiting to be revitalized. Or these rulings might be part of a normal statistical distribution, modest variations on the overall theme. We explore this conundrum by digging into Pozen's primary example, an Alaska Supreme Court ruling that established a right to drug possession. If, as Pozen urges, courts across the country had followed Alaska's lead, what would have happened?

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334. We do not mean to criticize Pozen for leaving these points out of his review. No author can cover every topic, and Pozen is fully transparent that his focus is on arguments "internal to constitutional law." POZEN, *supra* note 10, at 6-7. Nevertheless, we think this context is important for assessing the conclusions Pozen draws from his findings.

335. California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting). Pozen (and others) might offer a distinction between the drug war and the war on crime; the premise of *The Constitution of the War on Drugs* is the unique "travesty" of drug policy. POZEN, *supra* note 10, at 16. But it is not clear that drug policy was less coherent than other elements of the war on crime. There are many criminal laws that, like the drug laws, stand on shaky policy grounds and, like the drug laws, are regularly violated. And in none of these areas did the courts step in to block criminalization. In fact, a basic tenet of the war on crime was that longer terms of incarceration were an effective way to deter crime, a belief with little empirical support. BELLIN, MASS INCARCERATION NATION, *supra* note 13, at 75-76, 190-93.

In the 1975 case *Ravin v. State*, the Alaska Supreme Court established a (state) constitutional right to possess and use marijuana.[336] Specifically, the court held "that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution" that "encompass[es] the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home."[337] Pozen discusses the case throughout the book as the "most decisive breakthrough" in judicial resistance to the war on drugs.[338] He expresses regret that "[n]o other court followed [*Ravin*'s] lead, and by the early 1980s, the struggle to bring drugs into the rights revolution was effectively over."[339] When challenged on the viability of "judge-led reform of our drug policy" in a recent symposium,[340] Pozen reiterated *Ravin*'s importance to his narrative. Writing for the *Balkinization* blog, Pozen argued:

> Limited constitutional protections could have been established in this period and entrenched to some degree against subsequent political rollback. For instance, the judiciary could have established a right to personal possession and consumption of "soft drugs" like marijuana in the home, as the Alaska Supreme Court did in a 1975 ruling that has never been reversed.[341]

Ravin remains good law. That means we do not need to imagine an alternate universe where the judiciary followed Pozen's exhortation to deploy constitutional provisions to push back on drug prohibitions. That world already exists. It is Alaska.

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336. 537 P.2d 494, 504 (Alaska 1975). The court relied, in part, on an Alaska-specific constitutional provision. *See id.* at 500-02; ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed.").

337. *Ravin*, 537 P.2d at 504.

338. POZEN, *supra* note 10, at 34.

339. *Id.* at 35-36; *see also* Jason Brandeis, Ravin *Revisited: Alaska's Historic Common Law Marijuana Rule at the Dawn of Legalization*, 32 ALASKA L. REV. 309, 313 (2015) ("*Ravin* was the first, and remains the only, reported judicial opinion to announce a privacy interest that covers marijuana use.").

340. David Pozen, *The Constitution of the War on Drugs: Response to Commentators*, BALKINIZATION (May 20, 2024, 11:40 AM), https://balkin.blogspot.com/2024/05/the-constitution-of-war-on-drugs.html [https://perma.cc/R3P6-PWCN] (responding to Louis Michael Seidman, *Pozen and the Puzzle of Counterfactuals*, BALKINIZATION (May 2, 2024, 9:30 AM), https://balkin.blogspot.com/2024/05/pozen-and-puzzle-of-counterfactuals.html [https://perma.cc/T4KV-S4L4]).

341. *Id.*

The Federal Bureau of Investigation reports arrests by law-enforcement officers in each state.[342] Figure 1 shows marijuana-possession arrests and total drug-possession arrests in Alaska and the two most similarly populated states over three separate periods of the drug war. These data reflect that Alaska police regularly arrested people for marijuana possession, and that marijuana- and drug-possession arrests occurred at about the same or higher rates than in similarly populated states.[343] (In 2000, for example, there were 1,043 marijuana-possession arrests in Alaska, 833 in North Dakota, and 517 in Vermont.[344]) Alaska also has an above-average incarceration rate[345] and significant racial disparities in arrest rates.[346] And, as with other jurisdictions, a significant portion of the state's felony cases are drug offenses. For example, a 2016 Alaska report found that in twenty-two percent of felony sentencings, the most serious offense was a drug offense.[347] Drug offenses were one of three major categories of crimes prosecuted in Alaska, falling just below property offenses (twenty-seven percent) and just ahead of violent offenses (twenty percent).[348]

342. *Arrests in the United States by Offense*, FBI Crime Data Explorer (2024), https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/arrest [https://perma.cc/PT7T-FALY].

343. North Dakota and Vermont are the closest states in terms of population; North Dakota has slightly more people, Vermont slightly fewer. *See* U.S. Census Bureau, *Table 2. Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2020 Census*, U.S. Dep't of Com. (2020), https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table02.pdf [https://perma.cc/EJ7A-68GG].

344. These data were obtained by plugging the year and jurisdiction into the online Federal Bureau of Investigation database. *Arrests in the United States by Offense*, *supra* note 342.

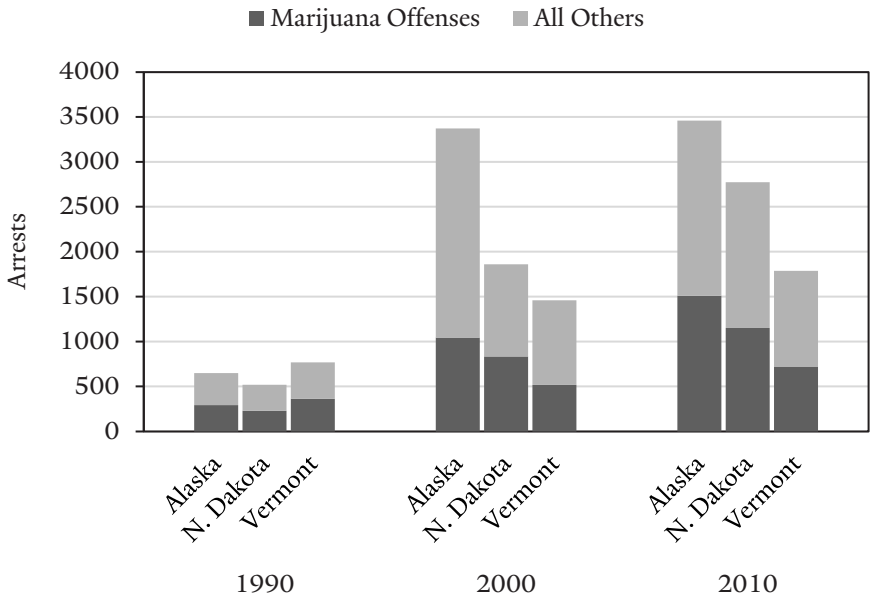
345. *Alaska Profile*, Prison Pol'y Initiative, https://www.prisonpolicy.org/profiles/AK.html [https://perma.cc/YK34-8958].

346. *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, ACLU 136 (June 2013), https://assets.aclu.org/live/uploads/publications/1114413-mj-report-rfs-rel1.pdf [https://perma.cc/85ZD-MUEU].

347. *Alaska Felony Sentencing Patterns: 2012-2013*, Alaska Jud. Council 22 fig.2 (June 2016), https://www.ajc.state.ak.us/publications/docs/research/AKFelonSenPatterns2012-2013(June%202016).pdf [https://perma.cc/KT5C-VUBF].

348. *Id.*

FIGURE 1. ALASKA DRUG-POSSESSION ARRESTS



Although granular data on criminal convictions is hard to find, there is data on Alaska convictions for small amounts of marijuana, the precise subject of *Ravin*. Looking at data from 2007 to 2019, Alaska's legislative analyst documented a high of 145 marijuana convictions for possession of less than one ounce of marijuana in 2013.[349] Convictions for less than an ounce plummeted after 2014 due to a ballot measure that legalized possession of up to an ounce of marijuana.[350]

There is also little evidence that Alaska drug prosecutions were different from those occurring in the rest of the country. A review of Alaska court opinions surfaces the familiar excesses. For example, *Noy v. State* reads like an authoritarian Christmas story. The facts section of the court opinion begins, "The North Pole police contacted [David] Noy at his home and told him they smelled

349. Jake Quarstad, Alaska Legis. Rsch. Servs., LRS 20.149, Conviction Data for Marijuana Possession in Alaska, 2007-2019; and Laws Relating to the Expungement, Sealing, or Nondisclosure of Marijuana Convictions 3 tbl. (2020).

350. *See id.* (showing that there were seventeen convictions in 2015 and two in 2017); *see also Alaska Crime Report*, Alaska Jud. Council 87 (Mar. 2017), https://www.ajc.state.ak.us/publications/docs/ACJC%20Reports/Crime%20In%20Alaska.pdf [https://perma.cc/5AQZ-XAQN] (noting that in Anchorage "[m]arijuana possession arrests peaked in 2010 at 353 arrests and ha[d] fallen to 42 arrests in 2015").

growing marijuana."[351] The court's narrative gets vague after that, but Noy's appellate brief fills in the details:

> Based on their alleged olfactory perceptions, the officers approached David while he was cooking at his barbeque, with his numerous guests in the area, and told David that they could smell marijuana coming from the inside of his house. The officers then asked permission to search David's residence. David initially declined to permit the search of his house. Subsequently, the officers stated that they would apply for a search warrant. The officers announced that the area was declared a crime scene and that none of the guests would be permitted to leave the scene. The police began establishing the identity of the guests and conducted personal pat-down searches of each one, spread-eagle up against the vehicles, possibly even including the children. Under these circumstances, David interpreted the officers' statements to mean that a search warrant was being obtained, although testimony was offered by Officer Jurgens that nobody actually ever went to get that search warrant at all. As a consequence of these events, David eventually gave permission for the officers to enter his home. Moreover, none of the guests were permitted to leave until the search was completed.[352]

Having secured the scene, "[t]he police searched Noy's house and found approximately eleven ounces of harvested marijuana, consisting of buds, leaves, and stalks."[353] A trial ensued where "[t]he jury found Noy not guilty of possessing eight ounces or more of marijuana, but guilty of possessing less than eight ounces."[354] The Alaska Court of Appeals reversed Noy's conviction, but it emphasized that the state remained free to pursue a new trial in which the jury would specify whether Noy had possessed less than four ounces (constitutionally protected) or more than four ounces (not constitutionally protected).[355] Merry Christmas!

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351. Noy v. State, 83 P.3d 538, 540 (Alaska Ct. App. 2003).

352. Appellant's Opening Brief at 4-5, *Noy*, 83 P.3d 538 (No. A-08327) (internal citations omitted). The government did not dispute these facts but left them out of its own rendition. Brief of Appellee at 2, *Noy*, 83 P.3d 538 (No. A-8327) ("While on a routine patrol, North Pole Police Officer Gary Jurgens smelled the odor of cultivated marijuana in the area of Noy's residence. He obtained Noy's consent to search inside and found marijuana in several locations." (internal citations omitted)).

353. *Noy*, 83 P.3d at 540.

354. *Id.*

355. *Id.* at 543-44.

Another example is *Murphy v. State*.[356] In 2016, in Homer, Alaska, police stopped a car for an "an inoperable headlight" and smelled marijuana.[357] They seized one of the passengers' backpacks to obtain a search warrant.[358] After a judge signed off, the officers opened the pack to find "less than one ounce of what appeared to be marijuana."[359] When the bag's owner, Michael Murphy, came to the police station to retrieve it, he was arrested.[360]

Murphy was charged with criminal possession of marijuana and convicted at trial.[361] The Alaska Court of Appeals made quick work of Murphy's appeal. The court explained that *Ravin* holds only "that adults have a right to possess less than four ounces of marijuana *in their home* for personal use."[362] While Murphy had no home and "carried all his possessions in his backpack," the court asserted that *Ravin* offered no protection.[363] The court also acknowledged that a recent ballot initiative made Murphy's conduct lawful.[364] But the initiative came into effect just after Murphy's arrest.[365] *Murphy* spans the spectrum of unfairness, government overreach, and policy pointlessness that came to characterize the drug war. The Alaska courts, operating in the world that *Ravin* created, did nothing to intervene.

Thus, even the Alaska case that Pozen highlights as a model for spurring a different reality produced only a slight deviation from the mainstream. We need not speculate about the types of pushback that might have occurred had the courts more robustly interfered in the drug war. *Ravin* had so little effect that while there was "political backlash," it was hardly necessary.[366] Thanks to *Ravin*, no one in Alaska could be convicted of possessing less than four ounces of marijuana in their home after 1975. The drug war in Alaska carried on, essentially undisturbed.

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356. No. A-11522, 2016 WL 4937865 (Alaska Ct. App. Sept. 14, 2016).

357. Opening Brief of Appellant at 1, *Murphy*, No. A-11522 (Alaska Ct. App. Sept. 14, 2016).

358. *Id.* at 2.

359. *Id.*

360. *Id.* at 3.

361. *Murphy*, 2016 WL 4937865, at *1.

362. *Id.* at *2.

363. *Id.*

364. *Id.*

365. *See id.* For similar cases, see *Good v. State*, No. A-11505, 2014 WL 5421217, at *1 (Alaska Ct. App. Oct. 22, 2014), which rejects a challenge to a conviction for a person who mailed a package of nineteen marijuana joints to himself in Alaska; and *State v. Erickson*, 574 P.2d 1, 3 n.6 (Alaska 1978), which upholds several convictions for cocaine possession "within and outside the home," including for a driver who had "a small glass vial later found to contain cocaine."

366. Brandeis, *supra* note 339, at 314 (describing "political backlash" that "legislatively undercut" the *Ravin* decision).

CONCLUSION

The Constitution of the War on Drugs offers a series of historical and legal insights made all the more valuable by the remarkable absence of these insights from modern discourse. That raises one last question: what lessons do Pozen's insights offer the present, especially a present marked at once by a growing acceptance of soft drugs, such as marijuana, and a growing feeling of powerlessness in the face of the opioid epidemic? And beyond the present, what lessons might Pozen's book offer for the future? Pozen's primary suggestion is that modern advocates for drug reform should supplement their arsenal of arguments, including proportionality, with the forgotten constitutional arguments of the past:

> Contemporary U.S. drug reformers invoke ideals of individual liberty, racial equality, and good government, yet they do not invoke our supreme law. In a country known for its extreme degree of Constitution worship—much of it oriented around those very ideals—I believe such disconnects are bound to be revealing. An ever-growing array of social issues has been constitutionalized since the 1960s. Drugs have been *de*-constitutionalized.[367]

As this Review suggests, however, there is reason to be skeptical about how much difference this will make. We suspect that even the most thoughtful legal arguments about substantive due process, freedom of thought, and the pursuit of happiness will do little to change judges' (and society's) views on drug prohibitions. For starters, as we hinted at in our discussion of Hunter Biden's conviction in the Introduction, it is not only the criminalization of drug use and distribution that has been normalized, such that it is now taken for granted. It is also the drift of drug regulation into domains such as gun laws, laws around child custody,[368] bases for employment decisions,[369] and others.[370] Beyond this, as we indicate in this Review, there are much deeper forces at work, including this country's complicated racial history and use of drug prohibition as part of its race-making project.

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367. POZEN, *supra* note 10, at 15 (footnote omitted).

368. *See, e.g.*, DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 202-05 (2022).

369. *See, e.g.*, Stacy Hickox, *It's Time to Rein in Employer Drug Testing*, 11 HARV. L. & POL'Y REV. 419, 419-20 (2017).

370. *See, e.g.*, Jennifer D. Oliva & Taleed El-Sabawi, *The "New" Drug War*, 110 VA. L. REV. 1103, 1147 (2024) (discussing, among other things, federal law denying public-housing benefits to individuals who use marijuana).

"[B]efore we can move beyond the old regime," Pozen states, "we need to understand how such a 'monstrous, incoherent mess' was made to seem non-monstrous, coherent."[371] Very true. But the mess has many layers, and only one—and we fear a relatively minor one—involves the types of failures that Pozen highlights in *The Constitution of the War on Drugs*.

So what is the answer? Is stemming the criminalization of drug use even possible? Three decades ago, in his important book *Crime and Punishment in American History*, the legal historian Lawrence M. Friedman observed that, with the establishment of the Federal Bureau of Narcotics in 1930, the campaign for criminalization was pretty much set:

> Since then, the federal government, and most state governments, have never looked back, never wavered, always stuck like glue to a single policy of prohibition, prohibition, and more prohibition: interdiction at the source, the arrest of users and pushers, draconian punishments, and, on the official level, no understanding, no mercy, no letup in the war.[372]

One could argue that there has been some change. Many jurisdictions around the country have decriminalized the personal use of marijuana.[373] A small number are even expunging the convictions of low-level drug offenders.[374] Still, it is entirely possible that this is as far as "we" are willing to go, at least for the foreseeable future. Maybe now that Americans can go to their local dispensaries to purchase gummies and buds and brownies tailored to their every need—*Do you want to relax? Relieve physical pain? Just have fun?*—"we" are "good." Especially since we already have access to tobacco and alcohol and prescription drugs and more. Even so, it is worth asking, as Friedman does, "Why, in an age that has relaxed so noticeably its attitudes on sex, vice, and gambling, does drug prohibition still stand so firm?"[375] Why do we continue "to associate drugs with certain enormous evils: the corruption of the young ([our] own children, perhaps); the wasted, impure lives of the urban underclass, much of it black or Hispanic;

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371. Pozen, *supra* note 10, at 17 (footnote omitted) (quoting Carl L. Hart, Drug Use for Grown-Ups: Chasing Liberty in the Land of Fear 2 (2021)).

372. Lawrence M. Friedman, Crime and Punishment in American History 356 (1993).

373. *See Decriminalization*, Marijuana Pol'y Project, https://www.mpp.org/issues/decriminalization [https://perma.cc/95DG-TXP9].

374. *See* Mason Marks, *State Drug Laws*, 93 Fordham L. Rev. 439, 447 (2024) (discussing these reforms). *See generally Legalization States' Approaches to Expungement and Release*, Marijuana Pol'y Project, https://www.mpp.org//assets/pdf/issues/legalization/legalization-states-approaches-to-expungement-and-release.pdf?v=1741055839 [https://perma.cc/U2BC-LE2M] (detailing measures taken by states to expunge past marijuana-related convictions).

375. Friedman, *supra* note 372, at 356.

and the explosion of violent crime, mostly in the cities"?[376] Or maybe the better question is this: given that we can decriminalize the personal use of marijuana, can we decriminalize more?

Perhaps, just as there was a concerted effort to demonize drugs — a concerted effort that brought together prosecutors and the police, legislators and the courts, White supremacists and everyday people — there can be a different concerted effort. One could imagine bringing together the growing number of people concerned about overcriminalization and mass incarceration with those who have a renewed interest in "freedom" — the buzzword for both the Republican and Democratic presidential candidates in the 2024 election. One could imagine bringing together lawyers, including lawyers of color, now armed with knowledge of the successful constitutional challenges that Pozen surfaces in his book, and creating a media campaign to counter the messaging that ran through *Reefer Madness* to "Just Say No." We could add antiracists, eager to play a role in delinking drug use from "biological" race. One could imagine finding more people to join the cause — allowing the tent to grow bigger and bigger.

And finally, one could imagine changing the question, or at least recognizing that the question we initially posed — "Is stemming the criminalization of drug use even possible?" — is too small a question. After all, the point of this Review has been to complicate Pozen's constitutional story — or more accurately, his constitutional story that brackets the Fourth Amendment — and to show how interconnected and indeed entangled everything is, from the "war on drugs" to overcriminalization to legislators to prosecutors to *Lochner* concerns to race and racemaking to pharmaceutical companies to the Fourth Amendment to, well, almost everything else. Maybe the better question, once we've created this big tent, is: How do we reimagine the Constitution to liberate ourselves from the cramped reading the Court has given to so many of our "rights," especially when minority rights are at stake? How do we finally unmake race and rein in an unconstrained capitalism while we're at it? Indeed, to linger on race and the Constitution and society a bit longer, how do we usher in a Third Reconstruction to finish "the unfinished revolutions of the First and Second Reconstructions,"[377] a Third Reconstruction that would not only read the Bill of Rights more liberally, but would also forge a world in which "universal humanity and brotherly love would reign

376. *Id.*

377. *See, e.g.*, Harris, *supra* note 171, at 765 (identifying CRT as, in many ways, being engaged in a project of reconstruction and finishing "the unfinished revolutions of the First and Second Reconstructions"); Tracey Meares, *A Third Reconstruction?*, BALKINIZATION (Aug. 14, 2015, 8:30 AM), https://balkin.blogspot.com/2015/08/a-third-reconstruction.html [https://perma.cc/UPR5-XXJE] (calling for a Third Reconstruction grounded in equality and structural change); Butler, *supra* note 123, at 1474-78 (joining other race scholars in calling for a Third Reconstruction).

as the supreme values undergirding our Constitution, our communities, and our lives"?[378] Yes, these questions are too big for this Review, and perhaps too big for Pozen's book. Still, they are questions worth asking. And answering.

378. Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 501 (2003).