

# DEMOCRACY

A JOURNAL OF IDEAS

## Beyond Mass Incarceration

Jonathan Blanks

May 31, 2018

Earlier this month, the Trump White House held a bipartisan event supporting prison reform, including good time credits for low-level offenders. Mass incarceration has indeed become the primary focus in the world of criminal justice reform, with many of the most popular reforms focused on sentencing and community reentry for nonviolent drug offenders. And although much can and should be done for those who have been incarcerated, there are many more victims of the the drug war's abuses than just those who end up in prison. In addition to the millions of people arrested each year for misdemeanor drug possession, countless people who will never step foot into a jail or prison nonetheless have been harassed and searched by police looking for drugs or their proceeds.

And the same incentives that drive police to make so many arrests and searches can also influence them to lie about how and why any search or arrest was legal. For example, if a police officer says he "smelled marijuana" emanating from a car during a stop, he can use that as probable cause to search a car, whether or not the smell was real. In addition, low-level dealers who are arrested are sometimes coerced into becoming informants and setting up stings with larger dealers, often at their own peril. What's more, the potential profits in the illicit drug trade can lead unscrupulous officers to use their authority as cover for criminal enterprise. In other words, on both the individual and institutional levels, prosecuting the drug war has corroded the integrity of law enforcement and its officers.

Just as Prohibition failed to make America dry again, the federal Controlled Substances Act of 1970 and local enforcement of drug prohibition have likewise failed to keep Americans sober. But during Prohibition, enforcement resources primarily went to curb the *supply* of illicit hooch to the American public. Even at the height of Prohibition Era, American law enforcement focused on those who were responsible for supplying black market booze, not those who were drinking. In today's drug prohibition regime, front-line police officers also go after the *demand* side by arresting users and low-level peddlers of drugs, who are often one in the same, rather than focusing primarily on high-end traffickers. To put this in perspective, and despite legalization and decriminalization efforts around the country, more Americans were arrested for marijuana possession in 2016 than for murder, rape, robbery, and aggravated assault ...combined. Is this what "to protect and to serve" is supposed to look like?

Demand-side and other low-level enforcement have created a bevy of problems, but two adverse consequences in American policing stand out in particular. First, because simple drug possession is a criminal act and drug possession is often easily concealed from view, police tactics for establishing that possession have become aggressive, invasive, and harassing, particularly for poor minorities. Second, the criminal penalties for low-level distribution can be so great that law enforcement can coerce small-time sellers into becoming informants, which can put police in ethically precarious positions and unnecessarily risk offenders' lives.

Police officers stop and search presumptively innocent people to find evidence of vice. Despite the curtailment of New York City's notorious "stop and frisk" anti-gun program that was rife with racial bias and questionable methods to stop individuals, the NYPD disproportionally arrests black and brown men on the street for misdemeanor marijuana possession, despite growing public pressure to reduce minor arrests. The police often lie to or otherwise manipulate people who are reluctant to give consent to search their car or person—which is contrary to the public servant and protector role that police are supposed to play—in no small part because it is legal for them to do so. In sum, for too many Americans, the basic liberty to move freely in society has been debased and degraded by police fighting the drug war.

Going beyond street harassment, the capture of low-level dealers brings along its own problems. Drug units like to snag "big fish" by setting up stings and fake buys and then work their way up the organizational chart of drug enterprises. That is, police will arrest an addict or other low-level dealer and coerce them into becoming informants to buy more drugs (and often guns) to get bigger dealers on bigger charges. The problem, of course, arises when police are not able to protect these individuals if they are found out. Reasonable people may disagree about punishing addicts for drug crimes, but a street-level drug bust shouldn't cost a suspect's life so that police can try to make a better case against their next target.

But even when informants *can* successfully help police without unnecessary risk to their own lives, police often must take them at their word when they use their information to swear out affidavits for warrants. Certainly, suspects with drug habits, criminal records, and other issues are not always the most reliable witnesses to begin with, let alone with the threat of imprisonment hanging over them. And this is particularly a problem, as legal scholar Alexandra Natapoff explains in her book, Snitching, because so much interaction between police and informants happens in proverbial and literal back alleys and without any official record or oversight. Informants are often incentivized to keep coming up with new cases to maintain their stay-out-of-jail card—and sometimes make money for the busts they aid—so they may go to extra-legal lengths to maintain their freedom and income.

If an informant is found out to have fabricated some or all of a story used against a suspect, every case that contained information the informant provided could be reexamined and potentially overturned. Thus, as a systemic matter, it's not in the best interest of anyone in law enforcement that holes in informants' stories are brought to light. And as Pulitzer Prize-winning reporters Wendy Ruderman and Barbara Laker detail in their true crime book Busted, when shady informants pair with less-than-reputable police officers and their units, the lines between legality and illegality become very blurred and justice suffers. Dangerous criminal organizations should

be investigated and disrupted, but using informants just to make more arrests in the unwinnable drug war unnecessarily entangles police in webs of deception they may not be able to escape.

Of course, police officers lie as well. Making false claims on affidavits or in court under oath is known in police circles as “testilying.” Although police may lie for any number of reasons, most often, police officers lie to cover up unconstitutional acts they may have justified as being necessary to catch the so-called “bad guys.” The Constitution places limits on how a police officer obtains evidence without a warrant, so officers will manufacture the probable cause needed to conduct a search without consent, such as claiming to see contraband in plain sight. This behavior can be thought of as lying for the greater good if the officer thinks the greater good is securing another conviction by whatever means available.

Just about everyone in the criminal justice system knows testilying happens and that it is probably the most common form of police corruption. Former judges and police chiefs have called testilying an “open secret” that is “widespread” in drug cases every year. While American crime procedural dramas regurgitate the “criminals getting off on a technicality” canard, that “technicality” is most often a violation of a defendant’s constitutional rights, which testilying attempts to cover up. Testilying compounds the initial violation by unjustly punishing those whose rights have been violated and sullies the integrity of the officer who believes he’s lying for a good reason. And, like informants who are found to have lied, if the officer is caught testilying, all of his arrests come under suspicion, potentially jeopardizing legitimate convictions of dangerous people. But so long as officers are measured by and promoted for high numbers of drug arrests, they will be incentivized to make those arrests one way or another. The tolerance of testilying in our justice system is just one more way the drug war has infected policing with deceit and dishonesty.

Beyond mass incarceration in and of itself, the drug war has enabled police to be aggressive, harassing occupiers of minority communities as a matter of policy. The low-level dealers and addicts caught in the system can be abused by the police, or can turn the system in their favor to enable their own habits and vices. And, far too often, cops tell lies that erode the civil liberties of the innocent and subvert justice for the accused because it makes their jobs easier. Almost everyone knows that drug prohibition has cost billions of dollars and disrupted millions of lives, but it has also corrupted the integrity of the police and the justice system. It’s not that all or even most officers are bad, but the police are responding to the law and to policy incentives that support enforcing our four-decades long drug war rather than solving other more serious types of crimes. And so long as American policymakers continue to lie to themselves about the efficacy of the drug war, American police will do what it takes to prosecute it.

*Jonathan Blanks is a research associate at the Cato Institute’s Project on Criminal Justice and writer-in-residence at Harvard University’s Fair Punishment Project.*