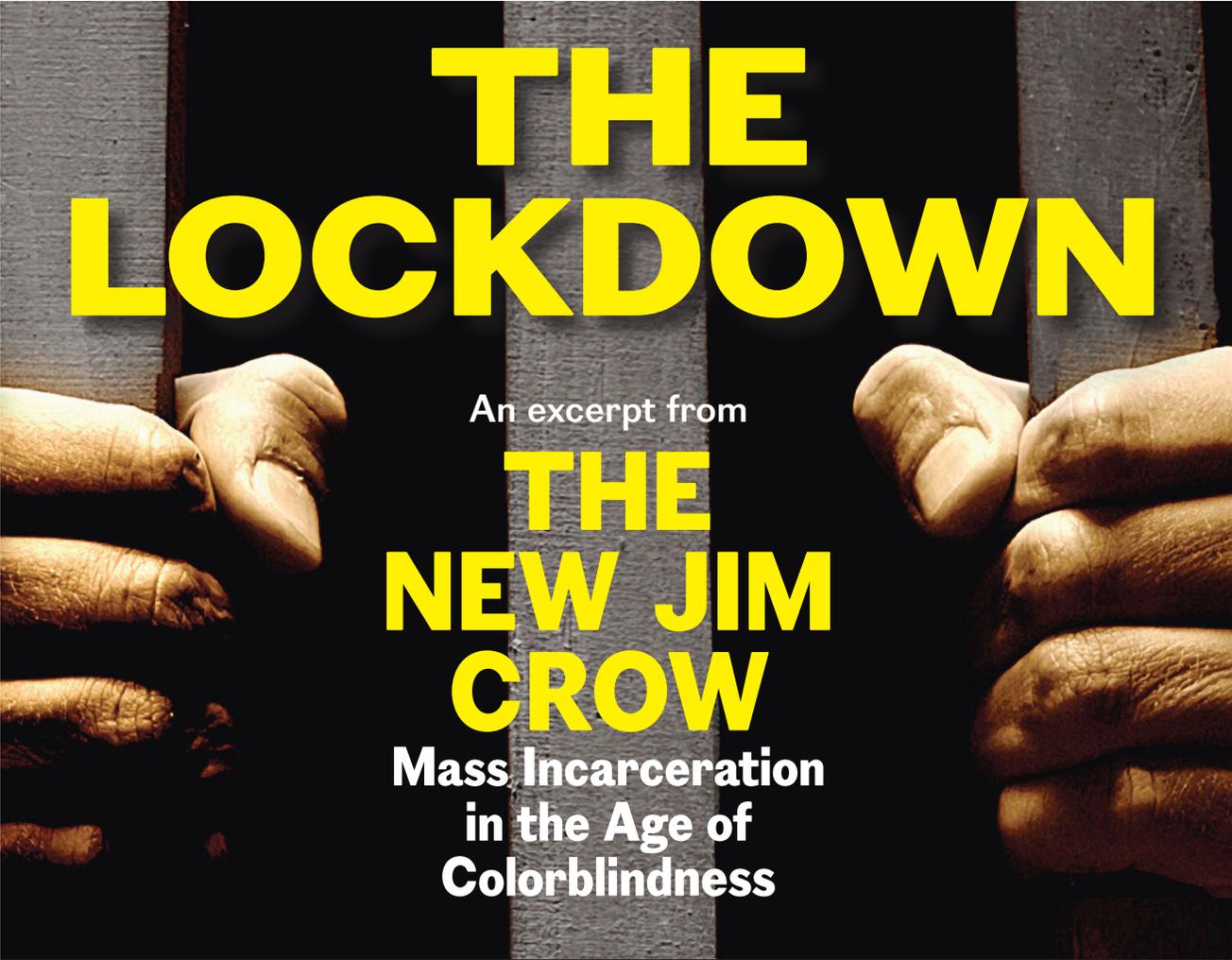


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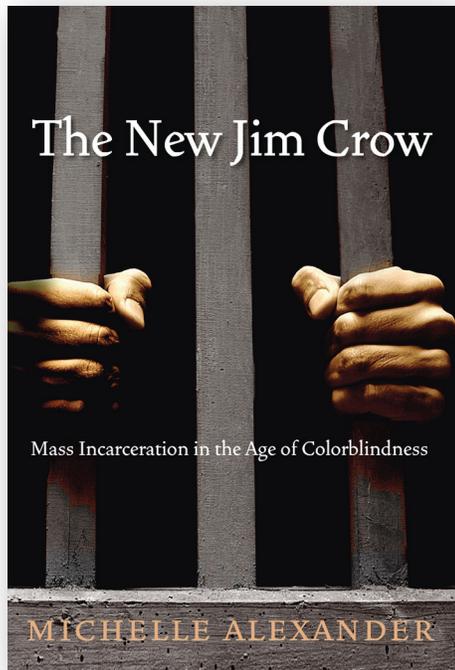
**THE  
LOCKDOWN**

An excerpt from

**THE  
NEW JIM  
CROW**

Mass Incarceration  
in the Age of  
Colorblindness

**MICHELLE ALEXANDER**



## THE AUTHOR

A long-time civil rights advocate and litigator, **Michelle Alexander** was a 2005 Soros Justice Fellow. She lives outside Columbus, Ohio, and holds a joint appointment at the Maritz College of Law and the Kirwan Institute for the Study of Race and Ethnicity. Alexander served for several years as director of the Racial Justice Unit at the ACLU of Northern California, which spearheaded a national campaign against racial profiling. **The New Jim Crow** is her first book.

## THE BOOK

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# ColdType

WRITING WORTH READING FROM AROUND THE WORLD

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# THE LOCKDOWN

An excerpt from

## THE NEW JIM CROW

Mass Incarceration in the  
Age of Colorblindness

MICHELLE ALEXANDER

**W**e 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**

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. 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. 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. 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.

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. 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



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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.

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 non-violent 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.

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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 underway. 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:



**Virtually all constitutionally protected civil liberties have been undermined by the drug war**

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.

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.” 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.” 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



**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**

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.

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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 officking 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.

Never do the traffickers 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. 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.

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



**The Court made clear that its decision was to govern all future drug sweeps, no matter what the circumstances of the targeted individual**

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.

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.

Prior to the *Bostick* decision, a number of lower courts had found absurd the no-

tion 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.” 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.” 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.” 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. 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.” In other words, consent



**Other courts emphasized that granting police the freedom to stop, interrogate, and search anyone who consented would likely lead to racial and ethnic discrimination**

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 for drugs just about anybody walking down the street. 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 please put your hands 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 plain-

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clothes 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



**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**

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 violations and throw them in jail (even if the statutory penalty for the 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 officestops, 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



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not trigger Fourth Amendment scrutiny. 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.

### **Kissing Frogs**

Court cases involving drug-law enforcement almost always involve guilty people. Police usually release the innocent on the street – often without a ticket, citation, or even an apology – so their stories are rarely heard in court. Hardly anyone files a complaint, because the last thing most people want to do after experiencing a frightening and intrusive encounter with the police is show up at the police station where the officer works and attract more attention to themselves. For good reason, many people – especially poor people of color – fear police harassment, retaliation, and abuse. After having your car torn apart by the police in a futile search for drugs, or being forced to lie spread-eagled on the pavement while the police search you and interrogate you for no reason at all, how much confidence do you have in law enforcement? Do you expect to get a fair hearing? Those who try to find an attorney to represent them in a lawsuit often learn that unless they have broken bones (and no criminal record), private attorneys are unlikely to be interested in their case. Many people are shocked to discover that what happened to them on the side of the road was not, in fact, against the law.

The inevitable result is that the people who wind up in front of a judge are usually guilty of some crime. The parade of guilty people through America’s courtrooms

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gives the false impression to the public – as well as to judges – that when the police have a “hunch,” it makes sense to let them act on it. Judges tend to imagine the police have a sixth sense – or some kind of special police training – that qualifies them to identify drug criminals in the absence of any evidence. After all, they seem to be right so much of the time, don’t they?

The truth, however, is that most people stopped and searched in the War on Drugs are perfectly innocent of any crime. The police have received no training that enhances the likelihood they will spot the drug criminals as they drive by and leave everyone else alone. To the contrary, tens of thousands of law enforcement officers have received training that guarantees precisely the opposite. The Drug Enforcement Agency (DEA) trains police to conduct utterly unreasonable and discriminatory stops and searches throughout the United States.

Perhaps the best known of these training programs is Operation Pipeline. The DEA launched Operation Pipeline in 1984 as part of the Reagan administration’s roll-out of the War on Drugs. The federal program, administered by over three hundred state and local law enforcement agencies, trains state and local law enforcement officers to use pretextual offic stops and consent searches on a large scale for drug interdiction. Officers learn, among other things, how to use a minor traffic violation as a pretext to stop someone, how to lengthen a routine offic stop and leverage it into a search for drugs, how to obtain consent from a reluctant motorist, and how to use drug-sniffing dogs to obtain probable cause. By 2000, the DEA had directly trained more than 25,000 officers in forty-eight states in Pipeline tactics and helped to develop training words, “Operation Pipeline is exactly what the Framers



**Judges tend to imagine the police have a sixth sense – or some kind of special police training – that qualifies them to identify drug criminals in the absence of any evidence. After all, they seem to be right so much of the time, don’t they?**

meant to prohibit: a federally-run general search program that targets people without cause for suspicion, particularly those who belong to disfavored groups.”

The program’s success requires police to stop “staggering” numbers of people in shotgun fashion. This “volume” approach to drug enforcement sweeps up extraordinary numbers of innocent people. As one California Highway Patrol Trafficer said, “It’s sheer numbers. . . . You’ve got to kiss a lot of frogs before you find a prince.” Accordingly, every year, tens of thousands of motorists find themselves stopped on the side of the road, fielding questions about imaginary drug activity, and then succumbing to a request for their vehicle to be searched – sometimes torn apart – in the search for drugs. Most of these stops and searches are futile. It has been estimated that 95 percent of Pipeline stops yield no illegal drugs. One study found that up to 99 percent of traffic stops made by federally funded narcotics task forces result in no citation and that 98 percent of task-force searches during traffic stops are discretionary searches in which the officer searches the car with the driver’s verbal “consent” but has no other legal authority to do so.

The “drug-courier profiles” utilized by the DEA and other law enforcement agencies for drug sweeps on highways, as well as in airports and train stations, are notoriously unreliable. In theory, a drug-courier profile reflects the collective wisdom and judgment of a law enforcement agency’s officials. Instead of allowing each officer to rely on his or her own limited experience and biases in detecting suspicious behavior, a drug-courier profile affords every officer the advantage of the agency’s collective experience and expertise. However, as legal scholar David Cole has observed, “in practice, the drug-cou-

rier profile is a scattershot hodgepodge of traits and characteristics so expansive that it potentially justifies stopping anybody and everybody.” The profile can include traveling with luggage, traveling without luggage, driving an expensive car, driving a car that needs repairs, driving with out-of-state license plates, driving a rental car, driving with “mismatched occupants,” acting too calm, acting too nervous, dressing casually, wearing expensive clothing or jewelry, being one of the first to deplane, being one of the last to deplane, deplaning in the middle, paying for a ticket in cash, using large-denomination currency, using small-denomination currency, traveling alone, traveling with a companion, and so on. Even striving to obey the law fits the profile! The Florida Highway Patrol Drug Courier Profile cautioned troopers to be suspicious of “scrupulous obedience to laws.” As Cole points out, “such profiles do not so much focus an investigation as provide law enforcement officials a ready-made excuse for stopping whomever they please.”

The Supreme Court has allowed use of drug-courier profiles as guides for the exercise of police discretion. Although it has indicated that the mere fact that someone fits a profile does not automatically constitute reasonable suspicion justifying a stop, courts routinely defer to these profiles, and the Court has yet to object. As one judge said after conducting a review of drug courier profile decisions: “Many courts have accepted the profile, as well as the Drug Enforcement Agency’s scattershot enforcement efforts, unquestioningly, mechanistically, and dispositively.”

### **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,



**The Florida Highway Patrol Drug Courier Profile cautioned troopers to be suspicious of “scrupulous obedience to laws.”**

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.

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, alization of drug crime violated the *con ser va tive* 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

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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. In fact, it is questionable whether any specialized drug enforcement activity would exist in



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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 drugwar 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. 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.” A retired police chief in New Haven, Connecticut, told the *New York Times*, “I was offered tanks, bazookas, anything I wanted.”

### 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 mili-

tary 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.

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.”

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. The escalation of military force was quite dramatic in cities throughout the United States. In the city of Minneapolis, Minnesota, for exam-



**Para military units (most commonly called Special Weapons and Tactics, or SWAT, teams) were quickly formed in virtually every major city to fight the drug war.**

ple, 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.

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. 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 ar-

## LOCKDOWN

rest 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."

Even in small towns, such as those in Dodge County, Wisconsin, SWAT teams treat routine searches for narcotics as a major battlefield 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.

SWAT raids have not been limited to homes, apartment buildings, or public housing projects. Public high schools have



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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 bullet-proof 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 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.

## 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



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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.”

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 MADOFF MOMENT

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



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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.<sup>47</sup> 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. Federal drug forfeiture laws are one reason, Blumenson and Nielsen 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.”

# WRITING WORTH READING FROM AROUND THE WORLD

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