

## The War on Crumbs

We have all seen the press conferences on the news: “A drug lord has been taken down by law enforcement.” Cameras pan across stacks of money, pounds of neatly packaged drugs, and arsenals of assault weapons. The sound bites are predictable: “It’s unprecedented. It was due to cooperation of multiple agencies and hundreds of officers. It will make a huge impact on trafficking. We are a little safer today, thanks to this operation.”<sup>1</sup>

As public defenders, we know that the everyday war on drugs looks very different. It is, in fact, a “War on Crumbs.” According to the Office of Drug Control Policy, the federal government spent over \$15 billion in 2008 on drug enforcement—a rate of about \$500 per second.<sup>2</sup> State and local governments spent at least another \$25 billion.<sup>3</sup>

Here, we argue that the United States is wasting a fortune on this “War on Crumbs.” We begin by discussing how current police tactics focus on the capture, prosecution, and imprisonment of drug addicts, many of them homeless or mentally ill, as opposed to the actual source of drugs. We then draw attention to the incentives that encourage law enforcement to engage in and consistently justify

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<sup>1</sup> See, e.g., *Drug Kingpin and Eight Others Indicted for Smuggling Millions of Dollars in Heroin from Colombia to New York City*, U.S. DRUG ENFORCEMENT ADMIN. (Mar. 6, 2013), <http://www.justice.gov/dea/divisions/nyc/2013/nyc030613.shtml>; *DEA and LAPD Conduct Massive West Coast OxyContin Sweep*, U.S. DRUG ENFORCEMENT ADMIN. (Feb. 28, 2013), <http://www.justice.gov/dea/divisions/sea/2013/sea022813.shtml>.

<sup>2</sup> JEFFREY A. MIRON & KATHRINE WALDOCK, *THE BUDGETARY IMPACT OF ENDING DRUG PROHIBITION 7* (2010), available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/DrugProhibitionWP.pdf>.

<sup>3</sup> *Id.* at 5.

unethical conduct and Fourth Amendment violations in court under oath. We end with suggestions for potential remedies.

For years, the Public Defender's Office has been inundated with arrests from sting operations, called "buy-busts," in which undercover cops pretend to be addicts and buy drugs on the street. These sting operations constitute the vast majority of drug arrests in San Francisco.<sup>4</sup> This enforcement tactic targets the wrong people and wastes valuable public resources: you simply cannot win the "War on Drugs" one or two crack rocks—or crumbs—at a time.

This problematic enforcement tactic is fueled by prosecutors at the state and federal levels who measure success by the number of arrests made and not by the quantity of drugs seized. This false measurement encourages police officers to target low-level street dealers selling very small amounts of drugs or vulnerable addicts by offering them outrageous prices for their personal stash—rather than focus on higher level drug-dealers who actually sell in larger quantities (usually behind closed doors).

In the San Francisco Public Defender's Office, the never-ending stream of clients is not composed of kingpins. Not even close. In a story typical of many of our clients, we represented an African-American woman arrested in a buy-bust.<sup>5</sup> This forty-year-old woman had a documented history of mental illness. She was charged with selling drugs to an undercover police officer—for which the maximum penalty is five years in prison. She was in possession of 0.04 grams of crack—the equivalent of 4/100ths of a "Sweet 'n Low"-sweetener packet, which weighs one gram. She allegedly sold the crack to a white police officer after he pretended to be a fellow addict desperate to get high. He told her he was willing to pay her twenty dollars for the crumb of crack she had just bought for five dollars. The woman's resulting conviction made her ineligible for housing or benefits, placing her one step closer to homelessness. She is not the exception.

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<sup>4</sup> See Chris Roberts, *Drug Policy: SFPD's Buy-Bust Operations a Costly Flop*, SF WEEKLY (Apr. 28, 2010), <http://www.sfweekly.com/2010-04-28/news/drug-policy-sfpd-s-buy-bust-operations-a-costly-flop/full/>; see also *Man Acquitted of Selling Drugs, Eating \$20*, S.F. PUB. DEFENDER (Feb. 26, 2013), <http://sfpublicdefender.org/2013/02/26/man-acquitted-of-selling-drugs-eating-20/> (describing a specific buy-bust sting).

<sup>5</sup> In 2009, San Francisco's newly appointed police chief promised to clean up the streets by initiating a crackdown targeting street level drug sales in the Tenderloin neighborhood in San Francisco.

Her arrest illustrates the costs related to this type of enforcement that targets the wrong people and does not even put a dent in the supply of drugs on the street. Much of the costs involved stem from the manpower used in these enforcement actions. For example, the operation to arrest her, like most undercover sting operations, involved approximately ten police officers. One of the ten officers involved in her arrest made \$30,000 in overtime in the first six months of the same year.<sup>6</sup> The same cadre of officers—many of whom can be found amongst the top 100 earners in city government because of their overtime pay—show up to testify at these cases.<sup>7</sup> Crackdowns like this one happen in cash-strapped cities every day, encouraging expensive injustice while social services are slashed.

Not all those arrested are addicts selling their personal stash to an undercover officer. Some of those arrested are low-level dealers, “crumb dealers,” who are caught with a few grams of drugs or pills and a few dollars in their pocket. A study suggests that the street-level dealer makes less than minimum wage.<sup>8</sup> From our experience at the San Francisco Public Defender’s Office, those on the street are often unemployed and undereducated teenagers: the special education kid or high school dropout raised by his grandmother because his parents have also been incarcerated. Others who are arrested tell us that they are indentured and are paying off debts to the “coyotes”<sup>9</sup> who brought them here.

Whether these youngsters are from San Francisco, Detroit, or Honduras, convicting them of drug-related crimes usually means an inability to get a job, ineligibility for a student loan, and consignment to the margins of society forever.<sup>10</sup> It is impossible to ignore the fact

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<sup>6</sup> The San Francisco City Controller’s Office has previously criticized what it deemed excessive or poorly managed police department overtime pay. *See generally* CITY AND CNTY. OF S. F. CONTROLLER’S OFFICE, POLICE DEPARTMENT: THE DEPARTMENT NEEDS TO IMPROVE ITS CONTROLS OVER OVERTIME AND PREMIUM PAY (2010), *available at* <http://sfcontroller.org/Modules/ShowDocument.aspx?documentid=1030>; *see also* Rachel Gordon, *1 in 3 San Francisco Employees Earned \$100,000*, SF GATE (Apr. 26, 2010, 4:00 AM), <http://www.sfgate.com/news/article/1-in-3-San-Francisco-employees-earned-100-000-3191191.php> (criticizing the amount paid to city employees citing overtime as one contributing factor).

<sup>7</sup> *See* Shoshana Walter, *SFPD Splurged on Overtime*, THE BAY CITIZEN (Aug. 30, 2010, 9:19 AM), <https://www.baycitizen.org/news/policing/auditor-sfpd-failed-control-overtime/>.

<sup>8</sup> *See* Steven D. Levitt & Stephen J. Dubner, *Why Drug Dealers Live With Their Moms*, L.A. TIMES (Apr. 24, 2005), <http://articles.latimes.com/2005/apr/24/opinion/oe-dubner24>.

<sup>9</sup> A coyote is a person who smuggles immigrants into the United States.

<sup>10</sup> *See* Phillip Smith, *Feature: The Conviction That Keeps On Hurting—Drug Offenders and Federal Benefits*, STOPTHEDRUGWAR.ORG (Feb. 4, 2007, 11:37 PM), <http://stop>

that for the last twenty years of this war, every naive or desperate youngster taken off the street has been quickly replaced by somebody else. Much like the “War on Terror,” the “War on Crumbs” is unwinnable.

People who are arrested off the street ultimately end up in jail and then on parole or probation. Descriptions of the offenders as on parole or probation are both misleading and, at the same time, telling. Defendants have historically been put on probation without addressing their underlying issues, and with a felony conviction they often fail to escape the cycle of the criminal justice system. Others who are on parole have been released from prison, which—no surprise—didn’t rehabilitate them.

While the enforcement tactics discussed above usually target the “crumb dealers,” they also tend to disproportionately focus on minority populations. For example, day after day at the Public Defender’s Office, we hear constant references by certain cops to the drug dealers coming over the bridge or on the train from “Oakland” which suggests that the police may be targeting African Americans or Latinos disproportionately because they match certain preconceived stereotypes.

Meanwhile, the police don’t seem to be able to track down the larger source of drugs. While it takes ten police officers to conduct a “buy-bust,” the police department doesn’t seem to have the time to follow someone out of town to find the source of their crumbs. Police justify the arrest of addicts or low-level dealers because they say that if they cooperate with them it can lead to the capture of someone higher up in the stream—a “big fish,” but at the Public Defender’s Office all we see are the minnows.

Police sources quoted in the newspapers often suggest a sophisticated organized crime network of dealers that engage in violence to protect their turf. While that may be true on crime dramas like *The Wire*, it isn’t reflected in our cases at the Public Defender’s office. Even if you believe the police story, a crackdown may actually lead to more violence: a disruption of the drug market caused by the increased enforcement could result in skirmishes over vacant street corners. Despite the rampant cocaine and meth dealing that goes on in

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[thedrugwar.org/chronicle/2007/feb/04/feature\\_conviction\\_keeps\\_hurting](http://thedrugwar.org/chronicle/2007/feb/04/feature_conviction_keeps_hurting); see also ALEXA EGGLESTON, PERPETUAL PUNISHMENT: THE CONSEQUENCES OF ADULT CONVICTIONS FOR YOUTH 2–18 (2007), available at <http://www.campaignforyouthjustice.org/documents/PerpetualPunishment.pdf> (discussing detrimental impacts of the criminal convictions on youth).

more affluent neighborhoods in the city, there is no violence in those communities because the police hardly do any enforcement there.<sup>11</sup> Those drug markets are never disrupted.

So why do police spend so much time enforcing failed drug laws that utilize these futile tactics? Funding for drug task forces is often based on the number of arrests made and property seized in drug busts.<sup>12</sup> Arresting users and low-level dealers in sting operations is a simple way to inflate arrest numbers without incurring any risk. To create arrest opportunities, police routinely violate suspects' constitutional rights and justify their actions when testifying in court under oath. In 2011, prosecutors in San Francisco were forced to dismiss dozens of drug cases, eight officers were put on desk duty, and an undercover narcotics unit was disbanded after egregious officer misconduct was caught on video.<sup>13</sup> The surveillance footage from residential hotels revealed officers entering residences without search warrants to look for drugs and stealing their property.<sup>14</sup> Officers' descriptions of the arrests in police reports and on the stand differed from the authenticated surveillance footage.<sup>15</sup> The scandal came on the heels of another drug-related black eye for the city. A longtime technician in the police crime lab had a cocaine addiction that led to the tampering and theft of drug evidence.<sup>16</sup> This ultimately resulted in a shutdown of the lab.<sup>17</sup>

So what is to be done? First, we have to be honest about what “the problem” actually is. The hard truth is that the police ignore most of the middle class drug use and dealing that occurs out of private homes or public venues—bars, nightclubs, or concert halls. Poor people bear the brunt of the “War on Drugs” while those with means can buy and sell drugs with impunity. One reason is because it is easier to make an arrest on the street. Another reason is that the invasions of privacy

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<sup>11</sup> See *Distorted Financial Incentives for Enforcement*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/distorted-financial-incentives-enforcement> (last visited Mar. 30, 2013).

<sup>12</sup> *Id.*

<sup>13</sup> See Jaxon Van Durbeken, *SF Police: D.A. Drops 57 Cases in Misconduct Probe*, SF GATE (Mar. 9, 2011, 12:43 PM), <http://www.sfgate.com/bayarea/article/SF-police-D-A-drops-57-cases-in-misconduct-probe-2472027.php>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Jaxon Van Derbeken, *SFPD Withheld Doubts on Crime Lab from Auditors*, SF GATE (Apr. 25, 2010, 4:00 AM), <http://www.sfgate.com/bayarea/article/SFPD-withheld-doubts-on-crime-lab-from-auditors-3191219.php>.

<sup>17</sup> *Id.*

and heavy-handed tactics used in poor neighborhoods would be met with greater outcry in the richer parts of town. But we also have to recognize that people don't like the drug use and dealing that occurs in the Tenderloin, and other poor urban neighborhoods like it across the country, because it occurs on the street and in public. It is bad for small business, terrible for raising children, and depressing to witness. While street-level dealing remains a problem then the harm associated with the actions of our clients is akin to a quality of life issue because drug-related offenses are usually treated as a misdemeanor rather than a felony offense that could result in prison.

From an enforcement perspective, if the problem is drug dealing in public and on the street, then there is a simple solution. Police officers who are currently assigned to "buy-busts" could instead be assigned to be in uniform and be visible in neighborhoods where drug dealing occurs on the street. The mere presence of officers could dissuade outsiders from coming into the neighborhood to buy drugs. They could even get to know the street-level sellers and addicts and direct them to services—without necessarily arresting them. Seattle implemented such a program—offering known street-level dealers a panoply of services before they would be arrested and caught up in the system.<sup>18</sup>

In a bit of bright news, some lawmakers are also beginning to recognize the futility and expense of the "War on Drugs." Sen. Mark Leno<sup>19</sup> has introduced a bill that would allow California prosecutors the discretion to charge simple drug possession as a misdemeanor.<sup>20</sup> Senate Bill 649 would redefine simple possession from a felony to a "wobbler," which is a crime that can be charged as either a misdemeanor or felony.<sup>21</sup> Leno argues that altering the sentencing guidelines is an alternative to a "failed and expensive war on drugs" that has fed soaring incarceration rates and is "perpetuating an

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<sup>18</sup> See Sara Jean Green, *Police Ultimatum to Drug Dealers: Quit, or Go to Prison*, SEATTLE TIMES (Aug. 7, 2009, 11:39 PM), [http://seattletimes.com/html/localnews/2009619108\\_webdrugdealers07m.html](http://seattletimes.com/html/localnews/2009619108_webdrugdealers07m.html).

<sup>19</sup> Sen. Mark Leno is a democrat who represents San Francisco in the California State Senate.

<sup>20</sup> See S.B. 649, 2013–14 Leg., Reg. Sess. (Cal. 2013).

<sup>21</sup> See *id.*; Jeremy B. White, *Mark Leno Proposes to Make Drug Possession a 'Wobbler'*, THE SACRAMENTO BEE (Feb. 27, 2013, 1:07 PM), <http://blogs.sacbee.com/capitolalert/latest/2013/02/mark-leno-revives-bill-to-make-california-drug-possession-a-wobbler.html>.

underclass of citizens.”<sup>22</sup> The measure, if passed, is expected to save California counties a combined \$160 million.<sup>23</sup>

But Leno’s proposed legislation would not address the problem of the low-level “crumb dealer” who is an addict on one day but arrested for selling to an undercover officer the next day. Nor would it address the young people caught up in the system selling at a low level. Sending these offenders to our broken prison system is not going to result in less drugs or violence on the streets. Instead, the offender will come back more desperate, hardened, and unemployed<sup>24</sup>—or their place on the corner will quickly be replaced by another addict or desperate teenager.

The reality is that there needs to be changes to enforcement so that police activity is not just directed toward the lowest end of the market on the street, and there should be greater flexibility in crafting alternative resolutions for street-level offenders. Existing alternative programs controlled by prosecutors’ offices need to be expanded. Further, more resources for drug treatment or job training need to be provided and programs should be evaluated and rewarded for success based on the outcomes of their participants. Cases could also be routinely dismissed if an offender stays out of trouble on his or her own, completes a drug program and stays clean, goes to school, or gets a job regardless of whether he or she is initially caught with less than a gram or tens of grams.

The “War on Crumbs” exacts tremendous costs on the poor people of color we send to prison every day. Rather than continue the same crackdowns with the same failed strategies and tactics, officials should instead embrace innovative solutions to end this failed war and, as a result, save neighborhoods and give future generations across the country the chance they deserve to lead a better life.

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<sup>22</sup> White, *supra* note 21.

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., M. Keith Chen & Jesse M. Shapiro, Does Prison Harden Inmates? A Discontinuity-Based Approach 19 (Dec. 4, 2006) (working paper), available at <http://sentencing.nj.gov/downloads/pdf/articles/2007/Jan2007/document08.pdf> (concluding that harsh prison conditions result in an increased likelihood of recidivism).

