

RECONSTRUCTION SENTENCING: REIMAGINING DRUG SENTENCING IN THE AFTERMATH OF THE WAR ON DRUGS

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INTRODUCTION

The year is 2020, and the world has been consumed by a viral pandemic, social unrest, increased political activism, and a history-changing presidential election. In this moment, anti-racism rhetoric has been adopted by many, with individuals and institutions pledging themselves to the work of dismantling systemic racism.¹ If we are going to be true to that mission, then addressing the carnage of the failed War on Drugs has to be among the top priorities. The forty years of treating drug law offenders as enemies of society have left us with decimated communities and have perpetuated a biased view of individuals in those communities. Of course, the

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1. For an example of the discourse concerning dismantling systemic racism that was sparked in June 2020, see N'Dea Yancy-Bragg, *What is Systemic Racism? Here's What It Means and How You Can Help Dismantle It*, USA TODAY (June 15, 2020, 9:33 AM), <https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism-what-does-mean/5343549002/>.

bulk of the devastation waged by the War has been borne by Black² and brown families. To begin the work of repairing the damage caused by overly punitive and racially disproportionate drug law enforcement, we must make commitments to actually end the War. Moreover, we must commit to reinterpret our Constitution to protect those who suffered most from Wartime policies and those who are most vulnerable to post-War retaliation. Dr. Henry Louis Gates, Jr. has written that “few American historical periods are more relevant to understanding our contemporary racial politics than Reconstruction.”³ This Article argues that Reconstruction’s modern relevance goes beyond politics and is especially applicable to the criminal sentencing context where law and policy have been used to perpetuate racialized oppression. With that in mind, this Article uses the promise and pitfalls of the Reconstruction Era as a model for reimagining drug sentencing in the aftermath of the War on Drugs.

The War on Drugs officially began in 1971 when President Nixon targeted drug abuse as “public enemy number one.”⁴ The goal of the war rhetoric was clear: identify drug abuse and the drug offender as dangerous foes to the law-abiding public and mandate military-like tactics to contain and defeat them. Criminal sentencing would come to be the weapon of choice used in this urgent combat. As a part of the war efforts, the Anti-Drug Abuse Act of 1986 was passed under President Reagan, establishing a weight-based, highly-punitive, mandatory-minimum sentencing approach to drug offenses that has persisted in some form for the last four decades.⁵ When the Act was passed, crack cocaine⁶ was publicized as the greatest drug threat, and crack cocaine offenders—the vast majority of whom

2. I have chosen to capitalize Black when used to refer to African Americans in any manner throughout this Article. Using the lowercase “black” treats it like an adjective describing a color. Black people are rarely black, and I believe that using the lowercase “black” as an adjective acknowledges that a descriptor was attached to African people by white colonists in order to justify their dehumanizing treatment of those Africans. Capitalizing Black elevates it beyond a mere color adjective that was originally meant to demean and embraces it as a descriptor of shared history, culture, and struggle. This approach has also now been adopted by AP editors. See *Explaining AP Style on Black and White* (July 20, 2020), available at: <https://apnews.com/article/9105661462>. For a discussion of capitalizing Black, see Merrill Perlman, *Black and White: Why Capitalization Matters*, COLUM. JOURNALISM REV. (June 23, 2015), https://www.cjr.org/analysis/language_corner_1.php; Barrett Holmes Pitner, *The Discussion on Capitalizing ‘B’ in ‘Black’ Continues*, HUFFPOST (Nov. 4, 2014, 7:12 PM), https://www.huffpost.com/entry/thediscussion-on-capitalizing-the-b-in-black-continues_b_6194626. For an explanation of the growing trend among editors to capitalize Black, see Shirley Carswell, *Why News Organizations’ Move to Capitalize ‘Black’ is a Win*, WASH. POST (June 30, 2020, 9:07 AM), <https://www.washingtonpost.com/opinions/2020/06/30/why-news-organizations-move-capitalize-black-is-win/>.

3. HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 5 (2019).

4. I explain more about this in my previous article, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941 (2019); see also *Timeline: America’s War on Drugs*, NAT’L PUB. RADIO (April 2, 2017), <https://www.npr.org/templates/story/story.php?storyId=9252490>.

5. Anti-Drug Abuse Act of 1986, § 1002, Pub. L. No. 99-570, 100 Stat. 3207, 3207-2 to -4 (codified as amended at 21 U.S.C. § 841).

6. “‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride [powder cocaine] and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.” U.S. SENT’G COMM’N, U.S. SENT’G GUIDELINES MANUAL, § 2D1.1(c) n.D (2018) [hereinafter SENT’G GUIDELINES].

were Black—were subjected to the heaviest mandatory minimum penalties.⁷ Like any war, the consequences of the War on Drugs has had widespread casualties, including (but not limited to) the destruction of many communities, families, and individuals; the increase in racial disparities in punishment; and a fiscal disaster in penal systems across the country.⁸ What the War on Drugs has failed to do is eradicate drug abuse in the United States.⁹ It is time to move on from this failed War. This Article imagines an America in which the War on Drugs has officially ended and introduces the idea of a “Reconstruction Sentencing” model in which we heal from the devastating effects of the drug war through intentional reinterpretation of key constitutional provisions. During the aftermath of the War, reconstruction sentencing necessitates an understanding that drug crime is undeterred by incarceration. Reconstructing our approach to drug sentencing requires identifying the goals of drug sentencing and developing multifaceted approaches to address and eradicate the underlying sources of the drug problem. When this is done, we may find that more appropriate purposes of punishment—rehabilitation and retribution—compel us to think beyond incarceration and move us away from viewing mandatory minimum sentences as ever appropriate.

This Article proceeds in four parts. Part I explores the need for Reconstruction following the Civil War and compares that period to the usefulness of a Reconstruction model for a post-Drug War period. The causes and casualties of the War on Drugs are explained in Part II, with a focus on how the War has disproportionately targeted Black communities. Part III then discusses how a reinvigoration of constitutional protections, namely those found in the Thirteenth Amendment, can and should be used to end the War on Drugs and rectify the damage that the War has caused over the past four decades. In Part IV the Article introduces ways in which this Reconstruction approach can lean on other constitutional amendments to reach similar restorative ends.

I. THE NEED FOR RECONSTRUCTION: THEN AND NOW

When the Civil War ended in 1865, the United States faced the readmission of Southern states from the Confederacy as well as the integration of four million formerly enslaved people into the United States. This “Reconstruction Era” was not a seamless transition period. It began with the passage of the Emancipation Proclamation and the adoption of the Thirteenth Amendment to officially end

7. See AM. CIV. LIBERTIES UNION, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING 5 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

8. See, e.g., Eric L. Jensen, Jurg Gerber & Clayton Mosher, *Social Consequences of the War on Drugs: The Legacy of Failed Policy*, 15 CRIM. JUST. POL’Y REV. 100 (2004) (discussing the repercussions of the War on Drugs and the resulting increased rates of incarceration).

9. For a discussion of the failed War on Drugs, see Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INSTITUTE (Apr. 12, 2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-811-updated.pdf>.

slavery in the United States. However, this advancement was met with resistance from the former Confederate states. At the beginning of this post-war period, during President Andrew Johnson's administration, Southern state legislatures passed Black Codes to maintain white supremacy and to continue their pre-war control of Black people's labor and behavior.¹⁰ Under Johnson's Reconstruction policies, the former Confederate states were required to uphold the abolition of slavery, swear loyalty to the Union, and pay off their war debt.¹¹ However, Johnson was a strong believer in state's rights.¹² Therefore, beyond those few Reconstruction requirements, the states were given the freedom to rebuild their own governments as they saw fit. This meant that Black Codes, designed to continue the legacy of slavery, were able to thrive in the South.¹³ The Southern states' deliberate circumvention of Black people's emancipation prompted the later Radical Reconstruction period that resulted in the United States' adopting the Fourteenth Amendment—extending due process and equal protection rights—and the Fifteenth Amendment—protecting against race-based disenfranchisement.¹⁴

There are many similarities between the early Reconstruction period and today's criminal justice reform movement. The end of the Civil War was hailed as an anti-slavery moment that “inspired a collective sense of optimism among formerly enslaved African Americans”¹⁵ and “a millennial sense of living at the dawn of a

10. As succinctly explained by the Editors of Encyclopedia Britannica:

The black codes enacted immediately after the American Civil War, though varying from state to state, were all intended to secure a steady supply of cheap [labor], and all continued to assume the inferiority of the freed slaves. There were vagrancy laws that declared a black person to be vagrant if unemployed and without permanent residence; a person so defined could be arrested, fined, and bound out for a term of [labor] if unable to pay the fine. . .

Apprentice laws provided for the “hiring out” of orphans and other young dependents to whites, who often turned out to be their former owners. Some states limited the type of property African Americans could own, and in other states black people were excluded from certain businesses or from the skilled trades. Former slaves were forbidden to carry firearms or to testify in court, except in cases concerning other blacks. Legal marriage between African Americans was provided for, but interracial marriage was prohibited.

Black Code, ENCYCLOPEDIA BRITANNICA (Aug. 20, 2019), <https://www.britannica.com/topic/black-code>.

11. *Black Codes*, HISTORY.COM (Jan. 21, 2021), <https://www.history.com/topics/black-history/black-codes>.

12. Elizabeth R. Varon, *Andrew Johnson: Life in Brief*, MILLER CENTER, <https://millercenter.org/president/johnson/life-in-brief> (last visited Mar. 16, 2021).

13. *Black Code*, *supra* note 10.

14. The editors of Encyclopedia Britannica explain:

Radical Reconstruction, also called Congressional Reconstruction, process and period of Reconstruction during which the Radical Republicans in the U.S. Congress seized control of Reconstruction from Pres. Andrew Johnson and passed the Reconstruction Acts of 1867–68, which sent federal troops to the South to oversee the establishment of state governments that were more democratic. Congress also enacted legislation and amended the Constitution to guarantee the civil rights of freedmen and African Americans in general.

Radical Reconstruction, ENCYCLOPEDIA BRITANNICA, (Jun. 23, 2020), <https://www.britannica.com/topic/Radical-Reconstruction>.

15. GATES, *supra* note 3, at 2.

new era.”¹⁶ At the same time that freedom was being hailed, the so-called New South was actually repackaging white supremacy into the Black Codes as a system of “neo-enslavement” on recently freed Blacks.¹⁷ Similarly, today, we have seen criminal justice reforms that inspire excitement among some and, at least in rhetoric, acknowledge that our country’s drug issues cannot be fought through the criminal justice system. However, there still has not been any official declaration of the end of the War on Drugs.¹⁸ The reality of what is happening today is quite reminiscent of the emergence of the Black Codes in the 1860s. At the same time that criminal justice reforms seem to be moving away from a punitive-only model of addressing the American drug problem,¹⁹ the tools of the drug war—punitive mandatory minimum drug sentencing—have not been significantly altered, and in some cases, have even been used with increased intensity.²⁰

The answer to Southern defiance during the age of Reconstruction was for Congress to step in with Military Reconstruction Acts²¹ and the introduction of the Fourteenth and Fifteenth Amendments. That period of Congressional Reconstruction—also called Radical Reconstruction—required the same type of constitutional rebirth that is necessary today to dismantle the War on Drugs and repair the damage of that war. As Dr. Henry Louis Gates, Jr. explains, Reconstruction had the dual tasks of “readmitting the conquered Confederate states to the Union and of granting freedom, citizenship”, and other rights to African Americans.²² But more fundamentally, he further expounds:

16. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* 281 (Harper & Row 1988).

17. GATES, *supra* note 3, at 4.

18. For an account of recent drug law reforms, see *Drug Law Reform*, NACDL, <https://www.nacdl.org/Landing/DrugLaw>. For a discussion on the changed warfare rhetoric, see Exum, *supra* note 4.

19. This can be seen in the treatment of the opioid crisis as a public health emergency, requiring medical, rather than simply criminal justice, interventions. See, e.g., *CDC’s Response to the Opioid Overdose Epidemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/opioids/strategy.html> (last accessed Mar. 16, 2021).

20. See, e.g., Leslie Scott, *Federal Prosecutorial Overreach in The Age of Opioids: The Statutory and Constitutional Case Against Duplicative Drug Indictments*, 51 U. TOL. L. R. 491 (2020) (explaining and criticizing the recent prosecutorial tactic of aggregating small opioid sales by addicts in order to trigger harsher mandatory minimum penalties meant for serious drug traffickers).

21. The Military Reconstruction Acts of 1867 divided the South into five military districts, each under the command of a Northern General. Further, the Acts outlined how the new governments would be designed, requiring new state delegates and constitutions in order to provide for equal rights for Black Americans. The Acts required any state seeking readmission to the Union to ratify the Fourteenth Amendment. Additionally, the Act granted the right to vote to African American men, but disenfranchised former Confederates. See *Reconstruction*, U.S. HISTORY, <https://www.ushistory.org/us/35.asp> (last accessed Mar. 16, 2021); see also *The History Engine: The First Reconstruction Act Is Passed*, UNIV. RICHMOND DIGIT. SCHOLARSHIP LAB, <https://historyengine.richmond.edu/episodes/view/1431> (last accessed Mar. 16, 2021). For a detailed study of this time period, see EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3rd Ed. 2017), <https://lynchinginamerica.eji.org/report>.

22. GATES, *supra* note 3, at 7.

Reconstruction, in this sense, meant *repairing* what the war had broken apart while simultaneously attempting to *uproot* the old slave system and the ideology underpinning it that had rationalized the process of making property of men a “black and white” issue.²³

The same type of repairing and uprooting is required if we are to meaningfully move away from the War on Drugs. Our approach to sentencing law, and constitutional challenges to those laws, must both repair the damage done by the War on Drugs, but also uproot the very system that relies on a wartime ideology of seeing the drug offender, who is often viewed as a Black man, as the enemy.

In many ways, Reconstruction was a glorious time for Black involvement in American political life. Black men were elected to office at every level of government, including two U.S. senators, twenty congressmen, and an estimated two thousand additional Black office holders at the state and local levels.²⁴ But Reconstruction was a woefully short-lived ten years,²⁵ followed by 100 years of legally sanctioned Jim Crow segregation. During that time, the very Reconstruction Amendments that were hailed as ringing in a new era of Black freedom were interpreted by the Supreme Court as being unable to do more than maintain a surface level of white supremacy-styled legal equality.²⁶ Therefore, while the promise of Reconstruction can be a lesson for reinvigorating constitutional sentencing arguments in order to end the War on Drugs, the pitfalls of Reconstruction are instructional as well. In order to move away from the War on Drugs in a way that creates true systemic change, constitutional provisions must be reinterpreted to eradicate the effects of racism within drug sentencing as well. In the Parts that follow, this Article will further discuss the underlying racism and disparate racial effects of the War on Drugs and highlight the ways in which reinvigorated constitutional arguments can reconstruct sentencing to truly bring an end to the War on Drugs.

23. *Id.* (emphasis added).

24. *Id.* at 8.

25. It is important to note, however, that even during this era of unprecedented political involvement by Black men, Black people continued to suffer from horrendous violence from whites in order to quash political and social gains and to maintain the existing racial hierarchy. The Equal Justice Initiative has reported that during Reconstruction “at least 2,000 Black women, men and children were victims of racial terror lynchings.” EQUAL JUSTICE INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 (2020), <https://eji.org/report/reconstruction-in-america>.

26. *Plessy v. Ferguson*, 136 U.S. 537 (1896), is a clear example of the Supreme Court failing the Reconstruction Amendments. In *Plessy*, the Court refused to find that Louisiana law requiring racially segregated railway cars violated Fourteenth Amendment’s Equal Protection Clause. *Id.* at 544. According to the Court, the Fourteenth Amendment was meant to provide absolute equality of the races under the law, but “could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races.” *Id.* The Supreme Court interpreted the Fourteenth Amendment to allow for the continued racial segregation that would be the hallmark of the Jim Crow era’s subjugation and stigmatization of Blacks. In Section III.A of this Article, I discuss how, in *Plessy*, the Supreme Court also fails the promises of Reconstruction in its interpretation of the Thirteenth Amendment as well.

II. UNDERSTANDING THE WAR ON DRUGS: THE WEAPONS, THE TACTICS, AND THE CASUALTIES

Before turning to the discussion of the constitutional reinvigoration needed to reconstruct sentencing, it is important to understand the impact and context of the War on Drugs. The War on Drugs gained momentum by feeding on the country's racial prejudices. As Professor Michelle Alexander explains in her influential book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, "By 1968, 81 percent of those responding to the Gallup Poll agreed with the statement that 'law and order has broken down in this country,' and the majority blamed 'Negroes who start riots' and 'Communists.'"²⁷ President Nixon's domestic policy advisor, John Ehrlichman, reportedly admitted that "[t]he Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and [B]lack people."²⁸ According to accounts of a 1994 Ehrlichman interview,²⁹ Ehrlichman described the racist strategy in this way:

You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or Black, but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.³⁰

This revelation shows that the War on Drugs was a political strategy rooted in centuries old prejudices against Blacks. Though there were concerns about drug use at the time, there was no evidence that African Americans were a driving force behind the country's increased drug use. In fact, in a 1969 Gallup poll, forty-eight percent of Americans said that drug use was a serious problem in their own

27. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 46 (The New Press 2011).

28. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>.

29. Ehrlichman reportedly gave these statements to reporter Dan Baum in a 1994 interview. *Id.* Baum did not publish these remarks until 2012 and again in 2016 in Harper's Magazine. Dan Baum, *Truth, Lies, and Audiotape*, in *THE MOMENT: WILD, POIGNANT, LIFE-CHANGING STORIES FROM 125 WRITERS AND ARTISTS FAMOUS & OBSCURE* 174, 175 (Larry Smith ed., 2012). Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), <https://www.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/index.html>. Ehrlichman died in 1999. Ehrlichman's children dispute the quote. Likewise, three of Ehrlichman's former colleagues questioned whether Ehrlichman made the statement, and, if he did, contended that he made it sarcastically. They also stated the war on drugs' impetus was not based on race. See Hilary Hanson, *Nixon Aides Suggest Colleague Was Kidding About Drug War Being Designed to Target Black People*, HUFFPOST (Mar. 25, 2016, 5:32 PM), https://www.huffingtonpost.com/entry/richard-nixon-drug-war-john-ehrichman_us_56f58be6e4b0a3721819ec61.

30. Baum, *supra* note 28.

community.³¹ But when the war was picked up by President Reagan, the intended disparate racial devastation was realized. Punitive drug sentencing was the weapon used in the War on Drugs, but the war required tactical enforcement efforts in order to attack the perceived enemy. And, unsurprisingly, Black Americans would bear the brunt of that enforcement.³²

In the 1980s, President Reagan created a multi-agency federal drug task force and increased anti-drug enforcement spending from \$645 million in fiscal year 1981 to over \$4 billion in fiscal year 1987.³³ His tactics were described this way:

[T]he Administration acted aggressively, mobilizing an impressive array of federal bureaucracies and resources in a coordinated—although futile—attack on the supply of illegal drugs, principally cocaine, marijuana, and heroin. The Administration hired hundreds of drug agents and cut through bureaucratic rivalries like no Administration before it. It acted to streamline operations and force more cooperation among enforcement agencies. It placed the FBI in charge of the Drug Enforcement Administration (DEA) and gave it major drug enforcement responsibility for the first time in history. And, as the centerpiece of its prosecutorial strategy, it fielded a network of Organized Crime Drug Enforcement Task Forces in thirteen “core” cities across the nation.³⁴

Reagan gathered his massive troops and sent them out into the field: American cities. To support his deployed troops, President Reagan needed the law on his side. He called for a “legislative offensive designed to win approval of reforms” of laws regarding bail, sentencing, criminal forfeiture, and the exclusionary rule, among others.³⁵

The President was successful in gaining support for his efforts. In 1981, members of Congress proposed over 100 bills to alter some aspect of the criminal justice system, with “more than three-fourths specifically propos[ing] harsher treatment for drug offenses or drug offenders” and many others calling for harsher sentences for drug traffickers.³⁶ There were also bills that proposed the elimination of the exclusionary rule for Fourth Amendment violations and others adopting a

31. Jennifer Robison, *Decades of Drug Use: Data from the '60s and '70s*, GALLUP (July 2, 2002), <https://news.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx>.

32. For a discussion of how the racially disparate impact of the War on Drugs, see Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 105–10 (2014).

33. Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889, 894 (1987); DRUG ABUSE POLICY OFFICE, FEDERAL STRATEGY FOR PREVENTION OF DRUG ABUSE AND DRUG TRAFFICKING 74 (1982).

34. *Id.* at 892 (internal citations omitted) (1982); Leslie Maitland, *President Gives Plan to Combat Drug Networks*, N.Y. TIMES, Oct. 15, 1982, § A, at 1, col. 2; see also OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, THE BORDER WAR ON DRUGS 33–39 (1987) (explaining the structure of drug enforcement agencies in the U.S. in the 1980s); ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCES: GOALS AND OBJECTIVES, 11 DRUG ENFORCEMENT 7 (1984).

35. President’s Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249, 1249 (Oct. 2, 1982); Wisotsky, *supra* note 33, at 890.

36. Wisotsky, *supra* note 33, at 897.

good faith exception to the Fourth Amendment warrant requirement.³⁷ The stated goals of these proposals were to “significantly increas[e] the risk of conviction and certainty of long prison sentences.”³⁸ The energy of the moment finally found a home in the Comprehensive Crime Control Act of 1984, which has been described “as an historic rollback of the rights of those accused of crime.”³⁹ That Act authorized the use of pretrial detention, restricted post-conviction bail, and enhanced criminal forfeiture authority, among other changes.⁴⁰ In authorizing pretrial detention, the Act included a rebuttable presumption of a defendant’s dangerousness upon a judicial finding of “probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act.”⁴¹

Pretrial detention is hugely consequential. An increasing number of studies have exposed how the inability to make bail and the experience and impact of pretrial detention produce more guilty pleas, higher rates of conviction, and harsher sentencing outcomes.⁴² And, of course, this phenomenon plays out to the detriment of Black people in the criminal justice system. For example, findings from a 2018 empirical study undertaken by sociologists Ellen Donnelly and John MacDonald, which focused specifically on data from Delaware, showed that “[p]retrial conditions contribute to 43.5% of explainable Black-White disparity in convictions and 37.2% of the disparity in guilty pleas.”⁴³ According to the study, the criminal processing stages “explain nearly 30% of the Black-White disparity in the decision to sentence a defendant to any period of incarceration.”⁴⁴ Further, the study demonstrated that pretrial treatment of a defendant explained “under a quarter of the disparity in average incarceration sentence length.”⁴⁵ Ultimately, the study concluded that “pretrial decisions appear to be an important source of Black-White disparities in court processing and Blacks being overrepresented in the jail and prison population in Delaware.”⁴⁶ Racial disparities like these play out across the country.⁴⁷

37. H.R. 4259, 97th Cong. (1981); S. 751, 97th Cong. (1981).

38. *Sentencing Practices and Alternatives in Narcotics Cases: Hearings Before the H. Select Comm. on Narcotics Abuse & Control*, 97th Cong. 3 (1981) (statement of Rep. Edward Beard).

39. Wisotsky, *supra* note 33, at 898. The Controlled Substances Act is codified at 21 U.S.C. §§ 801–971.

40. For a fuller discussion of the CCCA, see Wisotsky, *supra* note 33, at 898–903.

41. 18 U.S.C. § 3142(e).

42. Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges*, 108 AM. ECON. REV. 2, 212–14 (2018); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 724–28, 736 (2017); Meghan Sacks & Alissa Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL’Y REV. 59, 62–63, 71 (2014).

43. Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 780 (2018).

44. *Id.* at 780–81.

45. *Id.* at 781.

46. *Id.*

47. Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL’Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

These racial disparities were made possible by the foundation laid in the Comprehensive Crime Control Act of 1984. By authorizing the use of reduced bail options and increasing pretrial detention opportunities to widen the net cast by War on Drug policies, the legal shield for discriminatory punishment was strengthened.

The wartime offensive escalated further in the Anti-Drug Abuse Act of 1986, which turned to sentencing as the preferred weapon. With extremely punitive mandatory minimums, including the infamous 100-to-one crack to powder cocaine ratio, the 1986 Act was poised to take down any drug offenders in its sights. Under this Act, an offense had to involve 100 times more powder cocaine for a defendant to receive the same sentence as defendants convicted of a crack cocaine offense.⁴⁸ Offenses involving five grams of cocaine base (commonly referred to as “crack”) were treated as equivalent to those involving 500 grams of cocaine hydrochloride (commonly referred to as “powder cocaine”), triggering a five-year mandatory minimum sentence.⁴⁹ Likewise, 5,000 grams of powder cocaine were necessary to trigger the same ten-year mandatory minimum sentence that was triggered by fifty grams of crack.⁵⁰ The 100-to-one powder-to-crack cocaine sentencing ratio was incorporated into the Federal Sentencing Guidelines.⁵¹ Though seemingly race-neutral, this War on Drugs sentencing scheme has given police, prosecutors, and judges the firepower to disproportionately arrest, charge, and imprison Black offenders.⁵²

Though prosecutors levy charges and judges impose sentences, police officers were used to root out the perceived enemy. To support their efforts, police funding has increased significantly since the War on Drugs began. Between 1993 and 2008, state and local expenditures on police doubled, from \$131 per capita to \$260 per capita.⁵³ Actual police forces increased as well. The number of sworn officers in the United States increased by 26% between 1992 and 2008.⁵⁴ In certain cities this increase was even more dramatic. For instance, the number of patrol officers

48. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -4 (1986) (codified as amended at 21 U.S.C. § 841). Pursuant to the resulting 21 U.S.C. § 841, a five-year mandatory minimum applied to any trafficking offense of five grams of crack or 500 grams of powder, 21 U.S.C. § 841(b)(1)(B)(ii)–(iii), and its ten-year mandatory minimum applied to any trafficking offense of fifty grams of crack or 5,000 grams of powder, § 841(b)(1)(A)(ii)–(iii). The 1986 Drug Act imposed the heavier penalty on “cocaine base” without specifying that to mean crack. However, in 1993, the Sentencing Commission clarified that “[c]ocaine base,” for the purposes of this guideline, means “crack.” SENT’G GUIDELINES, *supra* note 6, app. C.

49. Anti-Drug Abuse Act § 1002.

50. *Id.*

51. See *Kimbrough v. United States*, 552 U.S. 85, 96–97 (2007).

52. See *infra* Section III.B.2.

53. Mona Lynch, *Theorizing the Role of the “War on Drugs” in US Punishment*, 16 THEORETICAL CRIMINOLOGY 175, 189 (2012).

54. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 (2011).

in New York City increased by 47% between 1990 and 1997.⁵⁵ With more police on the streets across America, law enforcement had the support to weed out the enemy. And they did just that. The Bureau of Justice Statistics has reported that between 1982 and 2007, the number of arrests for drug possession tripled, from approximately 500,000 to 1.5 million.⁵⁶ Currently, drug arrests constitute the largest category of arrests in the United States.⁵⁷ Staying true to form, law enforcement strategies during the War on Drugs operated in a racially discriminatory manner. In 1976, Blacks constituted 22% of drug-related arrests.⁵⁸ However, by 1990 Blacks accounted for 40% of all drug-related arrests.⁵⁹ One scholar explains the philosophy behind race-based policing this way:

The legislative and law enforcement responses to crack “cannot be attributed solely to objective levels of criminal danger, but [also reflect] the way in which minority behaviors are symbolically constructed and subjected to official social control.” Law enforcement efforts against crack in poor minority neighborhoods reinforced control of the urban “underclass,” a group deemed by the political and white majority to be particularly “dangerous, offensive and undesirable.” The conflation of the underclass with crack offenders meant the perceived dangerousness of one increased the perceived threat of the other. Urban blacks, the population most burdened by concentrated socio-economic disadvantage, became the population at which the war on drugs was targeted.⁶⁰

In other words, the War on Drugs’ law enforcement efforts focused on poor, Black communities as a method of social control, as opposed to purely crime control.

This perception of the dangerous urban “underclass” (code for poor Black communities) that needed to be policed more aggressively and punished more often than not with the longest prison sentences is just the sort of continued control of Black bodies that was evident in the Black Codes that proliferated just after the end of the Civil War. The Black Codes were enforced “by a police apparatus and judicial system in which blacks enjoyed virtually no voice whatever. Whites

55. Jennifer R. Wynn, *Can Zero Tolerance Last? Voices from Inside the Precinct*, in ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 111 (Andrea McArdle & Tanya Erzen eds., 2001).

56. *Drug and Crime Facts: Drug Law Violations*, BUREAU OF JUST. STAT. (Mar. 16, 2021), <http://www.bjs.gov/content/dcf/enforce.cfm>.

57. Lynch, *supra* note 53.

58. Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25.

59. *Id.*

60. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 265 (2009) (internal citations omitted) (citing Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 358, 361, 368 (Michael Tonry ed., 1997)); KATHARINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997) (arguing that wars on crime and drugs reflected efforts by politicians to mobilize a white electorate anxious over its declining status through the race-coded language of crime).

staffed urban police forces as well as State militias, intended, as a Mississippi white put it in 1865, to ‘keep good order and discipline amongst the negro population.’”⁶¹ The same suggestion that policing was needed to keep Blacks in line was perpetuated during the War on Drugs in the way that crack was touted as a Black problem.

The view that Black people have a propensity for criminal disorder was used to push back against Reconstruction and can similarly be seen in the War on Drugs rhetoric. In the 1994 Eastern District of Missouri case *United States v. Clary*, Judge Clyde Cahill explained the damaging racist discourse this way:

Crack cocaine eased into the mainstream of the drug culture about 1985 and immediately absorbed the media’s attention. Between 1985 and 1986, over 400 reports had been broadcast by the networks. Media accounts of crack-user horror stories appeared daily on every major channel and in every major newspaper. Many of the stories were racist. Despite the statistical data that whites were prevalent among crack users, rare was the interview with a young black person who had avoided drugs and the drug culture, and even rarer was any media association with whites and crack. Images of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were *solely* responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society.⁶²

As Judge Cahill’s account reveals, the War on Drugs rhetoric stirred up and drew on fear of Black people in order to legitimize race-based policing. This is what Nixon had been counting on when he declared war in the first place. Reagan developed an administrative framework for carrying out that war, and Congress gave it legal force through punitive drug sentencing laws. Police and prosecutors now had a healthy storehouse of ammunition to use against Black communities. The racially disparate sentencing outcomes made possible by the Anti-Drug-Abuse Act of 1986 make the race-based destruction of the War on Drugs undeniable.

The racial sentencing disparities in the U.S. criminal justice system are well known at this point. Studies continue to demonstrate the differences between the sentences imposed on white versus non-white offenders, with Black male offenders receiving the brunt of sentencing severity.⁶³ In its 2014 written testimony to the Inter-American Commission on Human Rights, the American Civil Liberties Union (“ACLU”) explained that “Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than

61. FONER, *supra* note 16, at 203.

62. 846 F. Supp. 768, 783 (E.D. Mo.) (citations omitted), *rev’d*, 34 F.3d 709 (8th Cir. 1994).

63. *See, e.g.*, WILLIAM RHODES, RYAN KLING, JEREMY LUALLEN & CHRISTINA DYOUS, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., FEDERAL SENTENCING DISPARITY: 2005–2012 (2015), <https://www.bjs.gov/content/pub/pdf/fsd0512.pdf> (providing data on federal sentencing disparity).

similarly situated white offenders and receive longer sentences than their white counterparts in some jurisdictions.”⁶⁴ Over-policing and severe punishment manifest in disproportionate incarceration. For example, in 2011, African-American males were six times more likely to be incarcerated than white males.⁶⁵ In a 2016 sentencing study, the Sentencing Project revealed that “African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites.”⁶⁶ Today, Blacks make up thirteen percent of the U.S. population, yet comprise thirty-eight percent of the U.S. prison population.⁶⁷ More than half of the prison population is African American in twelve states.⁶⁸ Incarceration is just one aspect of the consequences of the War on Drugs on Black communities.

There is a long list of the collateral consequences of incarceration. Drug convictions and subsequent incarceration lead to disenfranchisement, the loss of federal benefits, and reduced employment opportunities, to name a few.⁶⁹ There is ample evidence that children of incarcerated parents face emotional, mental, and physical health difficulties at a greater rate than other children.⁷⁰ The list of repercussions goes on and on, and Black children suffer the most.⁷¹ This evidence is the reason why drug sentencing must be reconstructed to move away from the War on Drugs and towards a post-war approach: an approach that truly repairs the damage of the war and protects us from simply repackaging racism into another form. In other

64. AM. CIV. LIBERTIES UNION, *supra* note 7, at 1.

65. See ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PRISONERS IN 2011 8 (2012), <https://www.bjs.gov/content/pub/pdf/p11.pdf> (providing graphs and data on incarceration statistics); see also THE SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING THE RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), <https://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> (discussing the disproportional incarceration rates between African Americans and white males).

66. THE SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnicdisparity-in-state-prisons/> (documenting the rates of incarceration of different races, identifying contributors to distributors, and providing recommendations for reform).

67. *Id.* at 4 (“The Bureau of Justice Statistics reports that 35% of state prisoners are white, 38% are black, and 21% are Hispanic.”).

68. *Id.* at 3 (“Maryland, whose prison population is 72% African American, tops the nation.”).

69. For an explanation of the numerous consequences of incarceration, see HUM. RTS. FOUND., THE COSTS AND CONSEQUENCES OF THE WAR ON DRUGS (2019), https://hrf.org/wp-content/uploads/2019/05/WoD_Online-version-FINAL.pdf; Eric L. Jensen, Jurg Gerber & Clayton Mosher, *Social Consequences of the War on Drugs: The Legacy of Failed Policy*, 15 CRIM. JUST. POL’Y REV. 100, 102 (2004).

70. For a review of the effects on children of having an incarcerated parent, see Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT. INST. JUST. J., May 2017, at 2–4, <https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children>. See also STEVE CHRISTIAN, NAT’L CONF. STATE LEGIS., CHILDREN OF INCARCERATED PARENTS (2009), <https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf> (noting that “[p]arental incarceration can affect many aspects of a child’s life,” but acknowledging that a definitive causal link between parental incarceration and children’s problems has yet to be established).

71. See THE SENT’G PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN 1–2 (2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarcerated-Parents-and-Their-Children-Trends-1991-2007.pdf>.

words, a change in rhetoric is not enough. To make an imagined post-War-on-Drugs system a reality, we must reinterpret constitutional protections.

III. WHY INTERPRETATION MATTERS: A LESSON FROM THE THIRTEENTH AMENDMENT

During the Reconstruction Era, Congress rebuilt the country through constitutional amendments and legislation to bolster those amendments. However, ending and sustaining an end to the War on Drugs does not necessarily require new constitutional amendments. It does, though, require a renewed interpretation of existing constitutional amendments. Again, the promises and pitfalls of the Reconstruction Era are instructional here. The story of the Thirteenth Amendment reveals the door left open for reconstructing the approach to drug sentencing and giving sentencing reform a constitutional basis for survival.

A. *The Thirteenth Amendment: Original Interpretation*

President Lincoln called for the end of slavery in the Emancipation Proclamation in 1863. But Republicans at the time understood that for the *system* of slavery to actually end, a constitutional amendment was necessary. As Eric Foner explains:

As a presidential decree, the proclamation could presumably be reversed by another president. Even apart from its exemptions, moreover, the proclamation emancipated people; it did not abolish the legal status of slaves, or the state laws establishing slavery. Emancipation, in other words, is not quite the same thing as abolition.⁷²

And so, to rid the country of the institution of slavery, Republicans began to plan for amending the Constitution.⁷³ Section 1 of the Thirteenth Amendment states that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁷⁴ As far as constitutional language goes, this amendment is clear and straightforward. It does not speak to vagaries such as “due process” or require an understanding of what might be deemed “unreasonable.” Perhaps it was because of its indisputable abolition of slavery that the Thirteenth Amendment did not have an easy road to ratification. After the proposed amendment passed in the Senate in April 1864, it stalled in the House of Representatives because Democrats refused to support it during an election year.⁷⁵ President Lincoln became

72. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 26 (2019).

73. *Id.* at 28.

74. U.S. CONST. amend. XIII, § 1.

75. *13th Amendment*, HISTORY.COM (June 9, 2020), <http://www.history.com/topics/black-history/thirteenth-amendment>.

heavily involved once Congress reconvened in December 1864, and the amendment finally passed on January 31, 1865, by a vote of 119 to 56 (just a few votes over the required two-thirds majority).⁷⁶ It took until December 6, 1865, for the necessary number of states to ratify the amendment.⁷⁷

It should be no surprise that there was not an avalanche of support for the abolition of slavery through the passage of Thirteenth Amendment, or that disagreements about the application of the amendment would quickly ensue. After all, slavery had been a hallmark of America for centuries at that point. There were more slaves in the United States at the start of the Civil War than there had been at any other point in U.S. history.⁷⁸ Slaveholders had controlled the federal government since the country's founding.⁷⁹ Therefore, once ratified, some in Congress argued that the Thirteenth Amendment gave Blacks "no rights except [their] freedom and [left] the rest to the states."⁸⁰ Most others, though, understood that abolition of slavery gave some substantive meaning to the freedom of Black Americans. Representative James Ashley, the amendment's floor leader in the House, declared that the amendment would provide "a constitutional guarantee of the government to protect the rights of all and secure the liberty and equality of its people."⁸¹ James Harlan, a Republican Senator from Iowa, put forth a long list of the "necessary incidents" and peculiar characteristics of slavery, which he believed the Thirteenth Amendment abolished as well.⁸² Included in his lists were the barriers to marry, to raise children, to own property, and to testify in court, along with the denial of education and restrictions on the freedoms of speech and press.⁸³ Similarly, Senator Henry Wilson of Massachusetts vowed that if the Amendment were enacted, "it [would] obliterate . . . everything connected with [slavery] or pertaining to it," including denials of "the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child."⁸⁴ To that end, just five months after the ratification of the amendment, Congress passed the Civil Rights Act of 1866. It did so under the authority of Section 2 of the Thirteenth Amendment, which gave Congress the power to use "appropriate legislation" to enforce the article.⁸⁵

The Civil Rights Act of 1866 declared that all U.S.-born persons ("excluding Indians not taxed") were citizens of the United States and granted all citizens the

76. *Id.*

77. Lincoln did not live to see ratification of the Thirteenth Amendment—he was assassinated on April 14, 1865.

78. FONER, *supra* note 72, at 21.

79. *Id.*

80. *Id.* at 41 (quoting border Unionist John Henderson).

81. REBECCA ZIETLOW, *THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION* 125 (2018).

82. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan).

83. *Id.*

84. *Id.* at 1324 (statement of Sen. Henry Wilson).

85. U.S. CONST. amend. XIII, § 2.

“full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.”⁸⁶ The Act recognized racial equality in the rights “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”⁸⁷ Interestingly, as for punishment issues, the Act prohibited those acting under the color of law from subjecting anyone “to different punishment, pains, or penalties . . . by reason of his color or race, than is prescribed for the punishment of white persons.”⁸⁸ It was clear even at that time that the criminal justice system could be, and had been, used to facilitate racial oppression and terror.

Of course, the breadth of the Act’s grant of equality was met with forceful opposition. Senator Willard Saulsbury, a Democrat from Delaware, reasoned, “A man may be a free man and not possess the same civil rights as other men.”⁸⁹ According to Senator Saulsbury and others who were in agreement with him, the Civil Rights Act went beyond the scope of the Thirteenth Amendment. As he explained, “If you intended to bestow upon the freed slave all the rights of a free citizen, you ought to have gone further in your constitutional amendment, and provided that not only the *status* and condition of slavery should not exist, but that there should be no inequality in civil rights.”⁹⁰ President Andrew Johnson embraced this limited view and vetoed the Act once it had passed the House and Senate.⁹¹ Debate continued, and for the one of the first times in the country’s history, Congress overrode the President’s veto, and the Civil Rights Act of 1866 was enacted in April 1866.⁹² The force of the Act and its subsequent versions, however, would depend on the Supreme Court’s interpretation of the meaning of the Thirteenth Amendment.

A look at the *Civil Rights Cases*⁹³ shows the importance of constitutional interpretation in moving from war to reconciliation and repair. Writing for an eight-Justice majority, Justice Joseph Bradley used the term “badges and incidents of slavery” to discuss the constitutionality of the Civil Rights Act of 1875, which built

86. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

87. *Id.*

88. *Id.* § 2.

89. CONG. GLOBE, 39th Cong., 1st Sess. 477 (1866) (statement of Sen. Willard Saulsbury). Senator Cowan explained, “The true meaning and intent of that amendment was simply to abolish negro slavery. That was the whole of it. What did it give to the negro? It abolished his slavery. Wherein did his slavery consist? It consisted in the restraint that another man had over his liberty, and the right that that other had to take the proceeds of his labor.” *Id.* at 1784 (statement of Sen. Edgar Cowan); *see also id.* at 1156 (statement of Rep. Anthony Thornton) (“The sole object of that amendment was to change the *status* of the slave to that of a freeman. . . .”); *id.* at 1268 (statement of Rep. Michael Kerr) (“But if these discriminations [prohibited by the Civil Rights Act] constitute slavery or involuntary servitude, which are the only things prohibited by the last constitutional amendment, then whose slaves are the persons so discriminated against?”). For further discussion of this debate, see James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (2018).

90. CONG. GLOBE, 39th Cong., 1st Sess. 477 (1866) (statement of Sen. Willard Saulsbury).

91. For an explanation of President Johnson’s constitutional argument for his veto, see 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3603–11 (James D. Richardson ed., 1897).

92. CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866).

93. 109 U.S. 3 (1883).

on the 1866 Act by outlawing private race discrimination in transportation and other public accommodations.⁹⁴ Justice Bradley explained that the Thirteenth Amendment “clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”⁹⁵ However, rather than holding that the amendment itself abolished all incidents of slavery, as its Republican supporters wished, Justice Bradley and seven of the other Justices in the majority adopted the narrow view, writing:

There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.⁹⁶

In holding that the 1875 Act could not be upheld under the Thirteenth Amendment, Justice Bradley defined freedom as the absence of a person being held as property.

This limited view of the Thirteenth Amendment was clear by the time the Supreme Court decided *Plessy v. Ferguson* in 1896.⁹⁷ In upholding Louisiana’s Separate Car Act, which required race-based segregation of railroad train passengers, the Court rejected the argument that the Act amounted to an incident of slavery.⁹⁸ Justice Henry Billings Brown even stated that it was “too clear for argument” that the Thirteenth Amendment didn’t apply to this situation.⁹⁹ As he explained:

Slavery implies involuntary servitude,—a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services.¹⁰⁰

With those words, it was plain that the Court believed the Thirteenth Amendment had limited to no application beyond the end of the Civil War.

This approach was not a foregone conclusion, and it was not within the understanding of those who proposed the Thirteenth Amendment in the first place. In his dissent in *Plessy*, Justice Harlan reiterated the Republican view:

94. *Id.* at 20 (discussing the Civil Rights Act of 1875, ch. 114, 18 Stat. 335).

95. *Id.*

96. *Id.* at 25.

97. 163 U.S. 537 (1896).

98. *Id.* at 542.

99. *Id.*

100. *Id.*

The [T]hirteenth [A]mendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude.¹⁰¹

But the majority view—reducing the Thirteenth Amendment to merely a form of simple emancipation—dashed the promise of Reconstruction. A reinvigoration of the intended purpose of the Thirteenth Amendment can combat this Supreme Court’s failure to address the legacy of slavery.

B. Reinterpreting the Thirteenth Amendment: An Opportunity for Reinvigoration and Promise for the War on Drugs

There was a brief resuscitation of the Thirteenth Amendment during the Civil Rights Era, also known as the Second Reconstruction Era. In *Jones v. Alfred H. Mayer Co.*, the Supreme Court upheld the Civil Rights Act of 1866 as a ban on private racial discrimination in the sale and rental of housing.¹⁰² Rather than expounding on the meaning of slavery and servitude in Section 1 of the Thirteenth Amendment, the Court focused on Section 2. Writing for the Court, Justice Stewart reasserted Justice Bradley’s words in the *Civil Rights Cases* that the Thirteenth Amendment “clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.’”¹⁰³ Ultimately, Justice Stewart left to Congress the choice “rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”¹⁰⁴ What is important, though, is that Justice Stewart saw the post-Civil War Black Codes as “substitutes for the slave system.”¹⁰⁵ Likewise, he recognized that housing discrimination was “a substitute for the Black Codes.”¹⁰⁶ This revitalized view of the Thirteenth Amendment allowed Congress to use the Amendment’s force to attack any “relic of slavery.”¹⁰⁷ However, this interpretation has gained little traction in the intervening years.

Despite recognizing that Congress has broad deference in this area, which arguably required a broad view of the reach of Section 1 of the Thirteenth Amendment, the Court failed to use the Thirteenth Amendment to uphold the only two Section 1 race claims to come before it since *Jones*. In the 1971 case, *Palmer v. Thompson*, Black plaintiffs challenged the decision by the City of Jackson, Mississippi, to shut

101. *Id.* at 555 (Harlan, J. dissenting).

102. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

103. *Id.* at 439 (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

104. *Id.* at 440–41 n.78.

105. *Id.* at 441–43.

106. *Id.*

107. *Id.* at 443.

down all of its segregated pools rather than to integrate them.¹⁰⁸ In his opinion for the Court, Justice Black claimed that upholding the plaintiff's claim "would severely stretch [the Thirteenth Amendment's] short simple words and do violence to its history."¹⁰⁹ In the second case, *City of Memphis v. Greene*, Black residents of Memphis, Tennessee, challenged the City's decision to block a road that had provided the most direct route for residents of a mostly Black neighborhood to reach downtown Memphis.¹¹⁰ The U.S. Court of Appeals for the Sixth Circuit found that the closure constituted a badge or incident of slavery because it was a racially-motivated attempt to disparately control Black motorists and hurt property values in the Black neighborhood.¹¹¹ In addressing whether the Thirteenth Amendment reaches the badges and incidents of slavery, Justice Stevens's opinion for the Court chose "to leave that question open"¹¹² and instead concluded that, even if Section 1 did directly ban badges and incidents, the road closing was a "slight inconvenience" that did not impose any badge or incident of slavery.¹¹³ The Supreme Court has not answered the badges and incidents questions since it was left open in *Greene*.

Scholars have attempted to resurrect the Thirteenth Amendment in the criminal punishment space. Some have claimed that the Thirteenth Amendment was meant to, and should, apply to some extent to the conditions of prison labor.¹¹⁴ Others make arguments specifically related to incarcerated individuals working in agriculture.¹¹⁵ Of course, the hurdle faced by all of these situations is that the Thirteenth Amendment explicitly exempts from its prohibition of slavery and involuntary servitude "punishment for crime whereof the party shall have been duly convicted."¹¹⁶ But, when it comes to moving from wartime to a post-war era, the Thirteenth Amendment holds the same promise today that it did during the post-Civil War years. Moving the country to a post-War-on-Drugs age only requires an answer to the open question regarding the badges and incidents of slavery. And adopting the answer that embraces the spirit of Reconstruction—that the Thirteenth Amendment requires eradicating the vestiges of slavery—naturally necessitates criminal justice reform of all sorts, but certainly in the drug sentencing realm. Arguments urging a reliance on the Thirteenth Amendment to address specific areas of criminal justice reform show the promise that the Amendment still holds. As discussed below, the Thirteenth Amendment can be a protection against the

108. 403 U.S. 217, 219 (1971).

109. *Id.* at 226.

110. 451 U.S. 100 (1981).

111. *Id.* at 103, 107–10, 138.

112. *Id.* at 126.

113. *Id.* at 119, 128.

114. See, e.g., Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395 (2009).

115. See, e.g., Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869 (2012).

116. U.S. CONST. amend. XIII, § 1.

racial profiling that leads to disproportionate arrests and harsh sentencing of Blacks, as well as a constitutional source to challenge drug sentencing themselves.

1. The Thirteenth Amendment Reinvigorated: Protection Against Racial Profiling

When it comes to the War on Drugs, racial sentencing disparities are merely a symptom of a larger systemic problem of biased law enforcement and prosecution. So, the utility of the Thirteenth Amendment in reconstructing the approach to drug crime need not only focus on actual sentencing laws. As explained earlier, racial prejudice in policing played a role in upholding racist legal systems, including the Black Codes and the War on Drugs. In 1990, during the height of the War on Drugs, national police leaders Hubert Williams and Patrick V. Murphy¹¹⁷ wrote:

The fact that the legal order not only countenanced but sustained slavery, segregation, and discrimination for most of our Nation's history—and the fact that the police were bound to uphold that order—set a pattern for police behavior and attitudes toward minority communities that has persisted until the present day.¹¹⁸

Even then, there was an internal recognition of the racial bias in policing. This has played out in the way racial profiling undergirds the War on Drugs.

Racial profiling refers to “stereotype-based policing” practices by which police make “decisions about criminal suspicion based on prior conceptions about groups and their prevailing characteristics.”¹¹⁹ The use of racial profiling to focus on Blacks in the traffic stop context has been well documented.¹²⁰ Studies show that racial profiling continues to be prevalent today, even though traffic stops based on racial profiling do not increase the yield of evidence of a crime.¹²¹ This racist practice is tied to the tactics developed as part of the War on Drugs. Jack Glaser, a leading expert on racial profiling, has explained that “[f]ormal racial profiling as we

117. Patrick Murphy was a President of the National Police Foundation and served as Commissioner of the New York Police Department. Hubert Williams has been described as “one of our Nation’s pioneering African-American police leaders.” See Jim Burch, *A Letter from the President of the National Police Foundation*, NAT’L POLICE FOUND., <https://www.policefoundation.org/presidents-page/>.

118. Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, PERSPECTIVES ON POLICING, Jan. 1990, at 2, <https://www.ncjrs.gov/pdffiles1/nij/121019.pdf>.

119. JACK GLASER, SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING 43 (2015).

120. See, e.g., WILLIAM R. SMITH, DONALD TOMASKOVIC-DEVEY, MATTHEW T. ZINGRAFF, H. MARCINDA MASON, PATRICIA Y. WARREN & CYNTHIA PFAFF WYATT, N.C. STATE UNIV., THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/204021.pdf> (providing statistical compilations on racial profiling in traffic stops).

121. For a discussion on rates of racial profiling in traffic stops and the resulting low yields of evidence, see Camelia Simoiu, Sam Corbett-Davies & Sharad Goel, *The Problem of Infra-marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED STAT. 1193, 1213 (2017). For a summary of this study, see Edmund Andrews, *A New Statistical Test Shows Racial Profiling in Police Traffic Stops*, STAN. ENGINEERING (June 28, 2016), <https://engineering.stanford.edu/magazine/article/new-statistical-test-shows-racialprofiling-police-traffic-stops>.

know it today . . . stems largely from the War on Drugs. Early drug courier profiles were developed in the mid-1970s by the Federal Bureau of Investigation (FBI) and the newly formed DEA.”¹²² Glaser notes that widely used, early drug courier profiles “included explicit reference to race (usually African American).”¹²³ The biased assumption that race—specifically Blackness—is relevant to criminal suspicion, and therefore has a place in policing, can be traced back to the foundations of our country, continuing well into the Reconstruction Era.¹²⁴

In *A Thirteenth Amendment Framework for Combating Racial Profiling*, Professor William M. Carter, Jr. makes a case for using the Thirteenth Amendment to defeat the lawfulness of racial profiling.¹²⁵ He asserts that “[t]he continuing stigma of criminality because one is African American is so pervasive and indiscriminate precisely because it did not arise by accident. The use of race as a ‘free-floating proxy’ for criminality arose during slavery as a means of social control over enslaved Africans and, later, the freedmen.”¹²⁶ Professor Carter ties this method of criminality as control to the Slave Codes.¹²⁷ In order to maintain the institution of slavery, slaveholding states passed a set of laws—the Slave Codes—to control all aspects of the lives of enslaved people. The restrictions were numerous, including prohibiting slaves from leaving their owners’ premises without permission, owning firearms, learning to read or write, marrying, as well as restricting slaves’ right to assemble.¹²⁸ Professor Carter expounds on how those laws sowed the seeds of a belief in Black criminality:

Additionally, race-based criminal suspicion, legally enforced through the Slave Codes, was used to keep blacks in fear and in their “place” during slavery. It also had the corollary effect of placing whites in constant fear of blacks, thereby making them more willing to accept black subordination in the name

122. GLASER, *supra* note 119, at 9.

123. *Id.*

124. *See id.* at 45 (“[I]t could be said that informal criminal profiling is as old as law enforcement. . .”).

125. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004).

126. *Id.* at 56–57 (quoting Randall Kennedy, *Suspect Policy: Racial Profiling Usually Isn’t Racist. It Can Help Stop Crime. And It Should Be Abolished*, NEW REPUBLIC, Sept. 13, 1999, at 34). Carter continues:

The American association of race and criminality under the slave regime was repeated in other colonial projects. Under British rule in India, for example, the Criminal Tribes’ Act of 1871 provided for the “registration, surveillance and control of certain tribes . . . [designated] criminal.” Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219, 1235–36 (1999). In addition to providing physical control over some 13 million people by imposing a pass system and forced labor penalties similar to those under the American Slave and Black Codes, the Act legislatively validated the “notion of hereditary and biological propensity to crime. . .” *Id.* at 1236. In doing so, the Act provided both legal and moral support for the British colonial project in India.

Id. at 56 n.209.

127. *Id.* at 57.

128. For a succinct explanation of the Slave Codes, see *Slave Code*, ENCYC. BRITANNICA, (2020), <https://www.britannica.com/topic/slave-code>.

of white safety. The Slave Codes heavily punished whites who aided slaves or interfered with the system of white dominance, since merciless discipline was seen as necessary because of blacks' supposed natural savagery.¹²⁹

The Slave Codes, which fostered distrust and fear of Blacks, were precursors to the Black Codes already addressed. The Black Codes, clear vestiges of slavery, merely carried on "the racialization of the criminal law as a means of controlling the freedmen."¹³⁰ The use of racial profiling during the War on Drugs continues this "stigmatization of African Americans as congenital criminals."¹³¹ And in this way racial profiling has always been a "component of our national fabric"¹³²—from the days of slavery to now.

In making the case that the Thirteenth Amendment should be read as barring racial profiling, Professor Carter characterizes this stigmatization as an injury suffered by African Americans that is "one most relevant for purposes of understanding racial profiling as a badge or incident of slavery."¹³³ In other words, the racial profiling that became a linchpin of the War on Drugs "is a modern-day manifestation of a means of social control that arose out of slavery."¹³⁴ This is because these biased policing practices are "a part of a larger series of institutions and cultural practices that relegate racial minorities to caste-like, second-class citizenship."¹³⁵ For those reasons, Professor Carter argues that "it is precisely the type of lingering effect of slavery that the Thirteenth Amendment was designed to eradicate."¹³⁶ This same sort of argument that characterizes War on Drug law enforcement

129. Carter, *supra* note 125, at 57 n.212 ("The issue of safety and the natural fear of slave revolts was also intertwined in the chain of legal judgments [during the colonial period]. . . . Many feared that any judicial protection of the slave would trigger further challenges to the legitimacy of the dehumanized status of blacks and slaves.") (quoting A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 8 (1978)). Carter's discussion on this issue is particularly helpful and includes the following two citations:

Patricia J. Williams, *Meditations on Masculinity*, in CONSTRUCTING MASCULINITY 238, 242 (Maurice Berger et al. eds., 1995). (describing the function of the connection between race and crime and stating that this connection results in "any black criminal becom[ing] all black men, and the fear of all black men becom[ing] the rallying point for controlling all black people")
KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 211 (Knopf 1961) (1956) (noting that the Slave Codes "were quite unmerciful toward whites who interfered with slave discipline") . . .

Id. at 57 nn.212–13; *see also infra* Section IV.D.3 (discussing the use of pseudo-scientific theories in the early twentieth century to convince whites that racial equality was dangerous because of the inherent dangerousness of Blacks).

130. Carter, *supra* note 125, at 57 (citing KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, AND OTHER MACROAGGRESSIONS 19–21 (1998)).

131. *Id.* at 58.

132. F.M. Baker, *Some Reflections on Racial Profiling*, 27 J. AM. ACAD. PSYCHIATRY L. 626, 627 (1999).

133. Carter, *supra* note 125, at 24.

134. *Id.* at 60.

135. *Id.*

136. *Id.*

tactics as violative of the Thirteenth Amendment can be applied to drug sentencing as well.

2. The Thirteenth Amendment Reinvigorated: Challenges to Drug Sentencing

Like policing, using punishment to control Blacks is also a practice woven into our nation's fabric dating back to slavery. The Slave Codes authorized whipping, branding, and imprisonment, among other tortures, as punishments for enslaved Blacks.¹³⁷ Under the next iteration of state-sponsored control of Blacks—the Black Codes—those Blacks who did not comply could be arrested, subjected to impossible-to-pay fines, and forced into unpaid labor on plantations.¹³⁸ Acknowledging that these punishments were race-based clarifies why the Civil Rights Act of 1866 prohibited those acting under the color of law from subjecting a person “to different punishment, pains, or penalties . . . by reason of his color or race, than is prescribed for the punishment of white persons.”¹³⁹ A system that punishes Blacks more severely than whites is a badge of slavery. A reinvigoration of this line of Thirteenth Amendment interpretation could open the door to taking down the entire drug sentencing scheme.

The racially disparate carnage caused by the sentencing system used in the War on Drugs is indisputable. The U.S. Sentencing Commission has repeatedly called attention to this fact. In its February 1995 report to Congress, the Commission revealed that 88.3% of crack cocaine offenders were Black.¹⁴⁰ Citing to a Bureau of Justice Statistics study, the Commission explained that the 100-to-1 quantity ratio was the cause for “the average sentence imposed for crack trafficking [being] twice as long as for trafficking in powdered cocaine.”¹⁴¹ The Sentencing Commission determined that “[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants.”¹⁴² In its 2002 Report, the Commission told Congress that an “overwhelming majority of crack cocaine offenders” were Black—“91.4 percent in 1992 and 84.7 percent in 2000.”¹⁴³ The Commission further reported that “[i]n addition, the average sentence for crack cocaine offenses (118 months) is 44 months—or almost 60 percent—longer than the average sentence for powder cocaine offenses

137. See *Slave Code*, *supra* note 10.

138. *Black Codes*, HISTORY.COM (Jan. 21, 2021), <https://www.history.com/topics/black-history/black-codes>.

139. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866).

140. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 152 (1995), <https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy>.

141. *Id.* at 153 (quoting DOUGLAS C. McDONALD & KENNETH E. CARLSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986–90, at 1 (1993)).

142. *Id.* at 154.

143. See U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 62 (2002), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf.

(74 months), in large part due to the effects of the 100-to-1 drug quantity ratio.”¹⁴⁴ At that time, the Commission advocated for a reduction in the 100:1 ratio, emphasizing in its report that there was no sound reason for maintaining the disparate sentencing. The report stated that: (1) the “current penalties exaggerate the relative harmfulness of crack cocaine”; (2) the “current penalties sweep too broadly and apply most often to lower level offenders”; (3) the “current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality”; and (4) the “current penalties’ severity mostly impacts minorities.”¹⁴⁵

Congress did not respond by adjusting drug sentencing, however.¹⁴⁶ In 2004, the Commission again called out the disparate force that the War on Drugs cocaine sentencing policy was inflicting upon Blacks, stating:

This one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination. Revising the crack cocaine thresholds would better reduce the gap **than any other single policy change**, and it **would dramatically improve the fairness** of the federal sentencing system.¹⁴⁷

Despite these clear statements of racial injustice, it took until 2010 for Congress to pass legislation reducing the 100:1 ratio—yet crack is still sentenced more harshly than powder cocaine, and the racial sentencing disparities persist.

Now, under the Fair Sentencing Act of 2010 (“FSA 2010”), it takes twenty-eight grams (instead of the former five grams) of crack cocaine to trigger a five-year mandatory minimum imprisonment and 280 grams (rather than fifty grams) of crack cocaine to trigger a ten-year mandatory minimum imprisonment term—a ratio of nearly eighteen to one.¹⁴⁸ At fiscal year-end 2012, “[t]he vast majority of crack cocaine offenders (88%) were non-Hispanic black or African American,” meaning that Blacks were still being sentenced more harshly than white offenders.¹⁴⁹ While the First Step Act of 2018 allowed for the FSA 2010 to be applied retroactively, and African Americans comprise 91% of those receiving retroactive sentencing reductions,¹⁵⁰ it does not constitute true reconstruction

144. *Id.* at 90.

145. *Id.* at v–viii.

146. U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 51 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/files/publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (noting Congress did not act on the Commission’s 2002 recommendation).

147. *Id.* at 132 (emphasis added).

148. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended at 21 U.S.C. § 841).

149. SAM TAXY, JULIE SAMUELS & WILLIAM ADAMS, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 3 (2015), <https://www.bjs.gov/content/pub/pdf/dofp12.pdf>.

150. Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, SENT’G PROJECT (Dec. 17, 2019), <https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/>.

sentencing. Legislation that reduces racial sentencing disparities but does not prohibit such disparities does not actually purge the system of the vestiges of slavery. By making the sentencing changes under the Fair Sentencing Act selectively retroactive, the First Step Act does not “provide the systemic change necessary to undue (sic) the harm caused by decades of mass incarceration at the federal level fueled by mandatory minimums and federal prosecutors’ focus on extreme punishments for street-level crime.”¹⁵¹ The same is true at the state level where, though there have been a number of recent state sentencing reforms, Black people are still subjected to the harshest treatment. At the state level, Blacks are 6.5 times as likely as whites to be incarcerated for drug-related offenses.¹⁵² Legislative reform without constitutional force is not reconstruction.

In the same way that an argument can be made that the law enforcement practices of the War on Drugs are unconstitutional under the Thirteenth Amendment, it is logical to argue that our current drug sentencing model—one that allows for racist manipulation—violates the Thirteenth Amendment as well. Perhaps this would be a weaker argument if there was evidence that drug sentencing outcomes are reflective of crime commission. However, when it comes to drug crime statistics, “whites are more likely to sell drugs and equally likely to consume them.”¹⁵³ When the system is more closely examined, the systemic racism is evident. In a thorough empirical study specifically focused on federal sentencing, Professors Sonja Starr and M. Marit Rehavi make the following revelation:

We identify an important procedural mechanism that appears to give rise to the majority of the otherwise-unexplained disparity in sentences: how prosecutors initially choose to handle the case, in particular, the decision to bring charges carrying “mandatory minimum” sentences. The racial disparities in this decision are stark: *ceteris paribus*, black men have 1.75 times the odds of facing such charges, which is equivalent to a 5 percentage point (or 65 percent) increase in the probability for the average defendant. The initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by precharge characteristics.¹⁵⁴

This racist manipulation of mandatory minimums supports an argument that the sentencing system is a remnant of slavery. Professors Starr and Rehavi argue that this charging phenomenon has contributed to a stark sentencing disparity that they

151. *Id.*

152. *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, HAMILTON PROJECT (Oct. 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

153. Jessica Eaglin & Danyelle Solomon, *Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice*, BRENNAN CTR. FOR JUST. 7 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Racial%20Disparities%20Report%20062515.pdf.

154. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

call the “black premium.”¹⁵⁵ In concluding their study, Professors Starr and Rehavi posit that the percentage of the sentencing disparity that their findings attributed to race alone could be lessened by “simply eliminating the disparity in mandatory minimum charges.”¹⁵⁶ Extrapolating their findings to state sentencing, they add: “If one assumes that all black male sentences in federal and state court face an average race premium of 9 percent, eliminating this disparity would ultimately move nearly 1 percent of all the black men under 35 in the United States from prisons and jails back to the community.”¹⁵⁷ This could be the beginning of the sort of repair that was envisioned during the Reconstruction Era. Returning Black men to their communities is a start. However, merely relying on prosecutors to curb their discretion so as to not rely on racial prejudices is not sufficient. The sentencing framework that allows for such abuses must be deemed unconstitutional.

The Supreme Court’s precedent leaves open a door to reinvigorating a Thirteenth Amendment argument that would allow for actual Reconstruction drug sentencing. Such sentencing would both “repair[] what the war had broken apart while simultaneously attempting to uproot”¹⁵⁸ the racist foundations of the War on Drugs by invalidating sentencing laws that can be manipulated to achieve racially disparate sentencing outcomes. In a true Reconstruction Sentencing model, there would be no requirement to prove the explicit racist intent of any government actor. Rather, the racist effect of the law would be enough to support its unconstitutionality. In making his Thirteenth Amendment argument against racial profiling, Professor Carter uses a line of reasoning that applies to drug sentencing as well. He reminds us that:

It is crucial to understand that a current practice or social condition need not actually be enslavement, or inflict an injury as severe as that inflicted by slavery, in order for it to be a badge or incident of slavery. The *Jones* Court did not hold that whites’ refusal to sell real property to blacks amounted to enslavement, nor did it reason that limitations on blacks’ ownership of real property inflicted an injury upon African Americans equivalent to slavery in severity. Instead, the Court concluded that white refusal to sell to blacks was a lingering vestige of legal structures and prejudices that existed during slavery prohibiting slaves from owning property in order to better control and subjugate them. Under *Jones*, the badges and incidents analysis examines modern-day inequalities to determine whether such inequalities are rationally traceable to the system of slavery.¹⁵⁹

155. *Id.*

156. *Id.* at 1349–50.

157. *Id.* at 1351.

158. GATES, *supra* note 3, at 7.

159. Carter, *supra* note 125, at 60.

Drug sentencing paints a picture of “modern-day inequalities” that are traceable to the system of slavery. Mandatory minimum drug sentencing laws were focused on poor, Black communities, inflicting excessive punishment that was endorsed by societal prejudices against Blacks. These are the same prejudices and views of criminality that were cultivated during slavery, legalized in the Slave Codes, and further perpetuated in the Black Codes. These were the same incidents and badges of slavery sought to be eradicated by the Thirteenth Amendment.

During the debates over the Thirteenth Amendment, supporters were clear that the constitutional change was meant to do more than simply formally prohibit forced labor. It was designed to reconstruct the treatment of Black Americans. Representative Thomas Treadwell Davis of New York said that the Amendment was meant to “remove[] every vestige of African slavery from the American Republic.”¹⁶⁰ Henry Wilson, a Senator from Massachusetts, affirmed that the Amendment was intended to “obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it. . . .”¹⁶¹ Iowan Senator James Harlan argued that the Amendment’s goals included full equalization of civil status for the formerly enslaved.¹⁶² Especially enlightening are the words spoken by Senator Lyman Trumbull of Illinois:

With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also.

Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also.¹⁶³

While Trumbull identifies laws that affirmatively prohibited Blacks from engaging in certain activities, what is evident in Trumbull’s words is that the Thirteenth Amendment was meant to lift freedmen from their oppressed position in society.

Fast forwarding to today, the entire system of policing, prosecution, and punishment that was ramped up during the War on Drugs can be shown to prevent Blacks from living on equal footing with whites. Some may be unwilling to say that mandatory minimum drug sentencing “would never have been thought of or enacted” except for the existence of slavery. However, as Professor Carter points out, when

160. CONG. GLOBE, 38th Cong., 2nd Sess. 155 (1865).

161. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 177 (1951) (citing CONG. GLOBE, 38th Cong., 1st Sess. 1319, 1321, 1324 (1864)).

162. See *id.* at 177–78 (citing CONG. GLOBE, 38th Cong. 1st Sess. 1439, 1440 (1864)).

163. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

constructing a Thirteenth Amendment argument that a law or practice continues the “badges” of slavery, “the focus is not on whether a specific practice that existed during slavery continues today. Rather, this theory concentrates on whether a current social condition can be rationally linked to inequalities arising out of slavery.”¹⁶⁴ Given the history of the War on Drugs, so long as there is willingness to view the Thirteenth Amendment as intended, there is room to argue for the unconstitutionality of the mandatory minimum sentencing scheme developed during that war. Doing so is crucial to making it possible to actually begin to repair some of the wartime devastation. A willingness to return to the spirit of the Reconstruction amendments will also create an avenue for attacking the constitutionality of other tactics associated with the War on Drugs—from policing practices, to the disparate use of pretrial detention, to inequitable charging decisions. But, without constitutional force, sentencing reforms are threatened by the same pitfalls of reconstruction—the continuation of a system that accepts and sustains systemic racism.

IV. APPLYING THE LESSON BEYOND THE THIRTEENTH AMENDMENT

This Article seeks to introduce the idea of constitutional reinterpretation in order to reconstruct sentencing. Like the possible approach to the Thirteenth Amendment, the same promise of constitutional reinvigoration applies to all of the ways in which constitutional interpretation has been used to perpetuate the racialized harms of the War on Drugs. For instance, the Supreme Court has interpreted the Fourth Amendment in a manner that allows the racial profiling and use of force against Black people that have become staples in War on Drugs policing. In 1996, during the height of the War on Drugs, the Supreme Court decided *Whren v. United States* and upheld police officers using the pretext of a minor traffic offense to stop and search individuals.¹⁶⁵ In that case, the defendant argued that allowing pretextual stops would increase the risk that police officers would routinely use minor traffic violations as legal cover for profiling racial minorities.¹⁶⁶ The Court rejected the defendant’s arguments, holding that an officer’s subjective intent in confronting an individual is not relevant to determining whether a Fourth Amendment violation has occurred.¹⁶⁷ So long as there is some objectively reasonable basis for the search or seizure, that search is valid under the Fourth Amendment.¹⁶⁸ In this unanimous decision, the Court failed to read freedom from racist targeting as a part of being free from “unreasonable searches and seizures.”¹⁶⁹

164. Carter, *supra* note 125, at 66.

165. 517 U.S. 806 (1996).

166. *Id.* at 810.

167. *Id.* at 813.

168. *Id.*

169. U.S. CONST. amend. IV.

It is important to recognize that *Whren* was a drug case. The defendant, Michael Whren, was convicted of a crack offense under the Anti-Drug Abuse Act of 1986, meaning that the harsh crack mandatory minimum sentencing laws applied to him.¹⁷⁰ The then-mandatory Federal Sentencing Guidelines, which incorporated those mandatory minimums, called for a sentence range from 168–210 months of imprisonment in Whren’s case.¹⁷¹ He was sentenced to 168 months, or fourteen years.¹⁷² This all stemmed from a pretextual stop by officers patrolling a “high drug area” in the District of Columbia and their suspicion of the youthful occupants in a dark Pathfinder truck that lingered at a stop sign a bit too long while the driver looked into the passenger’s lap.¹⁷³ A reconstructionist approach to this case—one intended to move away from the failed War on Drugs—would have allowed for arguments that the mandatory minimum sentences to which Whren was subjected served no penological purposes other than race-based retribution.¹⁷⁴ Further, a reconstructionist approach would have given credence to arguments that, when pretext can be shown to have a racial component, that practice is likewise an unconstitutional perpetuation of the racist War on Drugs. In this way, Whren could have had strong constitutional arguments challenging several aspects of his case under the Thirteenth Amendment (badges and incidents of slavery), Fourth Amendment (unreasonable search and seizure, when unreasonable is held to prohibit racially biased practices), and perhaps even the Eighth Amendment (cruel and unusual punishment due to a lack of satisfying any penological goals).¹⁷⁵ With such an approach, courts would look beneath the surface of challenged criminal laws and policies in order to acknowledge and seek to rectify the racially discriminatory impact of those laws.

170. See *United States v. Whren*, 111 F.3d 956, 961 n.1 (D.C. Cir. 1997) (Henderson, J., concurring) (citing *United States v. Whren*, 53 F.3d 371, 376 (D.C. Cir. 1995)).

171. See *id.* at 957–58 (main opinion).

172. *Id.*

173. *Whren*, 517 U.S. at 808.

174. For a lengthy discussion of how drug sentencing is divorced from the penological goals of deterrence, incapacitation, rehabilitation, and legitimate retribution, see Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014). Despite the name of the article, my argument was not against racial equality in sentencing. Instead, I argued that calling for racial equality in sentencing, particularly in the cocaine sentencing context, will not necessarily result in better sentencing. Rather, if racial inequality in drug sentencing was remedied by sentencing the overwhelmingly black cocaine defendants to the same sentences as powder cocaine defendants, we would simply be left with cocaine defendants of all races getting a sentence that is not serving any purpose of sentencing and is contributing to ineffective mass incarceration. This is because, as explained in the article, current cocaine sentencing does not deter drug offenses, rehabilitate offenders, incarcerate only dangerous defendants, or adequately reflect community sensibilities of just desserts or retribution.

175. For a discussion of how certain interactions with the police should also be viewed as punishment under the Eighth Amendment, see Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987 (2015).

CONCLUSION

A Reconstruction Sentencing model can emerge when constitutional challenges to War on Drugs laws and policies are given credibility. When racially destructive sentencing laws, like mandatory minimum drug sentencing, are struck down as unconstitutional, then other racist criminal justice policies can be uprooted as well. To be sure, the damaging laws and policies of the War on Drugs go beyond criminal sentencing. From policing, to pretrial detention, to charging decisions, the War on Drugs has facilitated massive destruction. It has also perpetuated the subjugation of hundreds of thousands of Black people. Therefore, a Reconstruction Sentencing model cannot solely about sentencing.

Proponents of the Thirteenth Amendment understood that by outlawing slavery, the Amendment went beyond simply formally ending forced labor. It was also meant to give force to legislation targeted at dismantling the caste system set up by slavery. Further, it was understood that the Thirteenth Amendment prohibited any laws that sustained that racial caste system.

Reconstruction Sentencing comes with the same understandings. The purpose of reconstructing drug sentencing laws is to take away the weapon that police and prosecutors can use to decimate communities so efficiently. Changes to laws regarding race-based policing remove the tactics that have been used to carry out that destruction. But a true Reconstruction Sentencing model both uproots oppressive systems and restores rights. Such an approach requires a restorative focus on reinvestment in damaged communities. This was the heart of Reconstruction—the understanding that the “mere exemption from servitude is a miserable idea of freedom.”¹⁷⁶ Like the calls throughout the country for anti-racist action to address systemic racism envision, Reconstruction Sentencing is a step toward long overdue realization of true freedom.

176. tenBroek, *supra* note 161, at 175 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2692 (1864) (statement of Rep. William Holman)). Holman was an opponent of the proposed amendment. *Id.*