political discourse. Once again, in response to a major disruption in the prevailing racial order—this time the civil rights gains of the 1960s—a new system of racialized social control was created by exploiting the vulnerabilities and racial resentments of poor and working-class whites. More than 2 million people found themselves behind bars at the turn of the twenty-first century, and millions more were relegated to the margins of mainstream society, banished to a political and social space not unlike Jim Crow, where discrimination in employment, housing, and access to education was perfectly legal, and where they could be denied the right to vote. The system functioned relatively automatically, and the prevailing system of racial meanings, identities, and ideologies already seemed natural. Ninety percent of those admitted to prison for drug offenses in many states were black or Latino, yet the mass incarceration of communities of color was explained in race-neutral terms, an adaptation to the needs and demands of the current political climate. The New Jim Crow was born.

2

The Lockdown

We may think we know how the criminal justice system works. Television is overloaded with fictional dramas about police, crime, and prosecutors—shows such as *Law & Order*. These fictional dramas, like the evening news, tend to focus on individual stories of crime, victimization, and punishment, and the stories are typically told from the point of view of law enforcement. A charismatic police officer, investigator, or prosecutor struggles with his own demons while heroically trying to solve a horrible crime. He ultimately achieves a personal and moral victory by finding the bad guy and throwing him in jail. That is the made-for-TV version of the criminal justice system. It perpetuates the myth that the primary function of the system is to keep our streets safe and our homes secure by rooting out dangerous criminals and punishing them. These television shows, especially those that romanticize drug-law enforcement, are the modern-day equivalent of the old movies portraying happy slaves, the fictional gloss placed on a brutal system of racialized oppression and control.

Those who have been swept within the criminal justice system know that the way the system actually works bears little resemblance to what happens on television or in movies. Full-blown trials of guilt or innocence rarely occur; many people never even meet with an attorney; witnesses are routinely paid and coerced by the government; police regularly stop and search people for no reason whatsoever; penalties for many crimes are so severe that innocent people plead guilty, accepting plea bargains to avoid harsh mandatory sentences; and children, even as young as fourteen, are sent to adult prisons.

Rules of law and procedure, such as "guilt beyond a reasonable doubt" or "probable cause" or "reasonable suspicion," can easily be found in court cases and law-school textbooks but are much harder to find in real life.

In this chapter, we shall see how the system of mass incarceration actually works. Our focus is the War on Drugs. The reason is simple: Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States. Drug offenses alone account for two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000.[1] Approximately a half-million people are in prison or jail for a drug offense today, compared to an estimated 41,100 in 1980—an increase of 1,100 percent.[2] Drug arrests have tripled since 1980. As a result, more than 31 million people have been arrested for drug offenses since the drug war began.[3] To put the matter in perspective, consider this: there are more people in prisons and jails today just for drug offenses than were incarcerated for *all* reasons in 1980.[4] Nothing has contributed more to the systematic mass incarceration of people of color in the United States than the War on Drugs.

Before we begin our tour of the drug war, it is worthwhile to get a couple of myths out of the way. The first is that the war is aimed at ridding the nation of drug "kingpins" or big-time dealers. Nothing could be further from the truth. The vast majority of those arrested are *not* charged with serious offenses. In 2005, for example, four out of five drug arrests were for possession, and only one out of five was for sales. Moreover, most people in state prison for drug offenses have *no* history of violence or significant selling activity.[5]

The second myth is that the drug war is principally concerned with dangerous drugs. Quite to the contrary, arrests for marijuana possession—a drug less harmful than tobacco or alcohol—accounted for nearly 80 percent of the growth in drug arrests in the 1990s.[6] Despite the fact that most drug arrests are for nonviolent minor offenses, the War on Drugs has ushered in an era of unprecedented punitiveness.

The percentage of drug arrests that result in prison sentences (rather than dismissal, community service, or probation) has quadrupled, resulting in a prison-building boom the likes of which the world has never seen. In two short decades, between 1980 and 2000, the number of people incarcerated in our nation's prisons and jails soared from roughly 300,000 to more than 2 million. By the end of 2007, more than 7 million Americans—or one in every 31 adults—were behind bars, on probation, or on parole.[7]

We begin our exploration of the drug war at the point of entry—arrest by the police—and then consider how the system of mass incarceration is structured to reward mass drug arrests and facilitate the conviction and imprisonment of an unprecedented number of Americans, whether guilty or innocent. In subsequent chapters, we will consider how the system specifically targets people of color and then relegates them to a second-class status analogous to Jim Crow. At this point, we simply take stock of the means by which the War on Drugs facilitates the roundup and lockdown of an extraordinary percentage of the U.S. population.

Rules of the Game

Few legal rules meaningfully constrain the police in the War on Drugs. This may sound like an overstatement, but upon examination it proves accurate. The absence of significant constraints on the exercise of police discretion is a key feature of the drug war's design. It has made the roundup of millions of Americans for nonviolent drug offenses relatively easy.

With only a few exceptions, the Supreme Court has seized every opportunity to facilitate the drug war, primarily by eviscerating Fourth Amendment protections against unreasonable searches and seizures by the police. The rollback has been so pronounced that some commentators charge that a virtual "drug exception" now exists to the Bill of Rights. Shortly before his death, Justice Thurgood Marshall felt compelled to remind his colleagues that there is, in fact, "no drug exception" written into the text of the Constitution.[8]

Most Americans do not know what the Fourth Amendment of the U.S. Constitution actually says or what it requires of the police. It states, in its entirety:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Courts and scholars agree that the Fourth Amendment governs all searches and seizures by the police and that the amendment was adopted in response

to the English practice of conducting arbitrary searches under general warrants to uncover seditious libels. The routine police harassment, arbitrary searches, and widespread police intimidation of those subject to English rule helped to inspire the American Revolution. Not surprisingly, then, preventing arbitrary searches and seizures by the police was deemed by the Founding Fathers an essential element of the U.S. Constitution. Until the War on Drugs, courts had been fairly stringent about enforcing the Fourth Amendment's requirements.

Within a few years after the drug war was declared, however, many legal scholars noted a sharp turn in the Supreme Court's Fourth Amendment jurisprudence. By the close of the Supreme Court's 1990–91 term, it had become clear that a major shift in the relationship between the citizens of this country and the police was under way. Justice Stevens noted the trend in a powerful dissent issued in *California v. Acevedo*, a case upholding the warrantless search of a bag locked in a motorist's trunk:

> In the years [from 1982 to 1991], the Court has heard argument in 30 Fourth Amendment cases involving narcotics. In all but one, the government was the petitioner. All save two involved a search or seizure without a warrant or with a defective warrant. And, in all except three, the Court upheld the constitutionality of the search or seizure. In the meantime, the flow of narcotics cases through the courts has steadily and dramatically increased. No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime.[9]

The Fourth Amendment is but one example. Virtually all constitutionally protected civil liberties have been undermined by the drug war. The Court has been busy in recent years approving mandatory drug testing of employees and students, upholding random searches and sweeps of public schools and students, permitting police to obtain search warrants based on an anonymous informant's tip, expanding the government's wiretapping authority, legitimating the use of paid, unidentified informants by police and prosecutors, approving the use of helicopter surveillance of homes without a warrant, and allowing the forfeiture of cash, homes, and other property based on unproven allegations of illegal drug activity.

For our purposes here, we limit our focus to the legal rules crafted by the Supreme Court that grant law enforcement a pecuniary interest in the drug war and make it relatively easy for the police to seize people virtually anywhere—on public streets and sidewalks, on buses, airplanes and trains, or any other public place—and usher them behind bars. These new legal rules have ensured that anyone, virtually anywhere, for any reason, can become a target of drug-law enforcement activity.

Unreasonable Suspicion

Once upon a time, it was generally understood that the police could not stop and search someone without a warrant unless there was probable cause to believe that the individual was engaged in criminal activity. That was a basic Fourth Amendment principle. In *Terry v. Ohio*, decided in 1968, the Supreme Court modified that understanding, but only modestly, by ruling that if and when a police officer observes unusual conduct by someone the officer reasonably believes to be dangerous and engaged in criminal activity, the officer "is entitled for the protection of himself and others in the area" to conduct a limited search "to discover weapons that might be used against the officer."[10] Known as the stop-and-frisk rule, the *Terry* decision stands for the proposition that, so long as a police officer has "reasonable articulable suspicion" that someone is engaged in criminal activity *and* dangerous, it is constitutionally permissible to stop, question, and frisk him or her—even in the absence of probable cause.

Justice Douglas dissented in *Terry* on the grounds that "grant[ing] police greater power than a magistrate [judge] is to take a long step down the totalitarian path."[11] He objected to the notion that police should be free to conduct warrantless searches whenever they suspect someone is a criminal, believing that dispensing with the Fourth Amendment's warrant requirement risked opening the door to the same abuses that gave rise to the American Revolution. His voice was a lonely one. Most commentators at the time agreed that affording police the power and discretion to protect themselves during an encounter with someone they believed to be a dangerous criminal is not "unreasonable" under the Fourth Amendment.

History suggests Justice Douglas had the better of the argument. In the years since *Terry*, stops, interrogations, and searches of ordinary people

driving down the street, walking home from the bus stop, or riding the train, have become commonplace—at least for people of color. As Douglas suspected, the Court in *Terry* had begun its slide down a very slippery slope. Today it is no longer necessary for the police to have any reason to believe that people are engaged in criminal activity or actually dangerous to stop and search them. As long as you give "consent," the police can stop, interrogate, and search you for any reason or no reason at all.

Just Say No

The first major sign that the Supreme Court would not allow the Fourth Amendment to interfere with the prosecution of the War on Drugs came in *Florida v. Bostick*. In that case, Terrance Bostick, a twenty-eight-year-old African American, had been sleeping in the back seat of a Greyhound bus on his way from Miami to Atlanta. Two police officers, wearing bright green "raid" jackets and displaying their badges and a gun, woke him with a start. The bus was stopped for a brief layover in Fort Lauderdale, and the officers were "working the bus," looking for persons who might be carrying drugs. Bostick provided them with his identification and ticket, as requested. The officers then asked to search his bag. Bostick complied, even though he knew his bag contained a pound of cocaine. The officers had no basis for suspecting Bostick of any criminal activity, but they got lucky. They arrested Bostick, and he was charged and convicted of trafficking cocaine.

Bostick's search and seizure reflected what had become an increasingly common tactic in the War on Drugs: suspicionless police sweeps of buses in interstate or intrastate travel. The resulting "interviews" of passengers in these dragnet operations usually culminate in a request for "consent" to search the passenger's luggage.[12] Never do the officers inform passengers that they are free to remain silent or to refuse to answer questions. By proceeding systematically in this manner, the police are able to engage in an extremely high volume of searches. One officer was able to search over three thousand bags in a nine-month period employing these techniques.[13] By and large, however, the hit rates are low. For example, in one case, a sweep of one hundred buses resulted in only seven arrests.[14]

On appeal, the Florida Supreme Court ruled in Bostick's case that the police officer's conduct violated the Fourth Amendment's prohibition of unreasonable

searches and seizures. The Fourth Amendment, the court reasoned, forbids the police from seizing people and searching them without some individualized suspicion that they have committed or are committing a crime. The court thus overturned Bostick's conviction, ruling that the cocaine, having been obtained illegally, was inadmissible. It also broadly condemned "bus sweeps" in the drug war, comparing them to methods employed by totalitarian regimes:

> The evidence in this case has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who had temporary power in Government. . . . This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ("that time permits") and check identification, tickets, ask to search luggage—all in the name of "voluntary cooperation" with law enforcement.[15]

The U.S. Supreme Court reversed. The Court ruled that Bostick's encounter with the police was purely voluntary, and therefore he was not "seized" within the meaning of the Fourth Amendment. Even if Bostick did not feel free to leave when confronted by police at the back of the bus, the proper question, according to the Court, was whether "a reasonable person" in Bostick's shoes would have felt free to terminate the encounter. A reasonable person, the Court concluded, would have felt free to sit there and refuse to answer the police officer's questions, and would have felt free to tell the officer "No, you can't search my bag." Accordingly, Bostick was not really "seized" within the meaning of the Fourth Amendment, and the subsequent search was purely consensual. The Court made clear that its decision was to govern all future drug sweeps, no matter what the circumstances of the targeted individual. Given the blanket nature of the ruling, courts have found police encounters to be consensual in truly preposterous situations. For example, a few years after *Bostick*, the District of Columbia Court of Appeals applied the ruling to a case involving a fourteen-year-old girl interrogated by the police, concluding that she must be held to the same reasonable-person standard.[16]

Prior to the *Bostick* decision, a number of lower courts had found absurd the notion that "reasonable people" would feel empowered to refuse to answer

questions when confronted by the police. As federal judge Prentiss Marshall explained, "The average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer."[17] Professor Tracey Maclin put it this way: "Common sense teaches that most of us do not have the chutzpah or stupidity to tell a police officer to 'get lost' after he has stopped us and asked us for identification or questioned us about possible criminal conduct."[18] Other courts emphasized that granting police the freedom to stop, interrogate, and search anyone who consented would likely lead to racial and ethnic discrimination. Young black men would be the likely targets, rather than older white women. Justice Thurgood Marshall acknowledged as much in his dissent in *Bostick*, noting "the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable."[19]

Studies have shown that Maclin's common sense is correct: the overwhelming majority of people who are confronted by police and asked questions respond, and when asked to be searched, they comply.[20] This is the case even among those, like Bostick, who have every reason to resist these tactics because they actually have something to hide. This is no secret to the Supreme Court. The Court long ago acknowledged that effective use of consent searches by the police depends on the ignorance (and powerlessness) of those who are targeted. In *Schneckloth v. Bustamonte*, decided in 1973, the Court admitted that if waiver of one's right to refuse consent were truly "knowing, intelligent, and voluntary," it would "in practice create serious doubt whether consent searches would continue to be conducted."[21] In other words, consent searches are valuable tools for the police only because hardly anyone dares to say no.

Poor Excuse

So-called consent searches have made it possible for the police to stop and search just about anybody walking down the street for drugs. All a police officer has to do in order to conduct a baseless drug investigation is ask to speak with someone and then get their "consent" to be searched. So long as orders are phrased as a question, compliance is interpreted as consent. "May I speak to you?" thunders an officer. "Will you put your arms up and stand

against the wall for a search?" Because almost no one refuses, drug sweeps on the sidewalk (and on buses and trains) are easy. People are easily intimidated when the police confront them, hands on their revolvers, and most have no idea the question can be answered, "No." But what about all the people driving down the street? How do police extract consent from them? The answer: pretext stops.

Like consent searches, pretext stops are favorite tools of law enforcement in the War on Drugs. A classic pretext stop is a traffic stop motivated not by any desire to enforce traffic laws, but instead motivated by a desire to hunt for drugs in the absence of any evidence of illegal drug activity. In other words, police officers use minor traffic violations as an excuse—a pretext—to search for drugs, even though there is not a shred of evidence suggesting the motorist is violating drug laws. Pretext stops, like consent searches, have received the Supreme Court's unequivocal blessing. Just ask Michael Whren and James Brown.

Whren and Brown, both of whom are African American, were stopped by plainclothes officers in an unmarked vehicle in June 1993. The police admitted to stopping Whren and Brown because they wanted to investigate them for imagined drug crimes, even though they did not have probable cause or reasonable suspicion such crimes had actually been committed. Lacking actual evidence of criminal activity, the officers decided to stop them based on a pretext—a traffic violation. The officers testified that the driver failed to use his turn signal and accelerated abruptly from a stop sign. Although the officers weren't really interested in the traffic violation, they stopped the pair anyway because they had a "hunch" they might be drug criminals. It turned out they were right. According to the officers, the driver had a bag of cocaine in his lap—allegedly in plain view.

On appeal, Whren and Brown challenged their convictions on the ground that pretextual stops violate the Fourth Amendment. They argued that, because of the multitude of applicable traffic and equipment regulations, and the difficulty of obeying all traffic rules perfectly at all times, the police will nearly always have an excuse to stop someone and go fishing for drugs. Anyone driving more than a few blocks is likely to commit a traffic violation of some kind, such as failing to track properly between lanes, failing to stop at precisely the correct distance behind a crosswalk, failing to pause for precisely the right amount of time at a stop sign, or failing to use a turn signal

at the appropriate distance from an intersection. Allowing the police to use minor traffic violations as a pretext for baseless drug investigations would permit them to single out anyone for a drug investigation without any evidence of illegal drug activity whatsoever. That kind of arbitrary police conduct is precisely what the Fourth Amendment was intended to prohibit.

The Supreme Court rejected their argument, ruling that an officer's motivations are irrelevant when evaluating the reasonableness of police activity under the Fourth Amendment. It does not matter, the Court declared, *why* the police are stopping motorists under the Fourth Amendment, so long as some kind of traffic violation gives them an excuse. The fact that the Fourth Amendment was specifically adopted by the Founding Fathers to prevent arbitrary stops and searches was deemed unpersuasive. The Court ruled that the police are free to use minor traffic violations as a pretext to conduct drug investigations, even when there is no evidence of illegal drug activity.

A few months later, in *Ohio v. Robinette*, the Court took its twisted logic one step further. In that case, a police officer pulled over Robert Robinette, allegedly for speeding. After checking Robinette's license and issuing a warning (but no ticket), the officer then ordered Robinette out of his vehicle, turned on a video camera in the officer's car, and then asked Robinette whether he was carrying any drugs and would "consent" to a search. He did. The officer found a small amount of marijuana in Robinette's car, and a single pill, which turned out to be methamphetamine.

The Ohio Supreme Court, reviewing the case on appeal, was obviously uncomfortable with the blatant fishing expedition for drugs. The court noted that traffic stops were increasingly being used in the War on Drugs to extract "consent" for searches, and that motorists may not believe they are free to refuse consent and simply drive away. In an effort to provide some minimal protection for motorists, the Ohio court adopted a bright-line rule, that is, an unambiguous requirement that officers tell motorists they are free to leave before asking for consent to search their vehicles. At the very least, the justices reasoned, motorists should know they have the right to refuse consent and to leave, if they so choose.

The U.S. Supreme Court struck down this basic requirement as "unrealistic." In so doing, the Court made clear to all lower courts that, from now on, the Fourth Amendment should place no meaningful constraints on the police in the War on Drugs. No one needs to be informed of their rights during a stop or search, and police may use minor traffic stops as well as the myth of "consent" to stop and search anyone they choose for imaginary drug crimes, whether or not any evidence of illegal drug activity actually exists.

One might imagine that the legal rules described thus far would provide more than enough latitude for the police to engage in an all-out, no-holds-barred war on drugs. But there's more. Even if motorists, after being detained and interrogated, have the nerve to refuse consent to a search, the police can arrest them anyway. In *Atwater v. City of Lago Vista*, the Supreme Court held that the police may arrest motorists for minor traffic violations and throw them in jail (even if the statutory penalty for the traffic violation is a mere fine, not jail time).

Another legal option for officers frustrated by a motorist's refusal to grant "consent" is to bring a drug-sniffing dog to the scene. This option is available to police in traffic stops, as well as to law enforcement officials confronted with resistant travelers in airports and in bus or train stations who refuse to give the police consent to search their luggage. The Supreme Court has ruled that walking a drug-sniffing dog around someone's vehicle (or someone's luggage) does not constitute a "search," and therefore does not trigger Fourth Amendment scrutiny.[22] If the dog alerts to drugs, then the officer has probable cause to search without the person's consent. Naturally, in most cases, when someone is told that a drug-sniffing dog will be called, the seized individual backs down and "consents" to the search, as it has become apparent that the police are determined to conduct the search one way or another.

59-69

1. Give three examples of how the drug war has shaped the way the courts interpret the 4th Amendement.

2. Describe the significance of Terry v. Ohio.

3. Describe the significance of Florida v. Bostick.

4. How are consent searches in traffic violation cases used as a pretext for drug investigations? Why?

72-85

1. Why did police departments prioritize the war on drugs?
2. Why was the announcement of the war on drugs met with confusion and resistance?
3. Explain the rise in the use of SWAT.
4. How did laws about forfeiture and confiscation change the drug war?
5. What are some ways poor people are disadvantaged in this context?

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It Pays to Play

Clearly, the rules of the game are designed to allow for the roundup of an unprecedented number of Americans for minor, nonviolent drug offenses. The number of annual drug arrests more than tripled between 1980 and 2005, as drug sweeps and suspicionless stops and searches proceeded in record numbers.[33]

Still, it is fair to wonder why the police would choose to arrest such an astonishing percentage of the American public for minor drug crimes. The fact that police are legally *allowed* to engage in a wholesale roundup of nonviolent drug offenders does not answer the question *why* they would choose to do so, particularly when most police departments have far more serious crimes to prevent and solve. Why would police prioritize drug-law enforcement? Drug use and abuse is nothing new; in fact, it was on the decline, not on the rise, when the War on Drugs began. So why make drug-law enforcement a priority now?

Once again, the answer lies in the system's design. Every system of control depends for its survival on the tangible and intangible benefits that are provided to those who are responsible for the system's maintenance and administration. This system is no exception.

At the time the drug war was declared, illegal drug use and abuse was not a pressing concern in most communities. The announcement of a War on Drugs was therefore met with some confusion and resistance within law enforcement, as well as among some conservative commentators.[34] The feder-

alization of drug crime violated the conservative tenet of states' rights and local control, as street crime was typically the responsibility of local law enforcement. Many state and local law enforcement officials were less than pleased with the attempt by the federal government to assert itself in local crime fighting, viewing the new drug war as an unwelcome distraction. Participation in the drug war required a diversion of resources away from more serious crimes, such as murder, rape, grand theft, and violent assault—all of which were of far greater concern to most communities than illegal drug use.

The resistance within law enforcement to the drug war created something of a dilemma for the Reagan administration. In order for the war to actually work—that is, in order for it to succeed in achieving its political goals—it was necessary to build a consensus among state and local law enforcement agencies that the drug war should be a top priority in their hometowns. The solution: cash. Huge cash grants were made to those law enforcement agencies that were willing to make drug-law enforcement a top priority. The new system of control is traceable, to a significant degree, to a massive bribe offered to state and local law enforcement by the federal government.

In 1988, at the behest of the Reagan administration, Congress revised the program that provides federal aid to law enforcement, renaming it the Edward Byrne Memorial State and Local Law Enforcement Assistance Program after a New York City police officer who was shot to death while guarding the home of a drug-case witness. The Byrne program was designed to encourage every federal grant recipient to help fight the War on Drugs. Millions of dollars in federal aid have been offered to state and local law enforcement agencies willing to wage the war. This federal grant money has resulted in the proliferation of narcotics task forces, including those responsible for highway drug interdiction. Nationally, narcotics task forces make up about 40 percent of all Byrne grant funding, but in some states as much as 90 percent of all Byrne grant funds go toward specialized narcotics task forces.[35] In fact, it is questionable whether any specialized drug enforcement activity would exist in some states without the Byrne program.

Other forms of valuable aid have been offered as well. The DEA has offered free training, intelligence, and technical support to state highway patrol agencies that are willing to commit their officers to highway drug interdiction. The Pentagon, for its part, has given away military intelligence and

millions of dollars in firepower to state and local agencies willing to make the rhetorical war a literal one.

Almost immediately after the federal dollars began to flow, law enforcement agencies across the country began to compete for funding, equipment, and training. By the late 1990s, the overwhelming majority of state and local police forces in the country had availed themselves of the newly available resources and added a significant military component to buttress their drug-war operations. According to the Cato Institute, in 1997 alone, the Pentagon handed over more than 1.2 million pieces of military equipment to local police departments.[36] Similarly, the *National Journal* reported that between January 1997 and October 1999, the agency handled 3.4 million orders of Pentagon equipment from over eleven thousand domestic police agencies in all fifty states. Included in the bounty were "253 aircraft (including six- and seven-passenger airplanes, UH-60 Blackhawk and UH-1 Huey helicopters, 7,856 M-16 rifles, 181 grenade launchers, 8,131 bulletproof helmets, and 1,161 pairs of night-vision goggles."[37] A retired police chief in New Haven, Connecticut, told the *New York Times*, "I was offered tanks, bazookas, anything I wanted."[38]

Waging War

In barely a decade, the War on Drugs went from being a political slogan to an actual war. Now that police departments were suddenly flush with cash and military equipment earmarked for the drug war, they needed to make use of their new resources. As described in a Cato Institute report, paramilitary units (most commonly called Special Weapons and Tactics, or SWAT, teams) were quickly formed in virtually every major city to fight the drug war.[39]

SWAT teams originated in the 1960s and gradually became more common in the 1970s, but until the drug war, they were used rarely, primarily for extraordinary emergency situations such as hostage takings, hijackings, or prison escapes. That changed in the 1980s, when local law enforcement agencies suddenly had access to cash and military equipment specifically for the purpose of conducting drug raids.

Today, the most common use of SWAT teams is to serve narcotics warrants, usually with forced, unannounced entry into the home. In fact, in some

jurisdictions drug warrants are served *only* by SWAT teams—regardless of the nature of the alleged drug crime. As the *Miami Herald* reported in 2002, "Police say they want [SWAT teams] in case of a hostage situation or a Columbine-type incident, but in practice the teams are used mainly to serve search warrants on suspected drug dealers. Some of these searches yield as little as a few grams of cocaine or marijuana."[40]

The rate of increase in the use of SWAT teams has been astonishing. In 1972, there were just a few hundred paramilitary drug raids per year in the United States. By the early 1980s, there were three thousand annual SWAT deployments, by 1996 there were thirty thousand, and by 2001 there were forty thousand.[41] The escalation of military force was quite dramatic in cities throughout the United States. In the city of Minneapolis, Minnesota, for example, its SWAT team was deployed on no-knock warrants thirty-five times in 1986, but in 1996 that same team was deployed for drug raids more than seven hundred times.[42]

Drug raids conducted by SWAT teams are not polite encounters. In countless situations in which police could easily have arrested someone or conducted a search without a military-style raid, police blast into people's homes, typically in the middle of the night, throwing grenades, shouting, and pointing guns and rifles at anyone inside, often including young children. In recent years, dozens of people have been killed by police in the course of these raids, including elderly grandparents and those who are completely innocent of any crime. Criminologist Peter Kraska reports that between 1989 and 2001 at least 780 cases of flawed paramilitary raids reached the appellate level, a dramatic increase over the 1980s, when such cases were rare, or earlier, when they were nonexistent.[43] Many of these cases involve people killed in botched raids.

Alberta Spruill, a fifty-seven-year-old city worker from Harlem, is among the fallen. On May 16, 2003, a dozen New York City police officers stormed her apartment building on a no-knock warrant, acting on a tip from a confidential informant who told them a convicted felon was selling drugs on the sixth floor. The informant had actually been in jail at the time he said he'd bought drugs in the apartment, and the target of the raid had been arrested four days before, but the officers didn't check and didn't even interview the building superintendent. The only resident in the building was Alberta, described by friends as a "devout churchgoer." Before entering, police deployed a flash-bang grenade, resulting in a blinding, deafening explosion. Alberta

went into cardiac arrest and died two hours later. The death was ruled a homicide but no one was indicted.

Those who survive SWAT raids are generally traumatized by the event. Not long after Spruill's death, Manhattan Borough President C. Virginia Fields held hearings on SWAT practices in New York City. According to the *Village Voice*, "Dozens of black and Latino victims—nurses, secretaries, and former officers—packed her chambers airing tales, one more horrifying than the next. Most were unable to hold back tears as they described police ransacking their homes, handcuffing children and grandparents, putting guns to their heads, and being verbally (and often physically) abusive. In many cases, victims had received no follow-up from the NYPD, even to fix busted doors or other physical damage."[44]

Even in small towns, such as those in Dodge County, Wisconsin, SWAT teams treat routine searches for narcotics as a major battlefront in the drug war. In Dodge County, police raided the mobile home of Scott Bryant in April 1995, after finding traces of marijuana in his garbage. Moments after busting into the mobile home, police shot Bryant—who was unarmed—killing him. Bryant's eight-year-old son was asleep in the next room and watched his father die while waiting for an ambulance. The district attorney theorized that the shooter's hand had clenched in "sympathetic physical reaction" as his other hand reached for handcuffs. A spokesman for the Beretta company called this unlikely because the gun's double-action trigger was designed to prevent unintentional firing. The Dodge County sheriff compared the shooting to a hunting accident.[45]

SWAT raids have not been limited to homes, apartment buildings, or public housing projects. Public high schools have been invaded by SWAT teams in search of drugs. In November 2003, for example, police raided Stratford High School in Goose Creek, South Carolina. The raid was recorded by the school's surveillance cameras as well as a police camera. The tapes show students as young as fourteen forced to the ground in handcuffs as officers in SWAT team uniforms and bulletproof vests aim guns at their heads and lead a drug-sniffing dog to tear through their book bags. The raid was initiated by the school's principal, who was suspicious that a single student might be dealing marijuana. No drugs or weapons were found during the raid and no charges were filed. Nearly all of the students searched and seized were students of color.

The transformation from "community policing" to "military policing," began

in 1981, when President Reagan persuaded Congress to pass the Military Cooperation with Law Enforcement Act, which encouraged the military to give local, state, and federal police access to military bases, intelligence, research, weaponry, and other equipment for drug interdiction. That legislation carved a huge exception to the Posse Comitatus Act, the Civil War–era law prohibiting the use of the military for civilian policing. It was followed by Reagan's National Security Decision Directive, which declared drugs a threat to U.S. national security, and provided for yet more cooperation between local, state, and federal law enforcement. In the years that followed, Presidents George Bush and Bill Clinton enthusiastically embraced the drug war and increased the transfer of military equipment, technology, and training to local law enforcement, contingent, of course, on the willingness of agencies to prioritize drug-law enforcement and concentrate resources on arrests for illegal drugs.

The incentives program worked. Drug arrests skyrocketed, as SWAT teams swept through urban housing projects, highway patrol agencies organized drug interdiction units on the freeways, and stop-and-frisk programs were set loose on the streets. Generally, the financial incentives offered to local law enforcement to pump up their drug arrests have not been well publicized, leading the average person to conclude reasonably (but mistakenly) that when their local police departments report that drug arrests have doubled or tripled in a short period of time, the arrests reflect a surge in illegal drug activity, rather than an infusion of money and an intensified enforcement effort.

One exception is a 2001 report by the *Capital Times* in Madison, Wisconsin. The *Times* reported that as of 2001, sixty-five of the state's eighty-three local SWAT teams had come into being since 1980, and that the explosion of SWAT teams was traceable to the Pentagon's weaponry giveaway program, as well as to federal programs that provide money to local police departments for drug control. The paper explained that, in the 1990s, Wisconsin police departments were given nearly a hundred thousand pieces of military equipment. And although the paramilitary units were often justified to city councils and skeptical citizens as essential to fight terrorism or deal with hostage situations, they were rarely deployed for those reasons but instead were sent to serve routine search warrants for drugs and make drug arrests. In fact, the *Times* reported that police departments had an extraordinary incentive to use their new equipment for drug enforcement: the extra federal

funding the local police departments received was tied to antidrug policing. The size of the disbursements was linked to the number of city or county drug arrests. Each arrest, in theory, would net a given city or county about $153 in state and federal funding. Non-drug-related policing brought no federal dollars, even for violent crime. As a result, when Jackson County, Wisconsin, quadrupled its drug arrests between 1999 and 2000, the county's federal subsidy quadrupled too.[46]

Finders Keepers

As if the free military equipment, training, and cash grants were not enough, the Reagan administration provided law enforcement with yet another financial incentive to devote extraordinary resources to drug law enforcement, rather than more serious crimes: state and local law enforcement agencies were granted the authority to keep, for their own use, the vast majority of cash and assets they seize when waging the drug war. This dramatic change in policy gave state and local police an enormous stake in the War on Drugs—not in its success, but in its perpetual existence. Law enforcement gained a pecuniary interest not only in the forfeited property, but in the profitability of the drug market itself.

Modern drug forfeiture laws date back to 1970, when Congress passed the Comprehensive Drug Abuse Prevention and Control Act. The Act included a civil forfeiture provision authorizing the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs. As legal scholars Eric Blumenson and Eva Nilsen have explained, the provision was justified as an effort "to forestall the spread of drugs in a way criminal penalties could not—by striking at its economic roots."[47] When a drug dealer is sent to jail, there are many others ready and willing to take his place, but seizing the means of production, some legislators reasoned, may shut down the trafficking business for good. Over the years, the list of properties subject to forfeiture expanded greatly, and the required connection to illegal drug activity became increasingly remote, leading to many instances of abuse. But it was not until 1984, when Congress amended the federal law to allow federal law enforcement agencies to retain and use any and all proceeds from asset forfeitures, and to allow state and

local police agencies to retain up to 80 percent of the assets' value, that a true revolution occurred.

Suddenly, police departments were capable of increasing the size of their budgets, quite substantially, simply by taking the cash, cars, and homes of people suspected of drug use or sales. At the time the new rules were adopted, the law governing civil forfeiture was so heavily weighted in favor of the government that fully 80 percent of forfeitures went uncontested. Property or cash could be seized based on mere suspicion of illegal drug activity, and the seizure could occur without notice or hearing, upon an ex parte showing of mere probable cause to believe that the property had somehow been "involved" in a crime. The probable cause showing could be based on nothing more than hearsay, innuendo, or even the paid, self-serving testimony of someone with interests clearly adverse to the property owner. Neither the owner of the property nor anyone else need be charged with a crime, much less found guilty of one. Indeed, a person could be found innocent of any criminal conduct and the property could still be subject to forfeiture. Once the property was seized, the owner had no right of counsel, and the burden was placed on him to prove the property's "innocence." Because those who were targeted were typically poor or of moderate means, they often lacked the resources to hire an attorney or pay the considerable court costs. As a result, most people who had their cash or property seized did not challenge the government's action, especially because the government could retaliate by filing criminal charges—baseless or not.

Not surprisingly, this drug forfeiture regime proved highly lucrative for law enforcement, offering more than enough incentive to wage the War on Drugs. According to a report commissioned by the Department of Justice, between 1988 and 1992 alone, Byrne-funded drug task forces seized over $1 billion in assets.[48] Remarkably, this figure does not include drug task forces funded by the DEA or other federal agencies.

The actual operation of drug forfeiture laws seriously undermines the usual rhetoric offered in support of the War on Drugs, namely that it is the big "kingpins" that are the target of the war. Drug-war forfeiture laws are frequently used to allow those with assets to buy their freedom, while drug users and small-time dealers with few assets to trade are subjected to lengthy prison terms. In Massachusetts, for example, an investigation by journalists found that on average a "payment of $50,000 in drug profits won a 6.3 year

reduction in a sentence for dealers," while agreements of $10,000 or more bought elimination or reduction of trafficking charges in almost three-fourths of such cases.[49] Federal drug forfeiture laws are one reason, Blumenson and Nilsen note, "why state and federal prisons now confine large numbers of men and women who had relatively minor roles in drug distribution networks, but few of their bosses."[50]

The Shakedown

Quite predictably, the enormous economic rewards created by both the drug-war forfeiture and Byrne-grant laws has created an environment in which a very fine line exists between the lawful and the unlawful taking of other people's money and property—a line so thin that some officers disregard the formalities of search warrants, probable cause, and reasonable suspicion altogether. In *United States v. Reese*, for example, the Ninth Circuit Court of Appeals described a drug task force completely corrupted by its dependence on federal drug money. Operating as a separate unit within the Oakland Housing Authority, the task force behaved, in the words of one officer, "more or less like a wolfpack," driving up in police vehicles and taking "anything and everything we saw on the street corner."[51] The officers were under tremendous pressure from their commander to keep their arrest numbers up, and all of the officers were aware that their jobs depended on the renewal of a federal grant. The task force commander emphasized that they would need statistics to show that the grant money was well spent and sent the task force out to begin a shift with comments like, "Let's go out and kick ass," and "Everybody goes to jail tonight for everything, right?"[52]

Journalists and investigators have documented numerous other instances in which police departments have engaged in illegal shakedowns, searches, and threats in search of forfeitable property and cash. In Florida, reporters reviewed nearly one thousand videotapes of highway traffic stops and found that police had used traffic violations as an excuse—or pretext—to confiscate "tens of thousands of dollars from motorists against whom there [was] no evidence of wrongdoing," frequently taking the money without filing any criminal charges.[53] Similarly, in Louisiana, journalists reported that Louisiana police engaged in massive pretextual stops in an effort to seize cash, with the money diverted to police department ski trips and other unauthorized uses.[54] And in Southern California, a Los Angeles Sheriff's Department employee reported that deputies routinely planted drugs and falsified police reports to establish probable cause for cash seizures.[55]

Lots of small seizures can be nearly as profitable, and require the expenditure of fewer investigative resources, than a few large busts. The Western Area Narcotics Task Force (WANT) became the focus of a major investigation in 1996 when almost $66,000 was discovered hidden in its headquarters. The investigation revealed that the task force seized large amounts of money, but also small amounts, and then dispensed it freely, unconstrained by reporting requirements or the task force's mission. Some seizures were as small as eight cents. Another seizure of ninety-three cents prompted the local newspaper to observe that "once again the officers were taking whatever the suspects were carrying, even though by no stretch could pocket change be construed to be drug money."[56]

In 2000, Congress passed the Civil Asset Forfeiture Reform Act which was meant to address many of the egregious examples of abuse of civil forfeiture. Some of the most widely cited examples involved wealthy whites whose property was seized. One highly publicized case involved a reclusive millionaire, Donald Scott, who was shot and killed when a multiagency task force raided his two-hundred-acre Malibu ranch purportedly in search of marijuana plants. They never found a single marijuana plant in the course of the search. A subsequent investigation revealed that the primary motivation for the raid was the possibility of forfeiting Scott's property. If the forfeiture had been successful, it would have netted the law enforcement agencies about $5 million in assets.[57] In another case, William Munnerlynn had his Learjet seized by the DEA after he inadvertently used it to transport a drug dealer. Though charges were dropped against him within seventy-two hours, the DEA refused to return his Learjet. Only after five years of litigation and tens of thousands of dollars in legal fees was he able to secure return of his jet. When the jet was returned, it had sustained $100,000 worth of damage.[58] Such cases were atypical but got the attention of Congress.

The Reform Act resulted in a number of significant due-process changes, such as shifting the burden of proof onto the government, eliminating the requirement that an owner post a cost bond, and providing some minimal

hardship protections for innocent parties who stand to lose their homes. These reforms, however, do not go nearly far enough.

Arguably the most significant reform is the creation of an "innocent owner" defense. Prior to the Reform Act, the Supreme Court had ruled that the guilt or innocence of the property's owner was irrelevant to the *property's* guilt—a ruling based on the archaic legal fiction that a piece of property could be "guilty" of a crime. The act remedied this insanity to some extent; it provides an "innocent owner" defense to those whose property has been seized. However, the defense is seriously undermined by the fact that the government's burden of proof is so low—the government need only establish by a "preponderance of the evidence" that the property was involved in the commission of a drug crime. This standard of proof is significantly lower than the "clear and convincing evidence" standard contained in an earlier version of the legislation, and it is far lower than the "proof beyond a reasonable doubt" standard for criminal convictions.

Once the government meets this minimal burden, the burden then shifts to the owner to prove that she "did not know of the conduct giving rise to the forfeiture" or that she did "all that reasonably could be expected under the circumstances to terminate such use of the property." This means, for example, that a woman who knew that her husband occasionally smoked pot could have her car forfeited to the government because she allowed him to use her car. Because the "car" was guilty of transporting someone who had broken a drug law at some time, she could legally lose her only form of transportation, even though she herself committed no crime. Indeed, women who are involved in some relationship with men accused of drug crimes, typically husbands or boyfriends, are among the most frequent claimants in forfeiture proceedings.[59] Courts have not been forgiving of women in these circumstances, frequently concluding that "the nature and circumstances of the marital relationship may give rise to an inference of knowledge by the spouse claiming innocent ownership."[60]

There are other problems with this framework, not the least of which being that the owner of the property is not entitled to the appointment of counsel in the forfeiture proceeding, unless he or she has been charged with a crime. The overwhelming majority of forfeiture cases do not involve any criminal charges, so the vast majority of people who have their cash, cars, or homes seized must represent themselves in court, against the federal government. Oddly, someone who has actually been charged with a crime is entitled to the appointment of counsel in civil forfeiture proceedings, but those whose property has been forfeited but whose conduct did not merit criminal charges are on their own. This helps to explain why up to 90 percent of forfeiture cases in some jurisdictions are not challenged. Most people simply cannot afford the considerable cost of hiring an attorney. Even if the cost is not an issue, the incentives are all wrong. If the police seized your car worth $5,000, or took $500 cash from your home, would you be willing to pay an attorney more than your assets are worth to get them back? If you haven't been charged with a crime, are you willing to risk the possibility that fighting the forfeiture might prompt the government to file criminal charges against you?

The greatest failure of the Reform Act, however, has nothing to do with one's due process rights once property has been seized in a drug investigation. Despite all of the new procedural rules and formal protections, the law does not address the single most serious problem associated with drug-war forfeiture laws: the profit motive in drug-law enforcement. Under the new law, drug busts motivated by the desire to seize cash, cars, homes, and other property are still perfectly legal. Law enforcement agencies are still allowed, through revenue-sharing agreements with the federal government, to keep seized assets for their own use. Clearly, so long as law enforcement is free to seize assets allegedly associated with illegal drug activity—without ever charging anyone with a crime—local police departments, as well as state and federal law enforcement agencies, will continue to have a direct pecuniary interest in the profitability and longevity of the drug war. The basic structure of the system remains intact.

None of this is to suggest that the financial rewards offered for police participation in the drug war are the only reason that law enforcement decided to embrace the war with zeal. Undoubtedly, the political and cultural context of the drug war—particularly in the early years—encouraged the roundup. When politicians declare a drug war, the police (our domestic warriors) undoubtedly feel some pressure to wage it. But it is doubtful that the drug war would have been launched with such intensity on the ground but for the bribes offered for law enforcement's cooperation.

Today the bribes may no longer be necessary. Now that the SWAT teams, the multiagency drug task forces, and the drug enforcement agenda have become a regular part of federal, state, and local law enforcement, it appears the drug war is here to stay. Funding for the Byrne-sponsored drug task

forces had begun to dwindle during President Bush's tenure, but Barack Obama, as a presidential candidate, promised to revive the Byrne grant program, claiming that it is "critical to creating the anti-drug task forces our communities need."[61] Obama honored his word following the election, drastically increasing funding for the Byrne grant program despite its abysmal track record. The Economic Recovery Act of 2009 included more than $2 billion in new Byrne funding and an additional $600 million to increase state and local law enforcement across the country.[62] Relatively little organized opposition to the drug war currently exists, and any dramatic effort to scale back the war may be publicly condemned as "soft" on crime. The war has become institutionalized. It is no longer a special program or politicized project; it is simply the way things are done.

Legal Misrepresentation

So far, we have seen that the legal rules governing the drug war ensure that extraordinary numbers of people will be swept into the criminal justice system—arrested on drug charges, often for very minor offenses. But what happens after arrest? How does the design of the system help to ensure the creation of a massive undercaste?

Once arrested, one's chances of ever being truly free of the system of control are slim, often to the vanishing point. Defendants are typically denied meaningful legal representation, pressured by the threat of a lengthy sentence into a plea bargain, and then placed under formal control—in prison or jail, on probation or parole. Most Americans probably have no idea how common it is for people to be convicted without ever having the benefit of legal representation, or how many people plead guilty to crimes they did not commit because of fear of mandatory sentences.

Tens of thousands of poor people go to jail every year without ever talking to a lawyer, and those who do meet with a lawyer for a drug offense often spend only a few minutes discussing their case and options before making a decision that will profoundly affect the rest of their lives. As one public defender explained to the *Los Angeles Times*, "They are herded like cattle [into the courtroom lockup], up at 3 or 4 in the morning. Then they have to make decisions that affect the rest of their lives. You can imagine how stressful it is."[63]

More than forty years ago, in *Gideon v. Wainwright*, the Supreme Court ruled that poor people accused of serious crimes were entitled to counsel. Yet thousands of people are processed through America's courts annually either with no lawyer at all or with a lawyer who does not have the time, resources or, in some cases, the inclination to provide effective representation. In *Gideon*, the Supreme Court left it to state and local governments to decide how legal services should be funded. However, in the midst of a drug war, when politicians compete with each other to prove how "tough" they can be on crime and criminals, funding public defender offices and paying private attorneys to represent those accused of crimes has been a low priority.

Approximately 80 percent of criminal defendants are indigent and thus unable to hire a lawyer.[64] Yet our nation's public defender system is woefully inadequate. The most visible sign of the failed system is the astonishingly large caseloads public defenders routinely carry, making it impossible for them to provide meaningful representation to their clients. Sometimes defenders have well over one hundred clients at a time; many of these clients are facing decades behind bars or life imprisonment. Too often the quality of court-appointed counsel is poor because the miserable working conditions and low pay discourage good attorneys from participating in the system. And some states deny representation to impoverished defendants on the theory that somehow they should be able to pay for a lawyer, even though they are scarecely able to pay for food or rent. In Virginia, for example, fees paid to court-appointed attorneys for representing someone charged with a felony that carries a sentence of less than twenty years are capped at $428. And in Wisconsin, more than 11,000 poor people go to court without representation every year because anyone who earns more than $3,000 per year is considered able to afford a lawyer.[65] In Lake Charles, Louisiana, the public defender office has only two investigators for the 2,500 new felony cases and 4,000 new misdemeanor cases assigned to the office each year.[66] The NAACP Legal Defense Fund and the Southern Center for Human Rights in Atlanta sued the city of Gulfport, Mississippi, alleging that the city operated a "modern day debtor's prison" by jailing poor people who are unable to pay their fines and denying them the right to lawyers.

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what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume applies to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States."[67]

Even when people are charged with extremely serious crimes, such as murder, they may find themselves languishing in jail for years without meeting with an attorney, much less getting a trial. One extreme example is the experience of James Thomas, an impoverished day laborer in Baton Rouge, Louisiana, who was charged with murder in 1996, and waited eight and a half years for his case to go to trial. It never did. His mother finally succeeded in getting his case dismissed, after scraping together $500 to hire an attorney, who demonstrated to the court that, in the time Thomas spent waiting for his case to go to trial, his alibi witness had died of kidney disease. Another Louisiana man, Johnny Lee Ball, was convicted of second-degree murder and sentenced to life in prison without the possibility of parole after meeting with a public defender for just eleven minutes before trial. If indicted murderers have a hard time getting meaningful representation, what are the odds that small-time drug dealers find themselves represented by a zealous advocate? As David Carroll, the research director for the National Legal Aid & Defender Association explained to *USA Today*, "There's a real disconnect in this country between what people perceive is the state of indigent defense and what it is. I attribute that to shows like *Law & Order*, where the defendant says, 'I want a lawyer,' and all of a sudden Legal Aid appears in the cell. That's what people think."[68]

Children caught up in this system are the most vulnerable and yet are the least likely to be represented by counsel. In 1967, the U.S. Supreme Court ruled in *In re Gault* that children under the age of eighteen have the right to legal assistance with any criminal charges filed against them. In practice, however, children routinely "waive" their right to counsel in juvenile proceedings. In some states, such as Ohio, as many as 90 percent of children charged with criminal wrongdoing are not represented by a lawyer. As one public defender explained, "The kids come in with their parents, who want to get this dealt with as quickly as possible, and they say, 'You did it, admit it.' If people were informed about what could be done, they might actually ask for help."[69]

Bad Deal

Almost no one ever goes to trial. Nearly all criminal cases are resolved through plea bargaining—a guilty plea by the defendant in exchange for some form of leniency by the prosecutor. Though it is not widely known, the prosecutor is the most powerful law enforcement official in the criminal justice system. One might think that judges are the most powerful, or even the police, but in reality the prosecutor holds the cards. It is the prosecutor, far more than any other criminal justice official, who holds the keys to the jailhouse door.

After the police arrest someone, the prosecutor is in charge. Few rules constrain the exercise of his or her discretion. The prosecutor is free to dismiss a case for any reason or no reason at all. The prosecutor is also free to file more charges against a defendant than can realistically be proven in court, so long as probable cause arguably exists—a practice known as overcharging.

The practice of encouraging defendants to plead guilty to crimes, rather than affording them the benefit of a full trial, has always carried its risks and downsides. Never before in our history, though, have such an extraordinary number of people felt compelled to plead guilty, even if they are innocent, simply because the punishment for the minor, nonviolent offense with which they have been charged is so unbelievably severe. When prosecutors offer "only" three years in prison when the penalties defendants could receive if they took their case to trial would be five, ten, or twenty years—or life imprisonment—only extremely courageous (or foolish) defendents turn the offer down.

The pressure to plead guilty to crimes has increased exponentially since the advent of the War on Drugs. In 1986, Congress passed The Anti-Drug Abuse Act, which established extremely long mandatory minimum prison terms for low-level drug dealing and possession of crack cocaine. The typical mandatory sentence for a first-time drug offense in federal court is five or ten years. By contrast, in other developed countries around the world, a first-time drug offense would merit no more than six months in jail, if jail time is imposed at all.[70] State legislatures were eager to jump on the "get tough" bandwagon, passing harsh drug laws, as well as "three strikes" laws mandating a life sentence for those convicted of any third offense. These mandatory

minimum statutory schemes have transferred an enormous amount of power from judges to prosecutors. Now, simply by charging someone with an offense carrying a mandatory sentence of ten to fifteen years or life, prosecutors are able to force people to plead guilty rather than risk a decade or more in prison. Prosecutors admit that they routinely charge people with crimes for which they technically have probable cause but which they seriously doubt they could ever win in court.[71] They "load up" defendants with charges that carry extremely harsh sentences in order to force them to plead guilty to lesser offenses and—here's the kicker—to obtain testimony for a related case. Harsh sentencing laws encourage people to snitch.

The number of snitches in drug cases has soared in recent years, partly because the government has tempted people to "cooperate" with law enforcement by offering cash, putting them "on payroll," and promising cuts of seized drug assets, but also because ratting out co-defendants, friends, family, or acquaintances is often the only way to avoid a lengthy mandatory minimum sentence.[72] In fact, under the federal sentencing guidelines, providing "substantial assistance" is often the only way defendants can hope to obtain a sentence below the mandatory minimum. The "assistance" provided by snitches is notoriously unreliable, as studies have documented countless informants who have fabricated stories about drug-related and other criminal activity in exchange for money or leniency in their pending criminal cases.[73] While such conduct is deplorable, it is not difficult to understand. Who among us would not be tempted to lie if it was the only way to avoid a forty-year sentence for a minor drug crime?

The pressure to plea-bargain and thereby "convict yourself" in exchange for some kind of leniency is not an accidental by-product of the mandatory-sentencing regime. The U.S. Sentencing Commission itself has noted that "the value of a mandatory minimum sentence lies not in its imposition, but in its value as a bargaining chip to be given away in return for the resource-saving plea from the defendant to a more leniently sanctioned charge." Describing severe mandatory sentences as a bargaining chip is a major understatement, given its potential for extracting guilty pleas from people who are innocent of any crime.

It is impossible to know for certain how many innocent drug defendants convict themselves every year by accepting a plea bargain out of fear of mandatory sentences, or how many are convicted due to lying informants and paid witnesses, but reliable estimates of the number of innocent people currently in prison tend to range from 2 percent to 5 percent.[74] While those numbers may sound small (and probably are underestimates), they translate into thousands of innocent people who are locked up, some of whom will die in prison. In fact, if only 1 percent of America's prisoners are actually innocent of the crimes for which they have been convicted, that would mean tens of thousands of innocent people are currently languishing behind bars in the United States.

The real point here, however, is not that innocent people are locked up. That has been true since penitentiaries first opened in America. The critical point is that thousands of people are swept into the criminal justice system every year pursuant to the drug war without much regard for their guilt or innocence. The police are allowed by the courts to conduct fishing expeditions for drugs on streets and freeways based on nothing more than a hunch. Homes may be searched for drugs based on a tip from an unreliable, confidential informant who is trading the information for money or to escape prison time. And once swept inside the system, people are often denied attorneys or meaningful representation and pressured into plea bargains by the threat of unbelievably harsh sentences—sentences for minor drug crimes that are higher than many countries impose on convicted murderers. This is the way the roundup works, and it works this way in virtually every major city in the United States.

Time Served

Once convicted of felony drug charges, one's chances of being released from the system in short order are slim, at best. The elimination of judicial discretion through mandatory sentencing laws has forced judges to impose sentences for drug crimes that are often longer than those violent criminals receive. When judges have discretion, they may consider a defendant's background and impose a lighter penalty if the defendant's personal circumstances—extreme poverty or experience of abuse, for example—warrant it. This flexibility—which is important in all criminal cases—is especially important in drug cases, as studies have indicated that many drug defendants are using or selling to support an addiction.[75] Referring a defendant to treatment, rather than sending him or her to prison, may well be the most prudent choice—saving government resources and potentially saving the defendant

from a lifetime of addiction. Likewise, imposing a short prison sentence (or none at all) may increase the chances that the defendant will experience successful re-entry. A lengthy prison term may increase the odds that re-entry will be extremely difficult, leading to relapse, and re-imprisonment. Mandatory drug sentencing laws strip judges of their traditional role of considering all relevant circumstances in an effort to do justice in the individual case.

Nevertheless, harsh mandatory minimum sentences for drug offenders have been consistently upheld by the U.S. Supreme Court. In 1982, the Supreme Court upheld forty years of imprisonment for possession and an attempt to sell 9 ounces of marijuana.[76] Several years later, in *Harmelin v. Michigan*, the Court upheld a sentence of *life imprisonment* for a defendant with no prior convictions who attempted to sell 672 grams (approximately 23 ounces) of crack cocaine.[77] The Court found the sentences imposed in those cases "reasonably proportionate" to the offenses committed—and not "cruel and unusual" in violation of the Eighth Amendment. This ruling was remarkable given that, prior to the Drug Reform Act of 1986, the longest sentence Congress had ever imposed for possession of any drug in any amount was one year. A life sentence for a first-time drug offense is unheard of in the rest of the developed world. Even for high-end drug crimes, most countries impose sentences that are measured in months, rather than years. For example, a conviction for selling a kilogram of heroin yields a mandatory ten-year sentence in U.S. federal court, compared with six months in prison in England.[78] Remarkably, in the United States, a life sentence is deemed perfectly appropriate for a first-time drug offender.

The most famous Supreme Court decision upholding mandatory minimum sentences is *Lockyer v. Andrade*.[79] In that case, the Court rejected constitutional challenges to sentences of twenty-five years without parole for a man who stole three golf clubs from a pro shop, and fifty years without parole for another man for stealing children's videotapes from a Kmart store. These sentences were imposed pursuant to California's controversial three strikes law, which mandates a sentence of twenty-five years to life for recidivists convicted of a third felony, no matter how minor. Writing for the Court's majority, Justice Sandra Day O'Connor acknowledged that the sentences were severe but concluded that they are not grossly disproportionate to the offense, and therefore do not violate the Eighth Amendment's ban on "cruel

and unusual" punishments. In dissent, Justice David H. Souter retorted, "If Andrade's sentence [for stealing videotapes] is not grossly disproportionate, the principle has no meaning." Similarly, counsel for one of the defendants, University of Southern California law professor Erwin Chemerinsky, noted that the Court's reasoning makes it extremely difficult if not impossible to challenge any recidivist sentencing law: "If these sentences aren't cruel and unusual punishment, what would be?"[80]

Mandatory sentencing laws are frequently justified as necessary to keep "violent criminals" off the streets, yet these penalties are imposed most often against drug offenders and those who are guilty of nonviolent crimes. In fact, under three-strikes regimes, such as the one in California, a "repeat offender" could be someone who had a single prior case decades ago. First and second strikes are counted by individual charges, rather than individual cases, so a single case can result in first, second, and even third strikes. The prosecutor has the discretion to charge related but individual charges as separate strikes. For example, imagine a young man arrested at age seventeen for a school yard fight tried and convicted as an adult. A few years later, he is struggling to survive, having been branded a felon and unable to find work. He passes two bad checks, desperate for cash. That's three strikes: one for the prior assault and one for each bad check. His children will be raised without a father.

Or imagine a woman struggling with drug addiction, unable to obtain treatment, and desperate for money so she can feed her habit. She burglarizes a home and steals a television that she hopes to sell, but she is caught and arrested a few blocks away. She gets no jail time but also gets no drug treatment and now has a felony record. When she is caught with cocaine and heroin in her pocket a few months later, she has three strikes. One strike for each drug, and one for her prior felony. She will die in prison.

These examples may sound extreme, but real life can be worse. Sentences for each charge can run consecutively, so a defendant can easily face a sentence of fifty, seventy-five, or one hundred years to life arising from a single case. It is not uncommon for people to receive prison sentences of more than fifty years for minor crimes. In fact, fifty years to life was the actual sentence given to Leandro Andrade for stealing videotapes, a sentence upheld by the Supreme Court.

The clear majority of those subject to harsh mandatory minimum sentences in the federal system are drug offenders. Most are low-level, minor drug dealers—not "drug kingpins." The stories are legion. Marcus Boyd was arrested after selling 3.9 grams of crack cocaine to a confidential informant working with a regional drug task force. At the time of his arrest, Marcus was twenty-four years old and had been addicted to drugs for six years, beginning shortly after his mother's death and escalating throughout his early twenties. He met the informant through a close family friend, someone he trusted. At sentencing, the judge based the drug quantity calculation on testimony from the informant and another witness, who both claimed they bought crack from Marcus on other occasions. As a result, Marcus was held accountable for 37.4 grams (the equivalent of 1.3 ounces) based on the statements made by the informant and the other witness. He was sentenced to more than fourteen years in prison. His two children were six and seven years old at the time of his sentencing. They will be adults when he is released.[81]

Weldon Angelos is another casualty of the drug war. He will spend the rest of his life in prison for three marijuana sales. Angelos, a twenty-four-year-old record producer, possessed a weapon—which he did not use or threaten to use—at the time of the sales. Under federal sentencing guidelines, however, the sentencing judge was obligated to impose a fifty-five-year mandatory minimum sentence. Upon doing so, the judge noted his reluctance to send the young man away for life for three marijuana sales. He said from the bench, "The Court believes that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational."[82]

Some federal judges, including conservative judges, have quit in protest of federal drug laws and sentencing guidelines. Face-to-face with those whose lives hang in the balance, they are far closer to the human tragedy occasioned by the drug war than the legislators who write the laws from afar. Judge Lawrence Irving, a Reagan appointee, noted upon his retirement: "If I remain on the bench, I have no choice but to follow the law. I just can't, in good conscience, continue to do this."[83] Other judges, such as Judge Jack Weinstein, publicly refused to take any more drug cases, describing "a sense of depression about much of the cruelty I have been a party to in connection with the 'war on drugs.'"[84] Another Reagan appointee, Judge Stanley Marshall, told a reporter, "I've always been considered a fairly harsh sentencer, but it's killing me that I'm sending so many low-level offenders away for all this time."[85] He made the statement after imposing a five-year sentence on a mother in Washington, D.C., who was convicted of "possession" of crack found by police in a locked box that her son had hidden in her attic. In California, reporters described a similar event:

> U.S. District Judge William W. Schwarzer, a Republican appointee, is not known as a light sentencer. Thus it was that everyone in his San Francisco courtroom watched in stunned silence as Schwarzer, known for his stoic demeanor, choked with tears as he anguished over sentencing Richard Anderson, a first offender Oakland longshoreman, to ten years in prison without parole for what appeared to be a minor mistake in judgment in having given a ride to a drug dealer for a meeting with an undercover agent.[86]

Even Supreme Court Justice Anthony Kennedy has condemned the harsh mandatory minimum sentences imposed on drug offenders. He told attorneys gathered for the American Bar Association's 2003 annual conference: "Our [prison] resources are misspent, our punishments too severe, our sentences too loaded." He then added, "I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In all too many cases, mandatory minimum sentences are unjust."[87]

The Prison Label

Most people imagine that the explosion in the U.S. prison population during the past twenty-five years reflects changes in crime rates. Few would guess that our prison population leaped from approximately 350,000 to 2.3 million in such a short period of time due to changes in laws and policies, not changes in crime rates. Yet it has been changes in our laws—particularly the dramatic increases in the length of prison sentences—that have been responsible for the growth of our prison system, not increases in crime. One study suggests that the *entire* increase in the prison population from 1980 to 2001 can be explained by sentencing policy changes.[88]

Because harsh sentencing is a major cause of the prison explosion, one might reasonably assume that substantially reducing the length of prison

sentences would effectively dismantle this new system of control. That view, however, is mistaken. This system depends on the prison label, not prison time.

Once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits. It does not matter whether you have actually spent time in prison; your second-class citizenship begins the moment you are branded a felon. Most people branded felons, in fact, are not sentenced to prison. As of 2008, there were approximately 2.3 million people in prisons and jails, and a staggering 5.1 million people under "community correctional supervision"—i.e., on probation or parole.[89] Merely reducing prison terms does not have a major impact on the majority of people in the system. It is the badge of inferiority—the felony record—that relegates people for their entire lives, to second-class status. As described in chapter 4, for drug felons, there is little hope of escape. Barred from public housing by law, discriminated against by private landlords, ineligible for food stamps, forced to "check the box" indicating a felony conviction on employment applications for nearly every job, and denied licenses for a wide range of professions, people whose only crime is drug addiction or possession of a small amount of drugs for recreational use find themselves locked out of the mainstream society and economy—permanently.

No wonder, then, that most people labeled felons find their way back into prison. According to a Bureau of Justice Statistics study, about 30 percent of released prisoners in its sample were rearrested within six months of release.[90] Within three years, nearly 68 percent were rearrested at least once for a new offense.[91] Only a small minority are rearrested for violent crimes; the vast majority are rearrested for property offenses, drug offenses, and offenses against the public order.[92]

For those released on probation or parole, the risks are especially high. They are subject to regular surveillance and monitoring by the police and may be stopped and searched (with or without their consent) for any reason or no reason at all. As a result, they are far more likely to be arrested (again) than those whose behavior is not subject to constant scrutiny by law enforcement. Probationers and parolees are at increased risk of arrest because their lives are governed by additional rules that do not apply to everyone

else. Myriad restrictions on their travel and behavior (such as a prohibition on associating with other felons), as well as various requirements of probation and parole (such as paying fines and meeting with probation officers), create opportunities for arrest. Violation of these special rules can land someone right back in prison. In fact, that is what happens a good deal of the time.

The extraordinary increase in prison admissions due to parole and probation violations is due almost entirely to the War on Drugs. With respect to parole, in 1980, only 1 percent of all prison admissions were parole violators. Twenty years later, more than one third (35 percent) of prison admissions resulted from parole violations.[93] To put the matter more starkly: *About as many people were returned to prison for parole violations in 2000 as were admitted to prison in 1980 for all reasons.*[94] Of all parole violators returned to prison in 2000, only one-third were returned for a new conviction; two-thirds were returned for a technical violation such as missing appointments with a parole officer, failing to maintain employment, or failing a drug test.[95] In this system of control, failing to cope well with one's exile status is treated like a crime. If you fail, after being released from prison with a criminal record—your personal badge of inferiority—to remain drug free, or if you fail to get a job against all the odds, or if you get depressed and miss an appointment with your parole officer (or if you cannot afford the bus fare to take you there), you can be sent right back to prison—where society apparently thinks millions of Americans belong.

This disturbing phenomenon of people cycling in and out of prison, trapped by their second-class status, has been described by Loïc Wacquant as a "closed circuit of perpetual marginality."[96] Hundreds of thousands of people are released from prison every year, only to find themselves locked out of the mainstream society and economy. Most ultimately return to prison, sometimes for the rest of their lives. Others are released again, only to find themselves in precisely the circumstances they occupied before, unable to cope with the stigma of the prison label and their permanent pariah status.

Reducing the amount of time people spend behind bars—by eliminating harsh mandatory minimums—will alleviate some of the unnecessary suffering caused by this system, but it will not disturb the closed circuit. Those labeled felons will continue to cycle in and out of prison, subject to perpetual

surveillance by the police, and unable to integrate into the mainstream society and economy. Unless the number of people who are labeled felons is dramatically reduced, and unless the laws and policies that keep ex-offenders marginalized from the mainstream society and economy are eliminated, the system will continue to create and maintain an enormous undercaste.

84-96

1. What is the significance of Gideon v. Wainwright?
    a. How is it flawed?
2. What are plea bargains? How have they deprived some people of justice?
3. What are some problems and long-term effects of mandatory sentencing?
4. How have changes in sentencing policies led to an explosion in the prison population?
5. What are some problems with the prison label and recidivism?

3

The Color of Justice

Imagine you are Emma Faye Stewart, a thirty-year-old, single African American mother of two who was arrested as part of a drug sweep in Hearne, Texas.[1] All but one of the people arrested were African American. You are innocent. After a week in jail, you have no one to care for your two small children and are eager to get home. Your court-appointed attorney urges you to plead guilty to a drug distribution charge, saying the prosecutor has offered probation. You refuse, steadfastly proclaiming your innocence. Finally, after almost a month in jail, you decide to plead guilty so you can return home to your children. Unwilling to risk a trial and years of imprisonment, you are sentenced to ten years probation and ordered to pay $1,000 in fines, as well as court and probation costs. You are also now branded a drug felon. You are no longer eligible for food stamps; you may be discriminated against in employment; you cannot vote for at least twelve years; and you are about to be evicted from public housing. Once homeless, your children will be taken from you and put in foster care.

A judge eventually dismisses all cases against the defendants who did not plead guilty. At trial, the judge finds that the entire sweep was based on the testimony of a single informant who lied to the prosecution. You, however, are still a drug felon, homeless, and desperate to regain custody of your children.

Now place yourself in the shoes of Clifford Runoalds, another African American victim of the Hearne drug bust.[2] You returned home to Bryan, Texas, to attend the funeral of your eighteen-month-old daughter. Before the funeral services begin, the police show up and handcuff you. You beg the

Hollow Hope

One might imagine that the facts described above would provide grounds for a lawsuit challenging the Seattle Police Department's drug war tactics as a violation of the equal protection clause of the Fourteenth Amendment and demanding reform. After all, obtaining reform through the city council or state legislature may seem unlikely, for black "criminals" are perhaps the most despised minority in the U.S. population. Few politicians will leap at the opportunity to support black people labeled criminals. Accordingly, a lawsuit may seem like the best option. The purpose of our Constitution—especially the Fourteenth Amendment's equal-protection guarantee—is to protect minority rights even when, or especially when, they are unpopular. So shouldn't African American defendants be able to file a successful lawsuit demanding an end to these discriminatory practices or challenge their drug arrests on the grounds that these law enforcement practices are unlawfully tainted by race? The answer is yes, they should, but no, they probably can't.

As legal scholar David Cole has observed, "The Court has imposed nearly insurmountable barriers to persons challenging race discrimination at all stages of the criminal justice system."[92] The barriers are so high that few lawsuits are even filed, notwithstanding shocking and indefensible racial disparities. Procedural hurdles, such as the "standing requirement," have made it virtually impossible to seek reform of law enforcement agencies through the judicial process, even when the policies or practices at issue are illegal or plainly discriminatory.

Adolph Lyons's attempt to ban the use of lethal chokeholds by the Los Angeles Police Department (LAPD) is a good example. Lyons, a twenty-four-year-old black man, was driving his car in Los Angeles one morning when he was pulled over by four police officers for a burned-out taillight. With guns drawn, police ordered Lyons out of his car. He obeyed. The officers told him to face the car, spread his legs, and put his hands on his head. Again, Lyons did as he was told. After the officers completed a pat-down, Lyons dropped his hands, prompting an officer to slam Lyons's hands back on his head. When Lyons complained that the car keys he was holding were causing him pain, the officer forced Lyons into a chokehold. He lost consciousness and collapsed. When he awoke, "he was spitting up blood and dirt, had urinated

and defecated, and had suffered permanent damage to his larynx."[93] The officers issued a traffic ticket for the burned-out taillight and released him.

Lyons sued the City of Los Angeles for violation of his constitutional rights and sought, as a remedy, a ban against future use of the chokeholds. By the time his case reached the Supreme Court, sixteen people had been killed by police use of the chokehold, twelve of them black men. The Supreme Court dismissed the case, however, ruling that Lyons lacked "standing" to seek an injunction against the deadly practice. In order to have standing, the Court reasoned, Lyons would have to show that he was highly likely to be subject to a chokehold again.

Lyons argued that, as a black man, he had good reason to fear he would be stopped by the police for a minor traffic violation and subjected to a chokehold again. He had done nothing to provoke the chokehold; to the contrary, he had obeyed instructions and cooperated fully. Why wouldn't he believe he was at risk of being stopped and choked again? The Court, however, ruled that in order to have standing

> Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they have an encounter, whether for the purpose of arrest, issuing a citation or for questioning, or (2) that the City ordered or authorized the police to act in such a manner.[94]

Lyons did not allege race discrimination, but if he had, that claim would almost certainly have been a loser too. The Court's ruling in *Lyons* makes it extremely difficult to challenge systemic race discrimination in law enforcement and obtain meaningful policy reform. For example, African Americans in Seattle who hope to end the Seattle police department's discriminatory tactics through litigation would be required to prove that they plan to violate drug laws and that they will almost certainly face race discrimination by Seattle police officers engaged in drug-law enforcement, in order to have standing to seek reform—i.e., just to get in the courthouse door.

It is worthy of note that the *Lyons* standard does not apply to suits for damages. But any suggestion that litigants need not worry about policy reform because they can always sue for damages would be disingenuous—particularly as applied to race discrimination cases. Why? Neither the state

nor the state police can be sued for damages. In a series of cases, the Supreme Court has ruled that the state and its offices are immune from federal suits for damages under the Eleventh Amendment to the Constitution (unless they consent), and the state can't be sued for damages for constitutional violations in state court either.[95] City police departments, like the LAPD, are also typically off limits. The Court has ruled that a city police department cannot be sued for damages unless a specific city policy or custom can be identified authorizing the illegal practice.[96] Most cities, of course, do not have policies specifically authorizing illegal conduct (particularly race discrimination), and "custom" is notoriously difficult to prove. Accordingly, suing a city police department for damages is generally not an option. Yet even if all of those hurdles can somehow be overcome, there is still the matter of proving a claim of race discrimination. As we have seen, to establish an equal-protection violation, one must prove *intentional* discrimination—conscious racial bias. Law enforcement officials rarely admit to having acted for racial reasons, leaving most victims of discriminatory law enforcement without anyone to sue and without a claim that can be proven in a court of law. But even if a plaintiff managed to overcome all of the procedural hurdles and prove that a police officer deliberately exercised his or her discretion on the basis of race, that still might not be enough.

Race as a Factor

The dirty little secret of policing is that the Supreme Court has actually granted the police license to discriminate. This fact is not advertised by police departments, because law enforcement officials know that the public would not respond well to this fact in the era of colorblindness. It is the sort of thing that is better left unsaid. Civil rights lawyers—including those litigating racial profiling cases—have been complicit in this silence, fearing that any acknowledgment that race-based policing is authorized by law would legitimate in the public mind the very practice they are hoping to eradicate.

The truth, however, is this: At other stages of the criminal justice process, the Court has indicated that overt racial bias necessarily triggers strict scrutiny—a concession that has not been costly, as very few law enforcement officials today are foolish enough to admit bias openly. But the Supreme Court has indicated that in policing, race *can* be used as a factor in

discretionary decision making. In *United States v. Brignoni-Ponce*, the Court concluded it was permissible under the equal protection clause of the Fourteenth Amendment for the police to use race as a factor in making decisions about which motorists to stop and search. In that case, the Court concluded that the police could take a person's Mexican appearance into account when developing reasonable suspicion that a vehicle may contain undocumented immigrants. The Court said that "the likelihood that any person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."[97] Some commentators have argued that *Brignoni-Ponce* may be limited to the immigration context; the Court might not apply the same principle to drug-law enforcement. It is not obvious what the rational basis would be for limiting overt race discrimination by police to immigration. The likelihood that a person of Mexican ancestry is an "alien" could not be significantly higher than the likelihood that any random black person is a drug criminal.

The Court's quiet blessing of race-based traffic stops has led to something of an Orwellian public discourse regarding racial profiling. Police departments and highway patrol agencies frequently declare, "We do not engage in racial profiling," even though their officers routinely use race as a factor when making decisions regarding whom to stop and search. The justification for the implicit doublespeak—"we do not racial-profile; we just stop people based on race"—can be explained in part by the Supreme Court's jurisprudence. Because the Supreme Court has authorized the police to use race as a factor when making decisions regarding whom to stop and search, police departments believe that racial profiling exists only when race is the *sole* factor. Thus, if race is one factor but not the only factor, then it doesn't really count as a factor at all.

The absurdity of this logic is evidenced by the fact that police almost never stop anyone solely because of race. A young black male wearing baggy pants, standing in front of his high school surrounded by a group of similarly dressed black friends, may be stopped and searched because police believe he "looks like" a drug dealer. Clearly, race is not the only reason for that conclusion. Gender, age, attire, and location play a role. The police would likely ignore an eighty-five-year-old black man standing in the same spot surrounded by a group of elderly black women.

The problem is that although race is rarely the sole reason for a stop or search, it is frequently a *determinative* reason. A young white male wearing

baggy pants, standing in front of his high school and surrounded by his friends, might well be ignored by police officers. It might never occur to them that a group of young white kids might be dealing dope in front of their high school. Similarly situated people inevitably are treated differently when police are granted permission to rely on racial stereotypes when making discretionary decisions.

Equally important, though, the sole-factor test ignores the ways in which seemingly race-neutral factors—such as location—operate in a highly discriminatory fashion. Some law enforcement officials claim that they would stop and search white kids wearing baggy jeans in the ghetto (that would be suspicious)—it just so happens they're rarely there. Subjecting people to stops and searches because they live in "high crime" ghettos cannot be said to be truly race-neutral, given that the ghetto itself was constructed to contain and control groups of people defined by race.[98] Even seemingly race-neutral factors such as "prior criminal history" are not truly race-neutral. A black kid arrested twice for possession of marijuana may be no more of a repeat offender than a white frat boy who regularly smokes pot in his dorm room. But because of his race and his confinement to a racially segregated ghetto, the black kid has a criminal record, while the white frat boy, because of his race and relative privilege, does not. Thus, when prosecutors throw the book at black repeat offenders or when police stalk ex-offenders and subject them to regular frisks and searches on the grounds that it makes sense to "watch criminals closely," they are often exacerbating racial disparities created by the discretionary decision to wage the War on Drugs almost exclusively in poor communities of color.

Defending against claims of racial bias in policing is easy. Because race is never the only reason for a stop or search, any police officer with a fifth-grade education will be able to cite multiple nonracial reasons for initiating an encounter, including any number of the so-called "indicators" of drug trafficking discussed in chapter 2, such as appearing too nervous or too calm. Police officers (like prosecutors) are highly adept at offering race-neutral reasons for actions that consistently disadvantage African Americans. Whereas prosecutors claim they strike black jurors not because of their race but because of their hairstyle, police officers have their own stock excuses—e.g., "Your honor, we didn't stop him because he's black; we stopped him because he failed to use his turn signal at the right time," or "It wasn't just because he was black; it was also because he seemed nervous when he saw

the police car." Judges are just as reluctant to second-guess an officer's motives as they are to second-guess prosecutors'. So long as officers refrain from uttering racial epithets and so long as they show the good sense not to say "the only reason I stopped him was 'cause he's black," courts generally turn a blind eye to patterns of discrimination by the police.

Studies of racial profiling have shown that police do, in fact, exercise their discretion regarding whom to stop and search in the drug war in a highly discriminatory manner.[99] Not only do police discriminate in their determinations regarding where to wage the war, but they also discriminate in their judgments regarding whom to target outside of the ghetto's invisible walls.

The most famous of these studies were conducted in New Jersey and Maryland in the 1990s. Allegations of racial profiling in federally funded drug interdiction operations resulted in numerous investigations and comprehensive data demonstrating a dramatic pattern of racial bias in highway patrol stops and searches. These drug interdiction programs were the brainchild of the DEA, part of the federally funded program known as Operation Pipeline.

In New Jersey, the data showed that only 15 percent of all drivers on the New Jersey Turnpike were racial minorities, yet 42 percent of all stops and 73 percent of all arrests were of black motorists—despite the fact that blacks and whites violated traffic laws at almost exactly the same rate. While radar stops were relatively consistent with the percentage of minority violators, discretionary stops made by officers involved in drug interdiction resulted in double the number of stops of minorities.[100] A subsequent study conducted by the attorney general of New Jersey found that searches on the turnpike were even more discriminatory than the initial stops—77 percent of all consent searches were of minorities. The Maryland studies produced similar results: African Americans comprised only 17 percent of drivers along a stretch of I-95 outside of Baltimore, yet they were 70 percent of those who were stopped and searched. Only 21 percent of all drivers along that stretch of highway were racial minorities (Latinos, Asians, and African Americans), yet those groups comprised nearly 80 percent of those pulled over and searched.[101]

What most surprised many analysts was that, in both studies, whites were actually *more likely* than people of color to be carrying illegal drugs or contraband in their vehicles. In fact, in New Jersey, whites were almost twice as likely to be found with illegal drugs or contraband as African Americans, and five times as likely to be found with contraband as Latinos.[102] Although

whites were more likely to be guilty of carrying drugs, they were far less likely to be viewed as suspicious, resulting in relatively few stops, searches, and arrests of whites. The former New Jersey attorney general dubbed this phenomenon the "circular illogic of racial profiling." Law enforcement officials, he explained, often point to the racial composition of our prisons and jails as a justification for targeting racial minorities, but the empirical evidence actually suggested the opposite conclusion was warranted. The disproportionate imprisonment of people of color was, in part, a product of racial profiling—not a justification for it.

In the years following the release of the New Jersey and Maryland data, dozens of other studies of racial profiling have been conducted. A brief sampling:

- In Volusia County, Florida, a reporter obtained 148 hours of video footage documenting more than 1,000 highway stops conducted by state troopers. Only 5 percent of the drivers on the road were African American or Latino, but more than 80 percent of the people stopped and searched were minorities.[103]
- In Illinois, the state police initiated a drug interdiction program known as Operation Valkyrie that targeted Latino motorists. While Latinos comprised less than 8 percent of the Illinois population and took fewer than 3 percent of the personal vehicle trips in Illinois, they comprised approximately 30 percent of the motorists stopped by drug interdiction officers for discretionary offenses, such as failure to signal a lane change.[104] Latinos, however, were significantly less likely than whites to have illegal contraband in their vehicles.
- A racial profiling study in Oakland, California, in 2001 showed that African Americans were approximately twice as likely as whites to be stopped, and three times as likely to be searched.[105]

Pedestrian stops, too, have been the subject of study and controversy. The New York Police Department released statistics in February 2007 showing that during the prior year its officers stopped an astounding 508,540 people—an average of 1,393 per day—who were walking down the street, perhaps on their way to the subway, grocery store, or bus stop. Often the stops included searches for illegal drugs or guns—searches that frequently required people to lie face down on the pavement or stand spread-eagled against a wall while

police officers aggressively groped all over their bodies while bystanders watched or walked by. The vast majority of those stopped and searched were racial minorities, and more than half were African American.[106]

The NYPD began collecting data on pedestrian stops following the shooting of Amadou Diallo, an African immigrant who died in a hail of police bullets on the front steps of his own home in February 1999. Diallo was followed to his apartment building by four white police officers—members of the elite Street Crime Unit—who viewed him as suspicious and wanted to interrogate him. They ordered him to stop, but, according to the officers, Diallo did not respond immediately. He walked a bit farther to his apartment building, opened the door, and retrieved his wallet—probably to produce identification. The officers said they thought the wallet was a gun, and fired forty-one times. Amadou Diallo died at the age of twenty-two. He was unarmed and had no criminal record.

Diallo's murder sparked huge protests, resulting in a series of studies commissioned by the attorney general of New York. The first study found that African Americans were stopped six times more frequently than whites, and that stops of African Americans were less likely to result in arrests than stops of whites—presumably because blacks were less likely to be found with drugs or other contraband.[107] Although the NYPD attempted to justify the stops on the grounds that they were designed to get guns off the street, stops by the Street Crime Unit—the group of officers who supposedly are specially trained to identify gun-toting thugs—yielded a weapon in only 2.5 percent of all stops.[108]

Rather than reducing reliance on stop-and-frisk tactics following the Diallo shooting and the release of this disturbing data, the NYPD dramatically *increased* its number of pedestrian stops and continued to stop and frisk African Americans at grossly disproportionate rates. The NYPD stopped five times more people in 2005 than in 2002—the overwhelming majority of whom were African American or Latino.[109] By 2008, the NYPD was stopping 545,000 in a single year, and 80 percent of the people stopped were African Americans and Latinos. Whites comprised a mere 8 percent of people frisked by the NYPD, while African Americans accounted for 85 percent of all frisks.[110] A report by the *New York Times* found that the highest concentration of stops in the city was a roughly eight-block area of Brownsville, Brooklyn, that was predominately black. Residents there were stopped at a rate thirteen times the city average.[111]

Although the NYPD frequently attempts to justify stop-and-frisk operations in poor communities of color on the grounds that such tactics are necessary to get guns off the streets, less than 1 percent of stops (0.15 percent) resulted in guns being found, and guns and other contraband were seized less often in stops of African Americans and Latinos than of whites.[112] As Darius Charney, a lawyer for the Center for Constitutional Rights, observed, these studies "confirm what we have been saying for the last 10 or 11 years, which is that with stop-and-frisk patterns—it is really race, not crime, that is driving this."[113]

Ultimately, these stop-and-frisk operations amount to much more than humiliating, demeaning rituals for young men of color, who must raise their arms and spread their legs, always careful not to make a sudden move or gesture that could provide an excuse for brutal—even lethal—force. Like the days when black men were expected to step off the sidewalk and cast their eyes downward when a white woman passed, young black men know the drill when they see the police crossing the street toward them; it is a ritual of dominance and submission played out hundreds of thousands of times each year. But it is more than that. These routine encounters often serve as the gateway into the criminal justice system. The NYPD made 50,300 marijuana arrests in 2010 alone, mostly of young men of color. As one report noted, these marijuana arrests offer "training opportunities" for rookie police who can practice on ghetto kids while earning overtime.[114] These arrests serve another purpose as well: they "are the most effective way for the NYPD to collect fingerprints, photographs and other information on young people not yet entered into the criminal databases."[115] A simple arrest for marijuana possession can show up on criminal databases as "a drug arrest" without specifying the substance or the charge, and without clarifying even whether the person was convicted. These databases are then used by police and prosecutors, as well as by employers and housing officials—an electronic record that will haunt many for life. More than 353,000 people were arrested and jailed by the NYPD between 1997 and 2006 for simple possession of small amounts of marijuana, with blacks five times more likely to be arrested than whites.[116]

In Los Angeles, mass stops of young African American men and boys resulted in the creation of a database containing the names, addresses, and other biographical information of the overwhelming majority of young black men in the entire city. The LAPD justified its database as a tool for tracking gang or

"gang-related" activity. However, the criterion for inclusion in the database is notoriously vague and discriminatory. Having a relative or friend in a gang and wearing baggy jeans is enough to put youth on what the ACLU calls a Black List. In Denver, displaying any two of a list of attributes—including slang, "clothing of a particular color," pagers, hairstyles, or jewelry—earns youth a spot in the Denver Police's gang database. In 1992, citizen activism led to an investigation, which revealed that eight out of every ten people of color in the entire city were on the list of suspected criminals.[117]

The End of an Era

The litigation that swept the nation in the 1990s challenging racial profiling practices has nearly vanished. The news stories about people being stopped and searched on their way to church or work or school have faded from the evening news. This is not because the problem has been solved or because the experience of being stopped, interrogated, and searched on the basis of race has become less humiliating, alienating, or demoralizing as time has gone by. The lawsuits have disappeared because, in a little noticed case called *Alexander v. Sandoval*, decided in 2001, the Supreme Court eliminated the last remaining avenue available for challenging racial bias in the criminal justice system.[118]

Sandoval was not, on its face, even about criminal justice. It was a case challenging the Alabama Department of Public Safety's decision to administer state driver's license examinations only in English. The plaintiffs argued that the department's policy violated Title VI of the Civil Rights Act of 1964 and its implementing regulations, because the policy had the effect of subjecting non-English speakers to discrimination based on their national origin. The Supreme Court did not reach the merits of the case, ruling instead that the plaintiffs lacked the legal right even to file the lawsuit. It concluded that Title VI does not provide a "private right of action" to ordinary citizens and civil rights groups; meaning that victims of discrimination can no longer sue under the law.

The *Sandoval* decision virtually wiped out racial profiling litigation nationwide. Nearly all of the cases alleging racial profiling in drug-law enforcement were brought pursuant to Title VI of the Civil Rights Act of 1964 and its implementing regulations. Title VI prohibits federally funded programs

or activities from discriminating on the basis of race, and the regulations employ a "disparate impact test" for discrimination—meaning that plaintiffs could prevail in claims of race discrimination without proving discriminatory intent. Under the regulations, a federally funded law enforcement program or activity is unlawful if it has a racially discriminatory impact and if that impact cannot be justified by law enforcement necessity. Because nearly all law enforcement agencies receive federal funding in the drug war, and because drug war tactics—such as pretext stops and consent searches—have a grossly discriminatory impact and are largely ineffective, plaintiffs were able to argue persuasively that the tactics could not be justified by law enforcement necessity.

In 1999, for example, the ACLU of Northern California filed a class action lawsuit against the California Highway Patrol (CHP), alleging that its highway drug interdiction program violated Title VI of the Civil Rights Act because it relied heavily on discretionary pretext stops and consent searches that are employed overwhelmingly against African American and Latino motorists. During the course of the litigation, the CHP produced data that showed African Americans were twice as likely, and Latinos three times as likely, to be stopped and searched by its officers as were whites. The data further showed that consent searches were ineffective; only a tiny percentage of the discriminatory searches resulted in the discovery of drugs or other contraband, yet thousands of black and brown motorists were subjected to baseless interrogations, searches, and seizures as a result of having committed a minor traffic violation. The CHP entered into a consent decree that provided for a three-year moratorium on consent searches and pretext stops statewide and the collection of comprehensive data on the race and ethnicity of motorists stopped and searched by the police, so that it would be possible to determine whether discriminatory practices were continuing. Similar results were obtained in New Jersey, as a result of landmark litigation filed against the New Jersey State Police. After *Sandoval*, these cases can no longer be brought under Title VI by private litigants. Only the federal government can sue to enforce Title VI's antidiscrimination provisions—something it has neither the inclination nor the capacity to do in most racial profiling cases due to its limited resources and institutional reluctance to antagonize local law enforcement. Since the War on Drugs, private litigants represented by organizations such as the ACLU have been at the forefront of racial profiling litigation. Those days, however, have come to an end. The racial profil-

ing cases that swept the nation in the 1990s may well be the last wave of litigation challenging racial bias in the criminal justice system that we see for a very long time.

The Supreme Court has now closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches to plea bargaining and sentencing. The system of mass incarceration is now, for all practical purposes, thoroughly immunized from claims of racial bias. Staggering racial disparities in the drug war continue but rarely make the news. One recent development that did make news was President Obama's decision to sign legislation reducing the hundred-to-one disparity in sentencing for crack versus powder cocaine to eighteen to one, a small step in the right direction.[119] Under the new law, it takes 28 grams of crack cocaine to net a five-year mandatory minimum sentence, while it still takes selling 500 grams of powdered cocaine to net the same sentence. There should be no disparity—the ratio should be one-to-one. But that disparity is just the tip of the iceberg. As noted in chapter 2, this system depends primarily on the prison label, not prison time. What matters most is who gets swept into this system of control and then ushered into an undercaste. The legal rules adopted by the Supreme Court guarantee that those who find themselves locked up and permanently locked out due to the drug war are overwhelmingly black and brown.

1. Explain how racial profiling has been made legally acceptable. Give three examples.
2. What has been the role of the Supreme Court in allowing racial profiling?
3. What is your reaction to the traffic stop studies?
    a. Is this valid evidence of discrimination?
    b. If this pattern is widespread, what will be the long-term results?
4. Explain the justification for stop and frisk. Do you think the policy is well-justified?
5. How do you explain that 80% of people of color in Los Angeles were on criminal suspect lists in 1992?