



THE NEW JIM CROW by Michelle Alexander

CHAPTER 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*. 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.

BOOK
EXCERPT

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.

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. More than 31 million people have been arrested for drug offenses since the drug war began.¹ 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 1980.² 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.³

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.⁴

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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.⁵

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.

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.

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.

Until the War on Drugs, courts had been fairly stringent about enforcing the Fourth Amendment's requirements.

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.

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.”⁶ 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.”⁷ 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. 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.

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.

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 ... 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?

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 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.

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 rollout of the War on Drugs. Officers learn, among other things, how to use a minor traffic violation as a pretext to stop someone, how to lengthen a routine traffic 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.⁸

The program's success requires police to stop “staggering” numbers of people in shotgun fashion.⁹ This “volume” approach to drug enforcement sweeps up extraordinary numbers of innocent people. As one California Highway Patrol Officer said, “It's sheer numbers. ... You've got to kiss a lot of frogs before you find a prince.”¹⁰ 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. It has been estimated that 95 percent of Pipeline stops yield no illegal drugs.¹¹

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. 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 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.

It Pays to Play

[I]t 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.

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 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 ... 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.

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.

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.

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. [P]ara 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.¹²

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.

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.

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.

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.

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. 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.

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.¹³ 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

[I]n *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.¹⁴ 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.

Mandatory sentencing laws are frequently justified as necessary to keep “violent criminals” off the streets, yet those penalties are imposed most often against drug offenders and those who are guilty of nonviolent crimes. In fact, under the three-strikes regime in California, a “repeat offender” could be someone who had only a single prior case decades ago, and one arrest can result in multiple strikes. For example, imagine a young man, eighteen years old, who is arrested as part of an undercover operation and charged with two counts of dealing cocaine to minors. He had been selling to friends to earn extra money for shoes and basic things his mother could not afford. The prosecutor offers him probation if he agrees to plead guilty to both charges and to snitch on a bigger dealer. Terrified of doing prison time, he takes the deal. Several years later, he finds his punishment will never end. Branded a felon, he is struggling to survive and to support his children. One night he burglarizes a corner store and steals food, toothpaste, Pepsi, and diapers for his baby boy. He is arrested almost immediately a few blocks away. That's it for him. He now has three strikes. His burglary can be charged as a third strike because of his two prior felony convictions. He is eligible for life imprisonment. His children will be raised without a father.

The Prison Label

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.¹⁵

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.

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.¹⁶ 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.

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.

Endnotes

1 Marc Mauer and Ryan King, *A 25-Year Quagmire: The “War on Drugs” and Its Impact on American Society* (Washington, DC: Sentencing Project, 2007), 3.

2 Testimony of Marc Mauer, Executive Director of the Sentencing Project, Prepared for the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, 111th Cong., *Hearing on Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?* May 21, 2009, 2.

3 Mauer and King, *A 25-Year Quagmire*, 2–3.

4 Ibid.; and Ryan King and Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s* (New York: Sentencing Project, 2005), documenting the dramatic increase in marijuana arrests. Marijuana is a relatively harmless drug.

The 1988 surgeon general's report lists tobacco as a more dangerous drug than marijuana, and Francis Young, an administrative law judge for the Drug Enforcement Administration found there are no credible medical reports to suggest that consuming marijuana, in any dose, has ever caused a single death. U.S. Department of Justice, Drug Enforcement Administration, Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge Francis L. Young, in the *Matter of Marijuana Rescheduling Petition*, Docket no. 86-22, Sept. 6, 1988, 56–57. By comparison, tobacco kills roughly 390,000 Americans annually, and alcohol is responsible for some 150,000 U.S. deaths a year. See Doug Bandow, "War on Drugs or War on America?" *Stanford Law and Policy Review* 3: 242, 245 (1991).

5 Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, DC: Pew Charitable Trusts, 2009).

6 *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

7 *Ibid.*, Douglas J., dissenting.

8 See U.S. Department of Justice, Drug Enforcement Administration, *Operations Pipeline and Convoy* (Washington, DC, n.d.), www.usdoj.gov/dea/programs/pipecon.htm.

9 *State v. Rutherford*, 93 Ohio App.3d 586, 593–95, 639 N.E. 2d 498, 503–4, n. 3 (Ohio Ct. App. 1994).

10 Gary Webb, "Driving While Black," *Esquire*, Apr. 1, 1999, 122.

11 *Ibid.*

12 *Ibid.*, 8–9.

13 Christopher J. Mumola and Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2006); and Ashley Nellis, Judy Greene, and Marc Mauer, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, 2d ed. (Washington, DC: Sentencing Project, 2008), 8.

14 *Harmelin v. Michigan*, 501 U.S. 967 (1991).

15 PEW Center for the States, *One in 31*.

16 Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (Washington, DC: Urban Institute Press, 2002), 32, citing Bureau of Justice Statistics.