ACLU

THE DRUG WAR IS THE NEW JIM CROW

The Drug War is the New Jim Crow by Graham Boyd

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Despite the growing public feeling that the drug war has failed, Attorney General John Ashcroft has declared that he wants to escalate it.[1] ""I want to renew it,"" he told CNN's Larry King. ""I want to refresh it, relaunch it if you will.""[2] And Bush's nominees to fight the drug war have joined in Ashcroft's chorus. John Walters, the new drug czar, and Asa Hutchinson, the choice to head the Drug Enforcement Agency (DEA), are promising ever more interdiction, incarceration and arrests.

As the nation prepares to careen further down this pernicious path, the drug war's costs urge a different course. Today, thanks in no small part to harsh sentences for drug crimes, especially for low-level nonviolent offenses, almost two million people fill the prisons and jails of the United States.[3] The population of this vast American Gulag, if brought together in a territory of its own, would rank as the 35th most populous state, just surpassing Nevada's 1.99 million residents.[4] While incarceration rates for non-drug crimes have remained remarkably stable over many decades, the drug war has provided a new, ever increasing supply of prisoners over the past 15 years. With 5% of the world's population, the United States now holds 25% of the world's prisoners, winning it the dubious title of the world's leading jailer. The rate at which we lock up our citizens now surpasses every other country that has ever kept such statistics.

Pervasive racial targeting provides another peculiarly U.S. stamp to the drug war. We are incarcerating African-American men at a rate approximately four times the rate of incarceration of black men in South Africa under apartheid.[5] Worse still, we have managed to replicate-at least on a statistical level-the shame of chattel slavery in this country: The number of black men in prison (792,000) has already equaled the number of men enslaved in 1820. With the current momentum of the drug war fueling an ever expanding prison-industrial complex, if current trends continue, only 15 years remain before the United States incarcerates as many African-American men as were forced into chattel bondage at slavery's peak, in 1860.

The war on drugs thus offers seamless continuity with the most shameful episodes of our past. Slaves were bound in plantations from which they could not escape. Now, it is prisons that deprive black men of their freedom. For African-American men between the ages of 20 and 29, almost one in three are currently under the thumb of the criminal justice system.[6]

The drug war's uncanny revisiting of the badges and indicia of slavery began, ironically enough, as a slogan from the Party of Lincoln: a ""war on drugs"" to outdo the Democrats' ""war on poverty."" This rhetorical flourish outlived its use as a verbal sally in partisan skirmishes to have real and sinister effects. A declaration of war, now as at other moments in our national history, allows us to throw out the normal rules of conduct under the imperative of a higher goal assumed to trump all other considerations. Lincoln himself suspended the fundamental right to the Writ of Habeas Corpus, citing the exigencies of the Civil War as rationale for the summary imprisonment of perceived enemies. Closer to our consciousness today, and especially haunting in its racial targeting, is the incarceration of 100,000 Japanese Americans during World War II. While no one would now defend using ancestral traits as a proxy for disloyalty, in the heat of war the majority of U.S. citizens defended or ignored the concentration camps, complacent in their trust of leaders claiming all means necessary in the paramount goal of national security.

The same logic of urgency and exception, that same projection of national security into the domain of individual freedom, structures the contemporary

war on drugs. People all over the United States accept the idea that we need to lock up our fellow citizens in service to a higher goal, this war we are fighting. When George Bush, Sr. entered office in 1989, a Washington Post-ABC News Poll found that 62% of Americans would be willing to give up a few of the freedoms we have in this country in order to fight the war on drugs.[7] They have gotten their wish: a shrunken Bill of Rights, diminished democratic rights and a new Jim Crow. With millions behind bars and the toll mounting every day, the war on drugs has slipped the reins of metaphor to become a literal war.

The caustic effect of punitive drug policies has slowly eroded the cornerstone of U.S. democracy. It is no surprise that the court cases that have most destroyed the Bill of Rights, methodically abridging freedom of religion, freedom of speech, freedom from unreasonable searches and seizures, and property rights, have centered on fear of drugs.

The Supreme Court declared an end to the free practice of any religion in a 1988 case entitled Smith v. Oregon, brought on behalf of Native Americans who use peyote for religious purposes. The Court threw out the longstanding rules protecting religious freedom, requiring instead that all religious practices must now yield to laws of general application, even if the law has a decimating effect on the religion. Congress, in response, voted unanimously to restore religious freedoms under the Religious Freedom Restoration Act. Not to be outdone, the Supreme Court expanded the purview of its decision to encompass all religions in an opinion rejecting a Catholic church's challenge to local zoning laws that threatened its existence. A conflict between Congress and the Supreme Court had outgrown peyote and Native American disputes to threaten every religion.

The war on drugs has similarly decimated the Fourth Amendment, a measure intended to limit the power of law enforcement to search and arrest. Unlike other crimes, drug offenses do not typically have complaining witnesses, people who come forward to request police assistance. The parties are mostly consenting participants who likely wish to hide their drug activity. In order to unearth drug crimes, the police resort to wiretapping, surveillance, peering

through private windows, flying over houses, undercover operations, bribery of informants, entrapment by offering to buy or sell drugs, and countless other shady or corrupting police practices. Businesses, schools and government agencies have increasingly required intrusive drug tests. For example, until the ACLU brought suit to stop it, Michigan forced all welfare recipients to submit to urine drug tests regardless of suspicion.[8] Schools across the nation have sought to drug-test students, threatening to create a broad doctrine of treating students as second class citizens under the Constitution.[9]

Property rights, once sacred in the United States, have also been sacrificed to the war on drugs under the strange fiction that property could be ""guilty."" All assets suspected of ""participating"" in a crime can be seized and sold, with the profits flowing to law enforcement budgets. The burden of proof for demonstrating the property's innocence falls upon the rightful owner. Often without even accusing any individual person of a crime, the police confiscate the homes of innocent people rumored to have some relative who uses drugs; they seize the money of unsuspecting bystanders whose only crime is to carry an unusual amount of cash (""only drug dealers do that""); and they have gunned down property owners standing in the way of the quest for attractive assets. Beyond the deeply arbitrary process, asset forfeiture poses a deeper threat. A significant part of drug enforcement efforts has shifted from prosecuting drug crime to seizing property; indeed, by the late 1990s, many drug enforcement agencies were raking in more money than they received from their budgets. Self-financed police need not justify their activities through any regular budgetary process. Under the drug war, police construct a veil of secrecy, freedom from legislative oversight, and latitude to set an agenda accountable to no one-a system that lies very far from presumed democratic institutional practices in the United States.[10]

Another core tenet of democratic culture, freedom of speech, has also drawn fire in the drug war. California passed its medical marijuana initiative in 1996, exempting from arrest those patients who had a doctor's recommendation for marijuana use. The White House was irate. General Barry McCaffrey, the drug czar at the time, threatened to arrest and revoke the licence of any doctor who recommended marijuana to a patient (or even discussed its

benefits). The ACLU went to court defending doctor's freedom of speech and won an injunction protecting doctors' speech.

Yet another free speech and medical marijuana case reached sublime heights of absurdity. The District of Columbia included a voter initiative on medical marijuana in the 1998 election. Congressman Bob Barr passed a law-a provision buried into the budget act that year-that forbade the District of Columbia from counting the duly cast votes. Never before in U.S. history has an election been canceled for fear of its outcome. A federal judge saw beyond the drug war rhetoric and ordered the votes to be counted.[11] The initiative had passed by a margin of two-to-one, further demonstrating the chasm between public opinion and elected officials.

Of all the constitutional depredations of the war on drugs, one stands out for its continuing damage to democracy: the disenfranchisement of former felons. The United States is the only democracy in the world to deprive its citizens of the right to vote after they have completed their sentences. Coupled with the unprecedented rate of incarceration, disenfranchisement laws fundamentally restructure political power and entrench the politicians who support and benefit from drug war policies. In the states with the most widespread and lasting loss of voting rights, harsh drug laws find particularly solid political support.

The political impact of felony disenfranchisement laws became starkly evident in the 2000 presidential election. Butterfly ballots and hanging chads were not the only culprits in that controversial election. In Florida even a minor drug offense-low-level, nonviolent drug possession-is counted as a felony. Many drug offenders often never face any time in jail, but they lose their right to vote-forever. The outcome of the Florida vote and of the presidential race turned upon just a few hundred votes. Yet, over 200,000 African-American men (31% of all African-American men in the state) were barred from that election, as they will be from every other election forever. Given the overwhelming support for Vice President Gore among black voters, if ex-felons had been allowed to exercise their rights there would have been no need for a recount and the White House would now have a different occupant. Ironically, the Clinton

Administration presided over the massive wave of incarceration that cost Gore this election.

The right to vote did not exist for slaves, even though each slave counted as 3/5 of a person for representational purposes. Today, 13% of all African-American men-1.4 million-are disenfranchised in the United States. More than ten states have disenfranchised over 20% of their male black citizens.[12] The seduction of drug war rhetoric must be powerful indeed to have allowed the erosion of a right that was so hard won, presaging a return to de facto racial subjugation, to Jim Crow in the name of drug policy, to a unique form of American apartheid.

The war on drugs subjects the United States to much of the same harm, with much of the same economic and ideological underpinnings, as slavery itself. Just as Jim Crow responded to emancipation by rolling back many of the newly gained rights of African-Americans, the drug war is again replicating the institutions and repressions of the plantation. And like slavery and Jim Crow, the drug war garners appalling levels of support. Each has its own rhetoric, each its own claims to unassailable legitimacy. The brutality of slavery was justified on economic and paternalistic grounds. Jim Crow pretended that separate but equal treatment sufficed, even as blacks faced daily lynchings and every form of overt discrimination. The drug war claims morality and protection of children as its goals, while turning a blind eye to the racial injustice it promotes. And with all three systems of oppression, much of society sits idly by, accepting the rhetoric that later will seem so unbelievably corrupt. We will one day understand that the war on drugs was a war on people and communities.

And there are many more racial dimensions of the drug war. African-Americans do not use drugs more than white people; whites and blacks use drugs at almost exactly the same rates.[13] And since there are five times as many whites as blacks in the United States, it follows that the overwhelming majority of drug users are white. Nevertheless, African-Americans are admitted to state prisons at a rate that is 13.4 times greater than whites, a disparity driven largely by the grossly racial targeting of drug laws. In some

states, even those outside the Old Confederacy, blacks make up 90% of drug prisoners and are up to 57 times more likely than whites to be incarcerated for drug crimes.[14]

In yet another instance of the drug wars' methodical reproduction of the constitutive elements of slavery, disproportionate numbers of black women have lost or stand to lose their children. In his classic narration of life under slavery, Frederick Douglass describes the separation of African-American children from their mothers:

My mother and I were separated when I was but an infant-before I knew her as my mother.... For what this separation is done, I do not know, unless it be to hinder the development of the child's affection toward its mother, and to blunt and destroy the natural affection of the mother for the child. This is the inevitable result.[15]

Although a recent Supreme Court ruling will set some limits on this practice, African-American mothers regularly lose custody of their babies when they are targeted for drug tests and show signs of past use of drugs.[16] In one South Carolina hospital, nurses or doctors ordered drug tests exclusively for African-American women or for the partners of African-American men. In some instances, women who tested positive gave birth in shackles and were hauled away in chains to prison while their new born infant was removed to foster care.

The undercutting of free labor, so central to slavery, plays a similarly powerful role in driving the expansion of drug war prisons. Slaves were forced to work in inhuman conditions with no control over their situation and no remuneration. Public authorities today, intimidated by the rising costs of building and maintaining prisons, have introduced an innovative program as the panacea of incarceration: prison labor. Services and products created by prison labor range from data-entering and telemarketing, to furniture and textiles. Inmates are paid a pittance; for example, the California Prison Industry Authority (PIA) pays the 7,000 inmates who participate in its programs anywhere from 35 to 95 cents per hour, before deductions.[17] A lucky

inmate who made 50 cents an hour working eight hours every day would make $960 a year, before deductions of penalties and court imposed fees. Why exploit labor abroad, when you can do it at home? Much ordinary labor is increasingly being transferred to prisons, many of them privatized prisons- or should we say plantations?

Slaves were kept purposefully illiterate and uneducated. Again, Frederick Douglass' description of his master's prohibition of his education resonates with current drug war policies:

""Learning would spoil the best nigger in the world. Now,"" said [the master], ""if you teach that nigger (speaking of myself) how to read, there would be no keeping him. It would forever unfit him to be a slave. He would at once become unmanageable, and of no value to his master.""[18]

Under the drug war, Congress has once again moved to shut the gates of education to many African-Americans. Under The Higher Education Act (HEA) of 1998, any drug conviction blocks or delays all federal educational assistance, including loans and even work-study programs.[19] Given that 55% of those convicted of drug offenses are black and the fact that this law will not affect the wealthy who do not need financial aid, the HEA plainly targets low-income people of color. Murder and rape do not render a person ineligible; someone could burn a nursery or bomb a federal building and still receive financial aid. But smoking marijuana in the privacy of one's own room means a student risks losing financial aid and having to leave college or graduate school.

The health of African-Americans was constantly under attack on the plantation and under Jim Crow; and it is still under fierce fire from the war on drugs. AIDS is the leading cause of death for young blacks and Latinos. Although blacks make up only 12% of the population, they account for 41% of U.S. citizens with AIDS.[20] Black and Latino adults and adolescents represented 67% of the AIDS cases reported in 1999. African-American and Latina women together represent less than one-fourth of all U.S. women, yet they account for more than three-fourths (77%) of AIDS cases reported to date among women in our country. HIV/AIDS remains among the leading causes of death for U.S.

women aged 25-44.[21] Sixty-five percent of African-American women who are HIV positive have contracted the disease because somebody shared a needle.[22] Most advanced democracies have implemented harm reduction policies, including needle exchange programs to prevent the spread of AIDS and other blood transmitted diseases. However, U.S. drug policies block funding for clean needles, and some states like New Jersey arrest anyone attempting to provide clean injection equipment using private funds. These murderous policies exact a high price from minority populations in the United States.

Here lies the new Civil Rights Movement. As in a nightmare it revisits the same issue civil rights activists faced in the 1960s when fighting Jim Crow, the same issues abolitionists faced in the nineteenth century. It is the original sin of the United States that the ""Founding Fathers"" sanctioned slavery and enshrined racism in the Constitution in the form of the three-fifths compromise. And with each generation Americans become uncomfortable with this legacy of racism. We chronically disavow the sin, distancing ourselves from the old, discredited form of racism. We denounce it. We say we have finally healed ourselves. But yet, as with the figure of original sin, it rises back up to the surface, and today takes form as the war on drugs. We must recognize it and call it by its true name. It is the U.S. apartheid, the new Jim Crow.

ABOUT THE AUTHOR

Graham Boyd is founder and director of the ACLU Drug Policy Litigation Project. His article ""This is Your Bill of Rights on Drugs"" appeared in the December 1999 Harpers.

NOTES

1. Pew Research Center, March 21, 2001, available online at http://www.people-press.org/drugs01rpt.htm.
2. Larry King Live, CNN, February 7, 2001.
3. U.S. Department of Justice, Bureau of Justice Statistics, Prisoners and Jail

Inmates at Midyear 2000 (Washington, DC: U.S. Department of Justice, March 2001) http://www.ojp.usdoj.gov/bjs/abstract/pjim00.htm. The report estimates that by late 2001, the inmate population will break the two million barrier.

4. The number of inmates also exceeds the combined population of Wyoming, Alaska, Vermont. U.S. Census Bureau, ""Population Change and Distribution,"" April 2001.

5. C. Haney and P. Zimbardo, ""The past and future of U.S. Prison Policy"", American Psychologist, Vol. 53, No. 7 (July 1998), p. 714.

6. Jan M. Chaiken, ""Crunching Numbers: Crime and Incarceration at the End of the Millennium,"" National Institute of Justice Journal, January 2000, p. 14.

7. Washington Post, ""Many in Poll say Bush Plan is not Stringent Enough,"" September 8, 1989, page A1.

8. See Marchwinski v. Michigan, 2000 WL 1363685 (E.D.Mich. September 1, 2000).

9. ACLU litigation has recently curtailed efforts to expand drug testing beyond student athletes, a practice that was approved in Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995). See, e.g., Earls v. Bd. of Educ., Tecumseh Pub. Sch. Dist., 242 F.3d 1264 (10th Cir. 2001); Tannahill v. Lockney Indepen. Sch. Dist., 133 F. Supp. 2d 919 (N.D. Tex. 2001).

10. For an excellent summary discussion of the corrupting influence of asset forfeiture, see Eric Blumenson and Eva Nilsen, ""The Drug War's Hidden Economic Agenda,"" The Nation, March 9, 1998, pp. 11-16.

11. Turner v. D.C. Board. of Elections and Ethics, 77 F. Supp. 2d 25 (D.D.C. 1999).

12. Human Rights Watch, ""Losing the vote: the impact of felony disenfranchisement laws in the U.S.,"" 1998. http://www.hrw.org/reports98/vote/.

13. Percentage of drug use during most recent month by race: white, 6.6%, black 7.7%, hispanic 6.7%. U.S. Department of Health & Human Services, Substance Abuse and Mental Health Services Administration, 1999 National Household Survey on Drug Abuse, August 2000. http://www.samhsa.gov/OAS/NHSDA/1999/Table%20of%20Contents.htm#TopOfPag

14. Human Rights Watch, Punishment and Prejudice: Racial Disparities in the War on Drugs (Washington: Human Rights Watch, May 2000).

15. Frederick Douglass, Narrative of the Life of Frederick Douglass, an American Slave (New Haven: Yale University Press, 2001), Chapter 1.
16. Ferguson v. City of Charleston, 121 S. Ct. 1281 (2001).
17. See PIA website. http://www.pia.ca.gov/onlinecat/about.html.
18. Frederick Douglass, Narrative of the Life of Frederick Douglass, an American Slave, Chapter 6.
19. Higher Education Act of 1998 (Section 483, subsection 'F'). For information about the loss of federal financial aid and efforts to overturn the law, see http://www.sspd.org.
20. San Francisco Chronicle, ""Troubling New Figures On AIDS Among Blacks,"" August 19, 1997.
21. Centers for Disease Control and Prevention, ""HIV/AIDS Among US Women: Minority and Young Women at Continuing Risk,"" January 31, 2001.
22. Centers for Disease Control and Prevention, ""HIV/AIDS Surveillance Report,"" June 2000. http://www.cdc.gov/hiv/stats/hasr1201.pdf.

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