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Jelani Jefferson Exum

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JELANI JEFFERSON EXUM♦

Justice reform is having a moment. Across the nation and in the federal government, legislation has passed "to reduce the scale of incarceration and the impact of collateral consequences of a felony conviction."[1] While some of these reforms were the result of fiscal concerns over mass incarceration, others were in response to the criminal justice reckoning brought on by events of 2020 and intensified calls for racial justice.[2] In the summer of 2020 media attention on the police killings of George Floyd[3] and Breonna Taylor[4] sparked nationwide and global protests and accompanying antiracism pledges by individuals and institutions.[5] This social unrest and resulting commitments

♦ Jelani Jefferson Exum is the Dean and Philip J. McElroy Professor of Law at the University of Detroit Mercy School of Law. Her research focuses on sentencing reform, as well as issues of race in the criminal justice system. She teaches Constitutional Law, Criminal Procedure, Sentencing, and Race and American Law, and is on the Editorial Board of the *Federal Sentencing Reporter*. Dean Jefferson Exum would like to thank her Research Assistant Lauren Parrottino for her valuable research that made it possible to complete this article.

1. Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2020* 1, THE SENT'G PROJECT (Jan. 15, 2021), https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2020/

2. *See e.g.,* John Pfaff, *The Incalculable Costs of Mass Incarceration*, THE APPEAL (Sept. 20, 2018), https://theappeal.org/the-incalculable-costs-of-mass-incarceration/. *See also*, *Economics of Incarceration: The Economic Drivers and Consequences of Mass Incarceration*, PRISON POL'Y INITIATIVE (June 8, 2021, 11:20 AM), https://www.prisonpolicy.org/research/economics_of_incarceration/ (providing a collection of advocacy pieces to reduce mass incarceration based in research on economic factors of incarceration).

3. *See* Oliver Holmes, *George Floyd Killing Sparks Protests Across US: At a Glance Guide*, THE GUARDIAN (May 30, 2020, 6:58 AM), https://www.theguardian.com/us-news/2020/may/30/george-floyd-protests-latest-at-a-glance-white-house. For an understanding of how George Floyd was killed, *see* Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

4. *See* Arian Campos-Flores & Sabrina Siddiqui, *Police Killing of Breonna Taylor Fuels Calls to End No-Knock Warrants*, WALL ST. J. (May 24, 2020, 11:00 AM), https://www.wsj.com/articles/police-killing-of-breonna-taylor-fuels-calls-to-end-no-knock-warrants-11590332400.

5. 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/. For a list of large businesses making such pledges, see Nivedita Balu & Aishwarya Venugopal, *Factbox: Corporations Pledge $1.7 Billion to Address Racism, Injustice*, REUTERS (June 9, 2020, 9:48 PM), https://www.reuters.com/article/uk-minneapolis-police-pledges-factbox/factbox-corporations-pledge-1-7-billion-to-address-racism-injustice-idUKKBN23H06S. For an example of what educational institutions are doing, *see Law Deans Anti-Racist Clearinghouse Project*, ASS'N OF AM. L. SCHS. (Oct. 21, 2020), https://www.aals.org/antiracist-clearinghouse/.

to social justice corresponded with an intensifying global COVID pandemic, which has disproportionately affected racial minority communities and motivated calls for release of nonviolent prisoners.[6] In a way, this has been the perfect storm for reforming a system that has been in need of revision from its start. However, despite the movements to reform policing and efforts to reduce mass incarceration, few reforms truly take an antiracist approach—one designed to actually lead to equitable outcomes.[7] This article argues that a Reconstruction Sentencing approach is needed to uproot the racism embedded in the entire criminal justice system and to restore the damage done by that racism. Though sentencing may seem to be the end stage of a criminal prosecution, this article will demonstrate that a Reconstruction Sentencing approach requires going to the foundations of a criminal case and unearthing how the racially biased decisions along the way lead to disparate sentencing outcomes.[8] An effort to reconstruct sentencing will necessarily require a reconstruction and reformation of the entire criminal justice system into one that is racially equitable and, therefore, antiracist.[9]

This Article is a follow-up to the author's previous article, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*.[10] In *Reconstruction Sentencing*, the promise and pitfalls of the Reconstruction Era served as a model for reimagining drug sentencing in the aftermath of the War on Drugs.[11] Following the U.S. Civil War, the period of Reconstruction was meant to "repair[] 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."[12] Similarly, a Reconstruction Sentencing approach applied to ending the War on Drugs seeks to use constitutional challenges to racially discriminatory sentencing laws—and criminal procedures leading up to those sentencing outcomes—in order to "both repair the damage done by the War on Drugs"[13] and to "uproot the very system that

6. *See Health Equity Considerations & Racial & Ethnic Minority Groups*, CDC (Apr. 19, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html. *See also The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (May 18, 2021), https://www.prisonpolicy.org/virus/virusresponse.html.

7. *See also* Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AM. CRIM. L. REV. 1685 (Apr. 2021). "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."

8. Jelani Jefferson Exum, *Addressing Racial Inequalities in the Criminal Justice System Through A Reconstruction Sentencing Approach*, *infra* Part III (2021).

9. *Reconsruction Sentencing*, *supra* note 7, at 1712.

10. *Id.* at 1689.

11. *Id.* at 1686.

12. HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 7 (2019).

13. *Reconstruction Sentencing*, *supra* note 7, at 1694.

relies on a wartime ideology of seeing the drug offender, who is often viewed as a Black man, as the enemy."[14] As *Reconstruction Sentencing* explains, "the purpose of reconstructing drug sentencing laws is to take away the weapon that police and prosecutors can use to decimate communities so efficiently."[15] The present article will apply the Reconstruction Sentencing model to a criminal case to demonstrate that Reconstruction Sentencing is an approach that requires re-evaluation of the purposes and outcomes of the criminal process in order to achieve antiracist reform.[16]

Reconstruction Sentencing is grounded in the practice of antiracism.[17] Professor Ibram X. Kendi has described an "antiracist idea" as "any idea that suggests the racial groups are equals in all their apparent differences."[18] That is the foundation of Reconstruction Sentencing, that all racial groups are equal.[19] Therefore, racially disparate sentencing outcomes rooted in racial bias are racist and must be eliminated through law and policy.[20] As Professor Kendi explains further, "[a]ntiracism is a powerful collection of antiracist policies that lead to racial equity and are substantiated by antiracist ideas."[21] Drawing from this understanding, Reconstruction Sentencing requires challenging current sentencing laws with an eye toward repairing the damage caused by racism and protecting the subjects of racism—namely Black people—from the reinstitution of policies that will lead to the continuation of those damaging results.[22] Many of the currently proposed police reforms miss this mark.[23]

Though Reconstruction Sentencing can apply to any sort of criminal case, because of the particular force the War on Drugs has levied against the Black community, this Article will use a drug prosecution as the framework for discussing Reconstruction Sentencing. Part I of the Article explains the framework for Reconstruction Sentencing.[24] In that Part, the paper discusses the Reconstruction Era and examines how it serves as a model for constitutional reinvigoration to end the War on Drugs.[25] Specifically, this

14. *Id*.
15. *Id*. at 1718.
16. *See infra* Part III.
17. *Reconstruction Sentencing*, *supra* note 7, at 1710.
18. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 20 (2019).
19. *See Reconstruction Sentencing*, *supra* note 7, at 1690 n.26. "[T]he Fourteenth Amendment was meant to provide absolute equality of the races under the law . . . ."
20. *Id.* at 1710.
21. KENDI, *supra* note 18, at 20.
22. *Reconstruction Sentencing*, *supra* note 7, at 1710.
23. *See* Lynne Peeples, *What the Data Say about Police Brutality and Racial Bias – and Which Reforms Might Work*, NATURE (June 19, 2020), https://www.nature.com/articles/d41586-020-01846-z#ref-CR4, for a discussion of the limits of proposed police reforms.
24. *See infra* Part I.
25. *Id.*

Part explores the Thirteenth and Fourteenth Amendments.[26] Part II of the paper applies the Reconstruction Sentencing model to drug sentencing laws.[27] In Part III, the paper takes a walk through typical aspects of a drug case—from police interaction to warrants to prosecutorial charging decisions—to demonstrate how the Reconstruction Sentencing approach can be used to address the systemic racism in the criminal justice system that leads to racially disparate sentencing outcomes.[28] Part IV concludes that reimagining constitutional arguments is necessary to actually achieve the promise of Reconstruction and to avoid the pitfalls of repackaging racism into new forms as criminal justice reforms are implemented.[29]

I. UNDERSTANDING RECONSTRUCTION SENTENCING

Dr. Henry Louis Gates, Jr. wrote that "few American historical periods are more relevant to understanding our contemporary racial politics than Reconstruction."[30] A Reconstruction Sentencing model adopts this view and adds the perspective 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."[31] A close look at the Reconstruction era reveals the similarities between that historic time and our present moment.

A. The Reconstruction Era

At the end of the Civil War in 1865, the United States sought to readmit Southern states from the Confederacy and integrate the four million formerly enslaved people into the United States.[32] This "Reconstruction Era" began with the passage of the Emancipation Proclamation and the adoption of the Thirteenth Amendment as the official end of slavery in the United States.[33] However, former Confederate states resisted this progress.[34] 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.[35] These laws, passed at the start of the post-war period, were designed to maintain white people's control of

26. *See infra* Part I.A.1.-2.
27. *See infra* Part II.
28. *See infra* Part III.
29. *See infra* Part IV.
30. GATES, JR., *supra* note 12, at 5.
31. *Reconstruction Sentencing*, *supra* note 7, at 1690.
32. *Id.* at 1687.
33. *Id.* at 1687-88.
34. *Id.* at 1688.
35. GATES, JR., *supra* note 12, at 4.

Black people's labor and behavior.[36] This deliberate circumvention of Black people's emancipation led to the subsequent Radical Reconstruction period during which the United States adopted the Fourteenth Amendment—providing due process and equal protection rights—and the Fifteenth Amendment—prohibiting race-based disenfranchisement.[37]

Reconstruction was a time of great promise for Black Americans. Black men were elected to political 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.[38] This time was hailed as a moment that "inspired a collective sense of optimism among formerly enslaved African Americans"[39] and "a millennial sense of living at the dawn of a new era."[40] But Reconstruction was a short-lived ten years,[41] followed by 100 painful years of legalized Jim Crow segregation.[42] During the Jim Crow era, the Reconstruction Amendments that were celebrated as ringing in a new era of Black freedom were interpreted by the Supreme Court in such a limited fashion that they instead served to bolster racial hierarchy

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36. 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.

37. 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.

38. *Id.* at 8.

39. GATES, JR., *supra* note 12, at 2.

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

41. 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.

42. *Reconstruction Sentencing*, *supra* note 7, at 1690.

and institutionalized white supremacy.[43] The Court's interpretation of the Thirteenth and Fourteenth Amendments were especially damaging to the promise of Reconstruction.[44]

1. The Thirteenth Amendment and the Legacy of Slavery

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."[45] Unsurprisingly, there were several legislators who opposed the adoption of the Thirteenth Amendment.[46] After the proposed amendment passed in the Senate in April 1864, it stalled in the House of Representatives when Democrats refused to support it during an election year.[47] Once President Lincoln became more heavily involved following the elections, the amendment finally passed on January 31, 1865, by a vote of 119 to 56 (just a few votes more than the required two-thirds majority).[48] It then took until December of that year for the requisite number of states to ratify the amendment.[49] Just as there was hesitance to support the amendment, there were disagreements about the scope of the amendment.[50] Once ratified, some Congressmen argued that the Thirteenth Amendment gave Blacks "no rights except [their] freedom and [left] the rest to the states."[51] Supporters of the amendment, however, understood that the abolition of slavery granted some substantive meaning to freedom beyond just broken shackles.[52] Representative James Ashley, the amendment's floor leader in the House, pronounced 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."[53] James Harlan, a Republican Senator from Iowa, offered a long list of the "necessary incidents" and peculiar characteristics of slavery, which he asserted the Thirteenth Amendment abolished as well.[54] His list included the barriers to marry, to

43. *Id.*
44. *Id.*
45. U.S. CONST. amend. XIII, § 1.
46. *13th Amendment*, HISTORY.COM (June 9, 2020), https://www.history.com/topics/black-history/thirteenth-amendment.
47. *Id.*
48. *Id.*
49. *Id.* Lincoln did not live to see ratification of the Thirteenth Amendment—he was assassinated on April 14, 1865.
50. *The Senate Passes the Thirteenth Amendment*, U.S. S., https://www.senate.gov/artandhistory/history/minute/Senate_Passes_the_Thirteenth_Amendment.htm.
51. *Id.* (quoting border Unionist John Henderson).
52. REBECCA ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 125 (2018).
53. *Id.*
54. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan).

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.[55] Similarly, Senator Henry Wilson of Massachusetts argued that if the Amendment 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."[56] In keeping with that understanding, five months after the ratification of the amendment, Congress passed the Civil Rights Act of 1866 under the authority of Section 2 of the Thirteenth Amendment, which gave Congress the power to use "appropriate legislation" to enforce the article.[57]

The Civil Rights Act of 1866 stated that all U.S.-born persons ("excluding Indians not taxed") were citizens of the United States and granted all citizens the "full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."[58] The Act recognized equal 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."[59] Additionally, the Act prohibited any law that would subject a person "to different punishment, pains, or penalties . . . by reason of his color or race, than is prescribed for the punishment of white persons."[60] As with the Thirteenth Amendment itself, the breadth of the Act's scope was met with vigorous opposition. Senator Willard Saulsbury, a Democrat from Delaware, asserted that "A man may be a free man and not possess the same civil rights as other men."[61] According to Senator Saulsbury and others the Civil Rights Act went beyond the scope of the Thirteenth Amendment.[62] As he reasoned, "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

55. *Id.*
56. *Id.* at 1324 (statement of Sen. Henry Wilson).
57. U.S. CONST. amend. XIII, § 2.
58. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
59. *Id.*
60. *Id.* § 2.
61. 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, 434-35 (2018).
62. CONG. GLOBE, *supra* note 61, at 477 (statement of Sen. Willard Saulsbury).

should not exist, but that there should be no inequality in civil rights."[63] President Andrew Johnson embraced this view and vetoed the Act once it had passed the House and Senate.[64] Congress overrode the President's veto, and the Civil Rights Act of 1866 was enacted in April 1866.[65] However, the force of the Act and its subsequent versions would be at the mercy of the Supreme Court's interpretation of the Thirteenth Amendment's reach.

In the *Civil Rights Cases* of 1883, writing for an eight-Justice majority, Justice Joseph Bradley used the now famous term "badges and incidents of slavery."[66] In the Cases, the Court examined the constitutionality of the Civil Rights Act of 1875, which built on the 1866 Act by outlawing private race discrimination in transportation and other public accommodations.[67] 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."[68] However, Justice Bradley and seven of the other Justices in the majority went on to apply that promising language in a disappointingly narrow manner:

> 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.[69]

By holding that the 1875 Act could not be upheld under the Thirteenth Amendment, Justice Bradley defined freedom simply as the absence of a person being held as property.[70] This limited view of the Thirteenth Amendment was clearly established by the time the Supreme Court decided *Plessy v. Ferguson* in 1896.[71] In upholding Louisiana's Separate Car Act, which required race-based segregation of railroad train passengers, the Court

63. *Id.*
64. 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).
65. CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866).
66. 109 U.S. 3 (1883).
67. 109 U.S. at 20 (discussing the Civil Rights Act of 1875, ch. 114, 18 Stat. 335).
68. *Id.*
69. *Id.* at 25.
70. *Id.*
71. 163 U.S. 537 (1896).

summarily rejected the argument that the Act amounted to an incident of slavery.[72] Justice Henry Billings Brown stated that it was "too clear for argument" that the Thirteenth Amendment did not apply to this situation.[73] 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.[74]

With those words, the promise of the Thirteenth Amendment to promote true freedom died. In *Plessy,* the Court also attempted to kill the promise of the Fourteenth Amendment.[75]

2. The Fourteenth Amendment and Limited Notions of Equality

Today, we often think of the Fourteenth Amendment's equal protection clause as embodying the great American ideal of colorblindness. In fact, in his famous dissent in *Plessy v. Ferguson*, Justice Harlan invoked that value when he wrote:

> But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.[76]

Of course, Harlan's words were merely setting forth an idyllic view of America and its governing document—not one that was actually grounded in the actual history of this country. And, as the lone dissenting voice, Harlan's words definitely did not reflect the views of his brother justices on the Court.[77] *Plessy v. Ferguson* is a clear example of the Supreme Court destroying the promise of the Reconstruction Amendments. In *Plessy*, a 7-justice majority (one justice did not participate) refused to find that Louisiana law requiring racially segregated railway cars violated the Fourteenth

72. *Id.* at 542.
73. *Id.*
74. *Id.*
75. *Id.*
76. Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting) (1896).
77. *Id.* at 564.

Amendment's Equal Protection Clause.[78] According to the Court, the Fourteenth Amendment "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."[79] The Supreme Court interpreted the Fourteenth Amendment in a manner that allowed for the continued racial segregation that would be the hallmark of the Jim Crow era's subjugation, stigmatization, and terrorizing of Black Americans.[80] The pitfall, staying true to America's racist roots, overtook the promise of Reconstruction.[81] The same dangers exist today as we undertake criminal justice reform in this country.

B. The Reconstruction Sentencing Model

Similar to the initial Reconstruction era enthusiasm, we have seen criminal justice reforms that inspire excitement.[82] Though there still has not been any official declaration of the end of the War on Drugs, there have been, at least, rhetorical acknowledgement from legislators and policymakers that our nation's drug woes cannot be addressed through the criminal justice system alone.[83] Also similar to Reconstruction, today's backlash against reform is reminiscent of the emergence of the Black Codes in the 1860s.[84] As criminal justice reforms have been moving away from a punitive-only model of addressing the American drug problem,[85] 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.[86] The same is true for War on Drugs' methods of policing, issuing and executing warrants, and prosecuting cases.[87] The answer to Southern

78. *Id.* at 544 (majority opinion).

79. *Id.*

80. *Reconstruction Sentencing*, *supra* note 7, at 1690 n.26.

81. *Id.* at 1690.

82. See e.g., ACLU, *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds* (Nov. 16, 2017), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justic e-reform-aclu-polling-finds.

83. For an account of recent drug law reforms, see *Drug Law Reform*, NACDL, https://www.nacdl.org/Landing/DrugL aw. For a discussion on the change from warfare rhetoric, see generally Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941 (2019).

84. *Reconstruction Sentencing*, *supra* note 7, at 1689.

85. 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/str ategy.html (last accessed Mar. 16, 2021).

86. *See, e.g.*, Leslie Scott, *Federal Prosecutorial Overreach in The Age of Opioids: The Statutory and Constitutional Case Against Duplicitous Drug Indictments*, 51 U. TOL. L. REV. 491-92 (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).

87. *See infra* Part III.

defiance during the Reconstruction Era was for Congress to intercede with Military Reconstruction Acts[88] and to introduce the Fourteenth and Fifteenth Amendments.[89] That period of Congressional Reconstruction, or "Radical Reconstruction," required a constitutional rebirth.[90] A Reconstruction Sentencing approach takes that model of constitutional rebirth and reinvigoration to dismantle the War on Drugs and to repair the damage it has caused.[91] While the promise of Reconstruction can be an example for reinvigorating constitutional sentencing arguments in order to end the War on Drugs, the pitfalls of Reconstruction are instructional, as well.[92] To move away from the War on Drugs in a way that creates true systemic change also requires the urging of the interpretation of constitutional provisions with an eye toward eradicating the effects of racism within drug sentencing.[93] A Reconstruction Sentencing approach examines the underlying racism and disparate racial effects of the War on Drugs and adopts reinvigorated constitutional arguments to protect against repackaging racism into new forms.[94]

II. STARTING FROM THE END: SENTENCING DURING THE WAR ON DRUGS

A Reconstruction Sentencing model is an approach which can be used to move from the War on Drugs to a restorative system. However, approaching that place of reconciliation requires understanding the War on Drugs for what it has been since its inception—a military-like offensive designed to cast drug abuse and the drug offender as dangerous adversaries of the law-abiding public.[95] The War on Drugs officially began in 1971 when President Nixon decried drug abuse as "public enemy number one."[96] In a press conference

88. 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. HIST., 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.

89. *Reconstruction Sentencing*, *supra* note 7, at 1689.

90. *Id.*

91. *Id.*

92. *Id.* at 1690.

93. *Id.*

94. *Reconstruction Sentencing*, *supra* note 7, at 1690.

95. *Id.* at 1686.

96. *Timeline: America's War on Drugs,* NPR (Apr. 2, 2017, 5:56 PM), https://www.npr.org/templates/story/story.php?storyId=9252490.

given on June 17, 1971, President Nixon, proclaimed: "In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive" on drug crime.[97] In a handbook issued by the Special Action Office for Drug Abuse Prevention (SAODAP), Nixon wrote a letter in which he promoted this war imagery by calling for the American people to "represent the front-line soldiers in this critical battle."[98] With that the war rhetoric, would-be drug offenders, who would turn out disproportionately to be Black males, were cast as threatening enemies to be fought with the force of the criminal justice system.[99] Nixon explained that the federal approach would be to "develop[ed] strong new laws and tough new law enforcement efforts, backed by more money and greater manpower."[100] Nixon went so far as to personify the enemy as one who "creeps quietly into homes and destroys the bonds of family."[101] A weapon would need to be developed to protect Americans against that dark villain. Drug sentencing answered the call.[102]

President Ronald Reagan has the distinction of carrying out Nixon's War on Drugs agenda.[103] On October 14, 1982, Reagan professed that illegal drugs were a threat to U.S. National Security.[104] Subsequently, Congress passed the Anti-Drug Abuse Act of 1986, which created highly punitive, weight based mandatory minimum sentences for drug offenses, including the infamous 100-to-one crack to powder cocaine ratio.[105] Pursuant to the 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.[106] Offenses involving five grams of cocaine base (commonly

97. Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND., (June 29, 2016), at https://www.nixonfoundation.org/2016/06/26404/.

98. U.S. DEPT. OF HEALTH, EDUC. & WELFARE, SPECIAL ACTION OFFICE FOR DRUG ABUSE PREVENTION ANSWERS THE MOST FREQUENTLY ASKED QUESTIONS ABOUT DRUG ABUSE, at 4, available at https://files.eric.ed.gov/fulltext/ED075187.pdf.

99. *See* U.S. v. Clary, 846 F.Supp. 768, 770 (1994). "[T]he Court is equally aware that this one provision . . . has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods . . . ." *See also Reconstruction Sentencing*, *supra* note 7, at 1696. "As [*Clary*] 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."

100. U.S. DEPT. OF HEALTH, EDUC. & WELFARE*, supra* note 98, at 3.

101. *Id*.

102. *Reconstruction Sentencing*, *supra* note 7, at 1686.

103. *Id.* at 1696.

104. Andre Glass, *Reagan Declares 'War on Drugs,'* POLITICO (Oct. 14, 2010), https://www.politico.com/story/2010/10/reagan-declares-war-on-drugs-october-14-1982-043552.

105. *Reconstruction Sentencing*, *supra* note 7, at 1694.

106. 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

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.[107] 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.[108] The 100-to-one powder-to-crack cocaine sentencing ratio was incorporated into the Federal Sentencing Guidelines.[109] Though facially race-neutral, this War on Drugs sentencing scheme has resulted in the disproportionate arrests, charges, and imprisonment of Blacks.[110]

It did not take long for the race-based carnage of the war on drugs to become apparent. In a February 1995 report, the U.S. Sentencing Commission revealed that 88.3 percent of crack cocaine offenders were Black.[111] The Commission cited to a Bureau of Justice Statistics study reporting that, due to the 100-to-1 ratio, "the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine."[112] The Sentencing Commission concluded 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."[113] In May of 1995, the Commission advised Congress to equalize crack and powder cocaine penalties.[114] Congress rebuffed those proposed amendments to the Sentencing Guidelines.[115] In 1997, the Sentencing Commission, once again,

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Commission clarified that "'[c]ocaine base,' for the purposes of this guideline, means 'crack.'" U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL, app. C (2018) [hereinafter SENT'G GUIDELINES]. "'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." SENT'G GUIDELINES, § 2D1.1(c) n.D

107. Anti-Drug Abuse Act § 1002.

108. *Id.*

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

110. *See infra* Part III.B.2.

111. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 153 (1995), https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy [hereinafter 1995 Report].

112. *Id*. at 162 (citing U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter?* (Nov. 1993)).

113. 1995 Report, *supra* note 111, at 163.

114. *See* Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25,074, amend. No. 5 (proposed May 10, 1995).

115. *See Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy* for 1995 USSC REPORT (May 1995); *see also* Nkechi Taifa, *Unwarranted Disparity in Sentencing Between Crack and Powder Cocaine* 7 (May 19, 1995) *in* ACLU & COALITION FOR EQUITABLE SENTENCING, COCAINE EQUITABLE SENTENCING BRIEFING: THE CALL TO END DISPARITY IN CRACK COCAINE SENTENCING; Act of Oct. 30, 1995, Pub. L. No 104-38, § 1, 109 Stat. 334 (1995); *Id.* § 2(a)(1)(A).

issued a report unanimously recommending the elimination of the 100:1 ratio.[116] Again, Congress rejected the recommendation.[117]

This call for racial equality through a change to drug sentencing came again in the Commission's 2002 Report to Congress, in which the Sentencing Commission explained its findings that an "overwhelming majority" of crack offenders were black—91.4 percent in 1992 and 84.7 percent in 2000.[118] The Commission also 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 (74 months), in large part due to the effects of the 100-to-1 drug quantity ratio."[119] As a result of the hearings and findings, the Commission again advocated for a reduction in the 100:1 ratio, stating in its report 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.[120] However, again, Congress did not respond.[121] In 2004, the Commission even clearly criticized this disparate cocaine sentencing ratio as being the cause of racial disparities in federal sentencing, explaining:

> 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.[122]

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116. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/19970429_RtC_Cocaine_Sentencing_Policy.pdf [hereinafter 1997 Report].

117. *Federal Crack Cocaine Sentencing*, The Sent'g Project 7, https://www.sentencingproject.org/wp-content/uploads/2016/01/Federal-Crack-Cocaine-Sentencing.pdf.

118. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii, 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 [hereinafter 2002 Report].

119. *Id*. at 90.

120. *Id*. at v-viii.

121. *Federal Crack Cocaine Sentencing*, *supra* note 117, at 7.

122. 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 132 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (emphasis added) [hereinafter 2004 Report].

Acting on this clear indictment of federal sentencing drug policy, the Sentencing Commission, in 2007, finally took its own initiative and enacted a series of Guidelines' amendments that it deemed "only a partial remedy to some of the problems associated with" Federal powder and crack cocaine defendants."[123] Amendment 706, effective November 1, 2007, reduced the base offense level for most crack offenses by two levels.[124] This small effort, though, was not met with Congressional action until 2010.[125]

In 2010, Congress passed the Fair Sentencing Act of 2010 (the "FSA"), which decreased the powder to crack cocaine sentencing ratio to nearly 18:1.[126] Now, under the FSA, it takes 28 grams (instead of the former 5 grams) of crack cocaine to trigger a 5-year mandatory minimum imprisonment and 280 grams (rather than 50 grams) of crack cocaine to trigger a 10-year mandatory minimum imprisonment term.[127] The 500 grams and 5 kilograms (or 5,000 grams) of powder cocaine that it takes to activate the 5-year and 10-year mandatory minimum, respectively, remained unchanged.[128] The mandatory minimum for a first-time offense of simple possession was eliminated, and first-time simple possession of any quantity of crack cocaine, like powder cocaine, will result in a sentence no longer than one year.[129] Though this was a major change, because it did not result in a 1-1 parity in cocaine sentencing, the Act did not eliminate nor repair the devastating racially disparate effects of the War on Drug's main weapon.[130] At fiscal yearend 2012, "the vast majority of crack cocaine offenders (88%) were non-Hispanic black or African American[.]"[131] Mandatory minimum sentences—the War's weapon of choice—still has its sights set on Blacks as the main enemies.[132] Eliminating mandatory minimum drug sentencing is the

123. U.S. SENT'G COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING Policy 10 (2007), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf [hereinafter 2007 Report]. Sentencing Policy at 10 (May 2007), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional _Testimony_and_Repo rts_Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

124. Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,571-72 (2007). The Sentencing Guidelines assign a base offense level to every federal criminal offense. Because the Sentencing Commission adopted a system of "real offense sentencing," Chapter Three of the Sentencing Guidelines also include several sections of adjustments that add points to the base offense level based on particular offense factors and offender conduct (i.e., role in the offense, type of victim, etc.). The sum is the total offense level which corresponds to the Sentencing Grid and is matched up with a criminal history category to result in a sentencing range.

125. *Federal Crack Cocaine Sentencing*, *supra* note 117, at 1.

126. Pub. L. No. 111-220, 124 Stat. 2372 (2010); 21 U.S.C. § 841 (2018).

127. *Id.* at (b)(1)(A)-(B).

128. *Id.*

129. 21 U.S.C. § 844(a) (2010).

130. *Reconstruction Sentencing*, *supra* note 7, at 1708.

131. *Id.*

132. *Id.* at 1709.

only way to achieve anti-racist drug sentencing.[133] Anti-racism requires "a radical choice in the face of history, requiring a radical reorientation of our consciousness."[134] Therefore, reforming drug sentencing is not enough for a fully antiracist approach.[135] Without first addressing the steps of the process that lead to the final biased sentencing decision, sentencing reform will fail to be systemic reform. Reconstruction Sentencing requires a systemic overhaul.

III. HOW WE GOT HERE: A WALK THROUGH A DRUG CASE

Reconstruction Sentencing requires "both repair[ing] the damage done by the War on Drugs"[136] and "uproot[ing] 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."[137] This requires, not only eliminating racist sentencing laws, but also purging the process leading up to disparate sentencing of its systemic racism. When it comes to drug sentencing, it is well documented that Black people are punished with long sentences at higher rates than people of other races.[138] The same is true for rates of arrests.[139] For instance, Blacks are almost four times more likely to be arrested for selling drugs and almost three times more likely to be arrested for possessing drugs than whites.[140] However, whites are actually more likely to sell drugs and are equally as likely to consume them as Blacks.[141] Therefore, if we only focus on equalizing sentencing outcomes, we will miss the injustices that funnel people into the criminal justice system based on their race.[142] Truly reconstructing sentences means starting at the beginning to address why we have the racist outcomes in the end. While truly starting at the beginning would require going back to the era of slavery to understand the initial dehumanization of Blacks, it is still helpful to take a quick jaunt through the Reconstruction Era and then spending time exploring the Jim Crow era to

133. A case for repealing mandatory minimum drug laws is made in both *From Warfare to Welfare*, *supra* note 83, at 959, and *Reconstruction Sentencing*, *supra* note 7, at 1709.

134. KENDI, *supra* note 18, at 23.

135. *Reconstruction Sentencing*, *supra* note 7, at 1709.

136. *Id.* at 1690.

137. *Id.*

138. *See Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT'G PROJECT 1 (Apr. 19 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

139. Jessica Eaglin & Danyelle Solomon, *Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice*, BRENNAN CTR. FOR JUSTICE 17, http://www.brennancenter.org/sites/default/files /publications/Racial%20Disparities%20Report%20062515.pdf.

140. Eaglin & Solomon, *supra* note139, at 7 (signifying the racial and ethnic disparity in regard in the treatment of low-level offenses in the criminal-justice system).

141. *See id.* (emphasizing that having a higher arrest rate for drug-related crimes does not prove that African Americans sell and use drugs more than other racial groups).

142. *Reconstruction Sentencing*, *supra* note 7, at 1696.

examine how convict leasing, redlining, restrictive covenants, educational segregation, and more led to the formation of concentrated poverty and stymied opportunities that disproportionately falls to African American communities.[143] But, for the purposes of this paper, we will start our journey at the typical beginning of an individual's interaction with a state agent in a criminal case—an encounter with the police. Along the way, we can connect the past to the present. Ultimately, Reconstruction Sentencing requires constitutional protections against the use of racial profiling in policing, racially biased procurement and execution of warrants, and the use of race in prosecutorial decisions.[144] Only then can we begin to achieve equality in sentencing.

A. Racial Profiling

Police interactions with people who end up being sentenced for a drug offense often begin on the street, either through a stop and frisk of an individual standing on a street corner or while they are driving.[145] We have a plethora of evidence confirming that racial bias plays a part in whom officers decide to stop.[146] Racial profiling refers to "stereotype-based policing" practices during which police make "decisions about criminal suspicion based on prior conceptions about groups and their prevailing characteristics."[147] New York City is perhaps one of the most famous examples of using the practice of stopping and frisking individuals in a pervasively racially biased manner.[148] The New York Civil Liberties Union (NYCLU) issued a comprehensive report in 2019 reporting that:

> Of the 92,383 recorded stops between 2014 and 2017, 49,362 (53 percent) were of black people, and 26,181 (28 percent) were of Latino people. Only 10,228 (11 percent) of those stopped were white.[149]

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143. *Id.* at 1690.

144. *Id.*

145. Eaglin & Solomon, *supra* note 139, at 17.

146. *Id.*

147. Jack Glaser, "Chapter 3: Causes of Racial Profiling,", Suspect Race: Causes and Consequences of Racial Profiling, University Press, 2015 [hereinafter "Suspect Race"] (Google Doc location: "Chapter 3: Causes of Racial Profiling." Suspect Race: Causes and Consequences of Racial Profiling, by Jack Glaser, Oxford University Press, 2015, pp. 42–68.)

148. *See* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding that the New York City Police Department was liable for a consistent practice of racial profiling as well as for unconstitutional stops); Darius Charney, *Stop and Frisk Report: NYPD Racial Bias Persists,* CTR. CONST. RTS. (Dec. 16, 2019), https://ccrjustice.org/home/press-center/press-releases/stop-and-frisk-report-nypd-racial-bias-persists.

149. *Stop-and-Frisk In The de Blasio Era*, N.Y. C.L. UNION 9 (Mar. 2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf [hereinafter NYCLU].

Though stops must be based on reasonable suspicion,[150] evidence suggests that implicit or explicit beliefs that a particular person—due to his or her race—is likely to be committing some crime informs officers' reasonable suspicion analysis.[151] For instance, the NYCLU report found that, between 2014 and 2016, the most prevalent reason given by officers to justify a stop was that the person stopped "fits a relevant description."[152] In 2017, the most common reason given was "matches a specific suspect description."[153] While these may seem like race-neutral explanations, the outcomes are racially skewed.[154] On this point, the NYCLU reveals that:

> In this four-year period, stops of black and Latino people accounted for more than half of all stops in 73 out of 77 precincts. Led by the 44th Precinct in the Bronx, where 99 percent of stops were of black or Latino people, there were 30 precincts where more than 90 percent of those stopped were black or Latino, and an additional 29 precincts where more than 75 percent of those stopped were black or Latino.[155]

This disproportionate method of stopping Black people also leads to Black people being frisked at higher rates than are others.[156] A frisk is a cursory pat down of an individual's outer clothing, but it allows for an officer to reach inside of the pockets or remove items when the officer has a reasonable belief that the item is a weapon.[157] In the case of New York City, "Of 60,583 frisks, 51,061 (84 percent) were conducted during stops of [B]lack or Latino people. By contrast, only 5,573 frisks (nine percent) were during stops of white people."[158] Similar to what we know about the ineffectiveness of racial profiling in general, police rarely discover weapons during these racially discriminatory frisks.[159] In the NYCLU report, the data showed that:

> Of black and Latino people stopped, 68 percent were frisked, while over 54 percent of white people stopped were frisked. Yet, a weapon was found on just six percent of black and Latino people frisked,

150. The Fourth Amendment analysis for stops and frisk was set forth by the Supreme Court in Terry v. Ohio, 392 U.S. 1, 19 (1968).

151. See generally, Glaser, supra note 147.

152. NYCLU, *supra* note 149, at 7.

153. *Id.*

154. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1144–46 (2012) (identifying a reasonableness problem in the low hit rates of stop-and-frisks and the judgment of suspiciousness).

155. NYCLU, *supra* note 149, at 10.

156. *Id.* at 11.

157. *Terry*, 392 U.S. at 29-30.

158. NYCLU, *supra* note 149, at 17.

159. *Id.*

> compared to a weapon being found on nine percent of white people frisked. Considering that people of color who were frisked were less likely to be carrying a weapon, this indicates that race remains a biasing factor in officers' decisions to conduct a frisk.[160]

In these cases, of course, drugs may sometimes be found on a person. When that happens, the drugs can be the basis for an arrest and further search of the person.[161] This arrest sets the person on the path to a drug prosecution and ultimately to sentencing based on a drug offense. The data on stops and frisks, however, tells us that race plays a part in initiating an encounter with police that may have nothing at all to do with suspicion of the drugs that may be ultimately recovered.[162] So long as race plays a part, Reconstruction Sentencing calls for addressing and reforming that practice.

In the context of traffic stops, Black drivers are stopped at a higher rate than drivers of other races.[163] As is the case with stops and frisks, once the car stop occurs, this gives the police an open door to asking for consent to search the car or for claiming that the officer has developed probable cause to search the car without the driver's consent.[164] Evidence has repeatedly shown that traffic stops based on racial profiling do not increase the yield of evidence of a crime.[165] Therefore, the fact that such a practice persists suggests that it is rooted in racists beliefs, rather than on any sound evidence on criminality.[166] As Prof. Ibram X. Kendi has explained, "To be antiracist is to think nothing is behaviorally wrong or right—inferior or superior—with any of the racial groups."[167] However, racial profiling approaches policing with just the opposite, thereby racist, philosophy—that it is reasonable to suspect someone because of their race.[168] A look at history further reveals

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160. *Id.*

161. See U.S. v. Robinson, 414 U.S. 218, 223-24 (1973).

162. NYCLU, *supra* note 149, at 17.

163. For statistics on racial profiling in traffic stops, see WILLIAM R. SMITH ET AL., U.S. DEP'T OF JUST. NO. 204021, THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY: FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 1 (2004), https://www.ojp.gov/pdffiles1/nij/grants/204021.pdf; see also Chris Horn, *Racial Disparities Revealed in Massive Traffic Stop Dataset*, U. OF S.C. (June 12, 2020), https://www.sc.edu/uofsc/posts/2020/06/racial_disparities_traffic_stops.php#.YIobYrVKhPY.

164. SMITH ET AL., *supra* note 163, at 34.

165. For a discussion on rates of racial profiling in traffic stops and the resulting low yields of evidence, see Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 ANNALS OF APPLIED STAT. 1193, 1194 (2017), https://5harad.com/papers/threshold-test.pdf. 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-racial-profiling-police-traffic-stops.

166. SMITH ET AL., *supra* note 163, at 34.

167. KENDI, *supra* note 18, at 105.

168. SMITH ET AL., *supra* note 163, at 290.

the racist roots of such police practices, and makes the case for using the Reconstruction Sentencing model to address this part of the process.[169]

In 2014, the NAACP released a study calling for an end to racial profiling.[170] In that report, the NAACP explained:

> Racial profiling by law enforcement—the targeting of individuals as suspicious based on a set of characteristics they believe to be associated with crime, rather than credible evidence or information linking a specific type of person to a specific criminal incident—is a deeply rooted phenomenon in America, dating back to the days of colonial armies, slavery, Jim Crow, and segregation.[171]

Others, too, have made the connection between today's racial profiling and the racist foundations of our Nations' history.[172] Professor William Carter, Jr. has characterized the racial profiling used in today's policing as a "badge and incident of slavery."[173] As he explains, "racial profiling is a modern manifestation of the historical presumption, still lingering from slavery, that African Americans are congenital criminals rightfully subject to constant suspicion because of their skin color."[174] He further expounds:

> . . .the legally enforced stereotype of black criminality has a particularly injurious effect on African Americans, given their history of enduring legally enforced and officially sanctioned enslavement, apartheid and mistreatment. The image in the collective white mind of blacks (particularly black men) as congenital criminals is perhaps the most deeply entrenched stereotype pervading the black-white relationship in America. The pervasiveness of this assumption reveals that it rests upon deeply rooted historical attitudes and is not simply the result of individual racial bias. . . This stigma remains one that African Americans cannot escape, regardless of their individual circumstances.[175]

As Professor Carter identifies, racial profiling infects policing by giving an avenue for "the most deeply entrenched stereotype" about Blackness to

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169. *Id.*

170. CORNELL WILLIAMS BROOKS ET AL., NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA I (2014), https://www.hivlawandpolicy.org/sites/default/files/Born_Suspect_Report_final_web.pdf.

171. *Id.* at 3.

172. *See* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling,* 39 HARV. C.R.-C.L. L. REV. 17, 25 (2004).

173. *Id.*

174. *Id.* at 56.

175. *Id.* at 24-25.

operate.[176] Because this step on the way to arrest, prosecution, and ultimately sentencing is based in racism, Reconstruction Sentencing requires a legal redress through re-invigorated Constitutional protection.[177]

Though racial profiling is illegal, it clearly continues to thrive under current manifestations of the law.[178] Therefore, new approaches to constitutional interpretation would be required to truly embrace a Reconstruction Sentencing approach. For instance, in *A Thirteenth Amendment Framework for Combating Racial Profiling*, Professor William M. Carter, Jr. makes a case for using the Thirteenth Amendment to hold that policing practices in which racial profiling is evident are unconstitutional.[179] As previously explained, in making a case for the Thirteenth Amendment to prohibit racial profiling, Professor Carter characterizes the racial profiling used in the War on Drugs "as a badge or incident of slavery"[180] because it is "a modern-day manifestation of a means of social control that arose out of slavery."[181] In this way, 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."[182] According to Professor Carter, that "it is precisely the type of lingering effect of slavery that the Thirteenth Amendment was designed to eradicate."[183] Reconstruction Sentencing builds upon Professor Carter's approach by not only calling for courts to hold that racial profiling violates the Thirteenth Amendment, but also using that constitutional interpretation to require that police departments develop practices to combat racial profiling.[184] In other words, just as it was insufficient to merely emancipate enslaved people without outlawing slavery, it is likewise inadequate to deem racial profiling a badge and incident of slavery without actually outlawing the mechanisms that allow for racial profiling to persist.[185]

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176. *Id.* at 25.

177. *Reconstruction Sentencing*, *supra* note 7, at 1687.

178. BROOKS ET AL., *supra* note 170, at III. "Racial profiling is a daily reality with often deadly consequences for communities of color . . . [a]nd despite the constitutional guarantee of equal protection under the law . . . this country lacks any meaningful policy banning racial profiling . . . ."

179. Carter, Jr., *supra* note 172, at 17.

180. *Id.*.

181. *Id.* at 60 (quoting Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Race Profiling in Law Enforcement*, NACCS ANN. CONF. PROC. 63, 69 (2001), https://scho larworks.sjsu.edu/naccs/2 001/Proceedngs/7 .

182. *Id.*

183. *Id.*

184. *Reconstruction Sentencing*, *supra* note 7, at 1706-07.

185. *Id.* at 1712.

B. Warrants

Another area where there is an opportunity for Reconstruction is the law regarding search warrants. There is evidence that Blacks are "over-represented as targets of narcotics search warrants."[186] Being overrepresented as targets of drug warrants also means that Blacks are more likely to be subject to military like force during the execution of drug warrants.[187] Federal programs send surplus military equipment to state and local police agencies for their SWAT (Special Weapons and Tactics) teams.[188] From 2011-2012, SWAT teams were deployed for hostage, barricade, or active shooter situations in only 7 percent of cases.[189] However, drug investigations, often low level, comprised 79 percent of the cases in which SWAT teams were used were to search a person's home.[190] Further, SWAT teams were more likely to be used in searches and raids targeting Blacks and Latinos than targeting Whites.[191] In those instances the SWAT tactics often involved "excessive violence, knocking down doors with battering rams, throwing flashbang grenades and sometimes injuring the people inside, shooting their dogs or destroying property."[192] Given the racially discriminatory manner in which warrants are obtained and executed in the War on Drugs, a comprehensive Reconstruction Sentencing approach would require the rules regarding a reasonable warrant execution to be more substantial.[193] The Fourth Amendment's "general touchstone of reasonableness . . . governs the method of execution of [a] warrant."[194] However, the reasonableness requirements for warrant execution are largely dealt with by statute and rule, rather than through court decisions on constitutional requirements.[195] The Supreme Court has held that the Fourth

186. See Laurence A. Benner, *Racial Disparities in Narcotics Search Warrants*, 6 J. OF GENDER, R. AND J. 101, 105 (2002), http://faculty.cwsl.edu/benner/aaRacialDisparityinNarcoticsSearchWarrants.pdf (discussing a study of search warrants in San Diego, California); *see also* Samantha Michaels, *Breonna Taylor Is One of a Shocking Number of Black People to See Armed Police Barge into Their Homes*, MOTHER JONES (May 20, 2020), https://www.motherjones.com/crime-justice/2020/05/breonna-taylor-is-one-of-a-shocking-number-of-black-people-to-see-armed-police-barge-into-their-homes/.

187. *See id.*; see also Lindsey Cook, *Use of SWAT Teams Affects Minorities More*, U.S. NEWS (Aug. 19, 2014, 3:39 P.M.), https://www.usnews.com/news/blogs/data-mine/2014/08/19/use-of-swat-teams-affects-minorities-more.

188. *Id*.

189. *Id*.

190. *Id*.

191. *Id*.

192. Cook, *supra* note 187.

193. *Reconstruction Sentencing*, *supra* note 7, at 1712.

194. United States v. Ramirez, 523 U.S. 65, 71 (1998).

195. For instance, Rule 41 of the Federal Rules of Criminal Procedure, provides, inter alia, that the warrant shall command its execution in the daytime, unless the magistrate "for good cause" shown directs in the warrant that it be served at some other time. Fed. R. Crim. P. 41(e)(2)(A)(ii). *See* Jones v. United States, 357 U.S. 493, 498–500 (1958); Gooding v. United States, 416 U.S. 430 (1974). A separate statutory

Amendment requires that officers knock and announce their presence when executing a search warrant,[196] but there is no exclusionary remedy if that rule is violated.[197] Further, the Supreme Court has said that there is no constitutional violation if officers forcibly enter a home after waiting only a mere 15-20 seconds after knocking and announcing themselves as law enforcement officials.[198] Additionally, the Court has recognized many instances in which an officer can forgo the knock and announce rule.[199] Many jurisdictions, therefore, allow for the issuance of no-knock warrants when police allege that they are necessary.[200] This is the authority under which SWAT raids are used to execute drug search warrants.[201] This lack of true warrant protection is even more apparent when the insubstantial knock and announce rule is combined with an even less substantial protection against daytime warrant executions.[202] Some jurisdictions have codified a default rule that warrants be executed during the daytime hours, but the Supreme Court has declined to decide that daytime warrants are required under the Fourth Amendment or to clarify any constitutional limits on nighttime warrant execution.[203] One Reconstruction Sentencing approach could take the form of infusing a true presumption of innocence in the constitutional requirements for the reasonable execution of warrants.[204] Rather than leaving the assessment of warrant execution reasonableness to a court after the fact, the common law principles of daytime execution and a meaningful knock and announce procedure must be required without exception.[205] When combined with a robust probable cause standard—one that looks at a warrant application with the presumption that the person being searched actually

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rule applies to narcotics cases. 21 U.S.C.A. § 879 (West, Westlaw through Pub. L. No. 117-26 (excluding Pub. L. No. 116-283)).

196. Wilson v. Arkansas, 514 U.S. 927, 929 (1995).

197. Hudson v. Michigan, 547 U.S. 586, 592 (2006).

198. United States v. Banks, 540 U.S. 31, 33 (2003).

199. Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (holding that the knock and announce rule can be disregarded when police have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime.")

200. See Congressional Research Service, *"No-Knock" Warrants and Other Law Enforcement Identification Considerations* 3 (June 23, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10499.

201. Cook*, supra* note 187.

202. *Richards*, 520 U.S. at 394.

203. For a full discussion of this issue, *see* Mallory K. Bland*, Nighttime Execution of Warrants: An Analysis Under Wilson v. Arkansas and Virginia v. Moore* 8 (Jan. 24, 2017), https://ssrn.com/abstract=2905358.

204. For a lengthier discussion of how to incorporate a presumption of innocence in the warrant requirement, *see* Jelani Jefferson Exum, *Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence*, 64 HOW. L.J. 101 (2021).

205. *Id.*

stands innocent before the law—the warrant process can be revamped to accomplish antiracist aims.[206]

C. Prosecutorial discretion

Whether an individual is arrested following a street stop and frisk, traffic stop, or search warrant, eventually the would-be drug offender will find himself at the mercy of a prosecutor. Prosecutors have enormous discretion in the criminal justice system, and numerous studies have shown that bias can often infect prosecutorial decision making.[207] And, while there are many aspects of a prosecutor's decisions along the way, for the purposes of the War on Drugs, a focus on the use of mandatory minimum sentences is illuminating. In a thorough empirical study on federal sentencing, Professors Sonja Starr and M. Marit Rehavi make the following discovery:

> 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.[208]

Professors Starr and Rehavi call this charging phenomenon the "black premium."[209] Such racist manipulation of mandatory minimums reinforces a need to address sentencing disparities through a Reconstruction Sentencing approach.[210] In concluding their study, Professsors Starr and Rehavi conclude that the sentencing disparity attributed to race alone in their study could be lessened by "simply eliminating the disparity in mandatory minimum charges."[211] They explain:

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206. *Id.*

207. For example, *see* Rachel D. Godsil & HaoYang (Carl) Jiang, *Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat*, 40 CDAA PROSECUTOR'S BRIEF 142, 146, (2018), https://perception.org/wp-content/uploads/2018/07/Prosecuting-Fairly.pdf.

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

209. *Id.*

210. *Reconstruction Sentencing*, *supra* note 7, at 1712.

211. Starr & Rehavi, *supra* note 208, at 1349–50.

> 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.[212]

Eliminating racial disparities that are attributable to bias is a crucial aspect of Reconstruction Sentencing. Eliminating mandatory minimum drug sentencing would accomplish some of the sort of repair originally envisioned during the Reconstruction Era.[213] 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. That, after all, is the real purpose of Reconstruction Sentencing—to reinvigorate and reinterpret constitutional provisions in order to realize antiracist sentencing law and policy.[214] There are many avenues for courts to reach that goal. Mandatory minimum sentencing could be prohibited under the Thirteenth Amendment as a vestige of slavery, in a similar manner to Professor Carter's arguments about racial profiling.[215] The Fourteenth Amendment Equal Protection clause could also be interpreted to prohibit mandatory minimum drug sentencing laws.

The Supreme Court's interpretation of the Equal Protection clause has made it difficult to succeed on claims which argue that systemic racism is unconstitutional.[216] As explained previously, though the Fourteenth Amendment was enacted during the Radical Reconstruction era to solidify equality in the post-slavery era, the Supreme Court quickly limited its promise in *Plessy v. Ferguson* by upholding the doctrine of separate but equal and refusing to acknowledge the true injury of segregation on the lives of Blacks.[217] Even after *Brown v. Board of Education*[218] outlawed racial segregation in public education, *Plessy's* legacy of ignoring the reality of lived experience lives on in the Supreme Court's jurisprudence.[219] In the 1976 case, *Washington v. Davis*, the Court held that a law is not

212. *Id.* at 1351.
213. *Reconstruction Sentencing*, *supra* note 7, at 1712.
214. *Id.* at 1690.
215. *Id.* at 1712.
216. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).
217. *See Plessy*, 163 U.S. at 544. "The object of the amendment . . . 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 upon terms unsatisfactory to either."
218. 347 U.S. 483, 495 (1954)
219. *Plessy*, 163 U.S. at 544.

unconstitutional "solely because it has a racially disproportionate impact."[220] By requiring proof of a discriminatory purpose, the Supreme Court belied its claim that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."[221] Though the Court went on to recognize that sometimes a pattern of discrimination can be sufficient proof of purposeful discrimination, the Court doubled down on its commitment to diminish the force of disparate outcomes.[222] According to the Court:

> Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.[223]

With that insincere embrace of disproportionate impact, the Supreme Court turned its back on the reality of discrimination—that it lives in the veins of systems and manifests in outcomes, rather than in clear purpose.[224] The Supreme Court carried that disingenuous approach forward the next year in *Village of Arlington Heights v. Metropolitan Housing Development Corp*., when it held that *Washington v. Davis* "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[225] In that case, the Respondent claimed that a zoning request denial was racially discriminatory.[226] Though the Supreme Court acknowledged that the zoning decisions did "bear more heavily on racial minorities,"[227] the Court concluded that the "discriminatory 'ultimate effect' is without independent constitutional significance."[228] With its Equal Protection jurisprudence, the Supreme Court has told Blacks that there is no legal avenue for fighting against disproportionate racial outcomes, even when there is no legitimate explanation for those disparate outcomes.[229] In other

220. *Davis*, 426 U.S. at 239. It should be noted that although the Supreme Court was applying the Fifth Amendment, rather than the Fourteenth Amendment, the equal protection test under either amendment is the same.

221. *Id.*

222. *Id.* at 241-242.

223. *Id*. at 242.

224. Carter, Jr., *supra* note 172, at 87.

225. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-265 (1977).

226. *Id*. at 254.

227. *Id.* at 269.

228. *Id.* at 271.

229. Carter, Jr., *supra* note 172, at 87.

words, the Supreme Court has said that it sees the problem, but it has decided that, unless there is a specific government official to blame, there is no constitutional solution.[230] Reconstruction Sentencing calls for a different conclusion. If the Supreme Court were using a Reconstruction Sentencing approach, the solution would be simply that where there are disparate outcomes by race that are explainable by bias—whether individual or systemic, and whether those outcomes are in policing, prosecution, or sentencing—the underlying policies violate equal protection and must be addressed to restore equity.[231] Such a "radical choice in the face of history"[232] is necessary to actually achieve the true promise of Reconstruction.

IV. CONCLUSION

This paper has offered a framework for applying a Reconstruction Sentencing approach to the select aspects of a drug case in order to "both repair the damage done by the War on Drugs"[233] and to "uproot the very system" of racism on which the War on Drugs was built and continues to facilitate.[234] Much could be accomplished by repealing mandatory minimum sentencing drug laws. Those laws were developed to be weapons focused on Black communities, and they have caused their intended damage.[235] Further, mandatory minimum sentencing laws have been used by prosecutors to further racially disparate outcomes.[236] It should be of no consequence that individual prosecutors may not intend to use the laws in that sort of racist manner. The data shows us that the outcomes are racist, nonetheless.[237] Likewise, even if individual legislators, today, do not maintain mandatory minimum sentencing laws because they intend to be explicitly racist, the fact remains that the laws have been maintained despite knowledge of their dubious development and present day disproportionate use against Blacks.[238] Preserving such a system is to sustain the badges and incidents of slavery and to denying the Black community the equal protection of laws.[239] Reconstruction taught us that, without a commitment to a constitutional protection against slavery and assurance of equal treatment, racism simply becomes repackaged—from slavery to Jim Crow, and eventually to the War on Drugs. Reconstruction Sentencing requires reclaiming the promise of

230. *Village of Arlington Heights*, 429 U.S. at 264-65.
231. *Reconstruction Sentencing*, *supra* note 7, at 1714.
232. KENDI, *supra* note 18, at 23.
233. *Reconstruction Sentencing*, *supra* note 7, at 1690.
234. *Id.*
235. *Id.* at 1709.
236. Starr & Rehavi, *supra* note 208, at 1323.
237. *Reconstruction Sentencing*, *supra* note 7, at 1709.
238. *Id.* at 1711.
239. *Id.*

Reconstruction through "a radical reorientation of our [constitutional] consciousness."[240] To truly repair and uproot requires courts to not only find sentencing laws that facilitate racial bias to be unconstitutional, but also requires courts to re-assess the constitutionality of policing practices based on racial profiling, laws regarding acquiring and executing warrants, and policies allowing for bias to infect prosecutorial decision-making.[241] Though this paper does not purport to have a blueprint for what this sentencing reconstruction era will look like in full, it does assert that razing the current structure to start anew is the only true way to move from war to peace. Reconstruction also taught us that building atop a faulty foundation simply leads to a short-lived era of promise followed by centuries of continued subjugation.[242]

240. KENDI, *supra* note 18, at 23.
241. *Reconstruction Sentencing*, *supra* note 7, at 1690.
242. *Id.*