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2002]

## COLLATERAL DAMAGE IN THE WAR ON DRUGS

GRAHAM BOYD\*

## I. INTRODUCTION

A declaration of war, now as at other moments in our national history, invites us to disregard the normal rules of conduct under the imperative of a higher goal assumed to trump all other considerations. For example, Abraham Lincoln suspended the fundamental right to the Writ of Habeas Corpus, citing the exigencies of the Civil War as a rationale for the summary imprisonment of perceived enemies.<sup>1</sup> During World War II, the majority of Americans defended or ignored the incarceration of 120,000 Japanese Americans, complacent in their trust of leaders claiming all means necessary in the paramount goal of national security.<sup>2</sup> Today, a similar urgency supporting racially targeting Arab Americans and those of Middle Eastern descent is being propagated in the name of national security following the devastating attacks on the World Trade Center.<sup>3</sup>

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 throughout the country accept the idea that incarcerating fellow citizens in service of a higher goal is justified, and even patriotic. As a result, almost two million people fill U.S. prisons and jails due largely to harsh sentencing laws for drug crimes, especially low-level nonviolent offenses.<sup>4</sup> This vast American Gulag ranks as the 35th most populous state, just surpassing Nevada's 1.99 million residents.<sup>5</sup> While incarceration rates for non-drug crimes have remained re-

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1. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 11 (1998) (detailing Lincoln's suspension of habeas corpus).

2. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 *ASIAN L.J.* 1, 3 (2001) (recounting internment narrative).

3. See generally Serge F. Kovaleski, *A Wide, Aggressive Probe Collides with Civil Rights; Innocent People May Face Questioning, Experts Say*, *WASH. POST*, Sept. 15, 2001, at A14 (weighing security atmosphere and possibility of racial profiling).

4. See U.S. Dep't of Justice, *Prison and Jail Inmates at Midyear 2000* (Mar. 25, 2001) [hereinafter *Prison & Jail Inmates*], (estimating that by late 2001, inmate population will break two million barrier), available at <http://www.ojp.usdoj.gov/bjs/abstract/pjim00.htm> (last visited Mar. 4, 2002).

5. The number of inmates also exceeds the combined population of Wyoming, Alaska and Vermont. See U.S. CENSUS BUREAU, *POPULATION CHANGE AND DISTRIBUTION* (Apr. 2001) (charting populations of states), available at <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>.

markably stable over many decades, the drug war has provided an increasing number of prisoners over the past fifteen years. This has earned the United States, which represents just 5% of the world's population, the dubious title of the world's leading incarcerator—because it holds 25% of the world's prisoners.<sup>6</sup>

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 their freedoms in order to fight the war on drugs.<sup>7</sup> These sacrifices have been made in the form of an emaciated Bill of Rights, diminished democratic rights and the emergence of 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, with civilian casualties.

## II. A MOTH EATEN BILL OF RIGHTS

The caustic effect of punitive drug policies has slowly eroded the cornerstone of American democracy. Not surprisingly, 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 all concerned drugs.<sup>8</sup>

The Supreme Court effectively declared an end to the free practice of any religion in a 1990 case entitled *Employment Division, Department of Human Resources v. Smith*,<sup>9</sup> brought by Native Americans who use peyote for religious purposes. The Court dismissed the longstanding rules protecting religious freedom, requiring instead that all religious practices yield to laws of general application, even if the law has a decimating effect on the religion.<sup>10</sup> Congress, in response, voted unanimously to restore religious freedoms under the Religious Freedom Restoration Act (RFRA).<sup>11</sup> 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.<sup>12</sup> The conflict between Congress and the Supreme Court had outgrown pe-

6. See U.S. Census Bureau, PopClocks, available at [www.census.gov/main/www/popclock.html](http://www.census.gov/main/www/popclock.html) (last visited Mar. 19, 2002); Roy Walmsley, *World Prison List* (2d ed. 1999), available at [www.homeoffice.gov.uk/rds/pdfs/r116.pdf](http://www.homeoffice.gov.uk/rds/pdfs/r116.pdf) (last visited Mar. 4, 2002).

7. See Richard Morin, *Many in Poll Say Bush Plan Is Not Stringent Enough*, WASH. POST, Sept. 8, 1989, at A1 (reporting poll results).

8. See generally Paul Finkelman, *The Second Casualty: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993) (criticizing drug war's impact on Bill of Rights).

9. 494 U.S. 872 (1990).

10. See *Employment Div.*, 494 U.S. at 877 (upholding Oregon law because it did not attempt to regulate religion).

11. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1499 (13th ed., 1997) (summarizing aftermath of *Employment Division*).

12. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down RFRA).

yote and Native American disputes to threaten the practice of every religion.

Another core tenet of democratic culture to come under attack has been freedom of speech. In 1996, California passed Proposition 215, which provides protection from state prosecution to patients who choose to use marijuana for medical purposes upon the recommendation of their doctors.<sup>13</sup> Federal officials, led by Secretary of Health and Human Services Donna Shalala and drug czar General Barry McCaffrey, swiftly responded by pledging to punish doctors who recommended medical marijuana.<sup>14</sup> The threats included revocation of the doctor's prescription drug license, loss of Medicare/Medicaid provider status and criminal prosecution.<sup>15</sup> In *Conant v. McCaffrey*,<sup>16</sup> a class-action lawsuit brought by the American Civil Liberties Union (ACLU), a California district court issued a permanent injunction protecting physicians and upholding their freedom of speech.<sup>17</sup>

The attempts to stifle free speech in the name of the war on drugs have reached sublime heights of absurdity. During the 1998 election, the District of Columbia ballot included a voter initiative on medical marijuana similar to that held in California.<sup>18</sup> Due to a provision buried in the budget act that year by Congressman Bob Barr, however, the duly cast votes were not allowed to be counted.<sup>19</sup> Never before in United States history had an election been canceled for fear of its outcome. The only recent precedent was in Nigeria in 1993 when the military dictator blocked the tabulation of the results of the presidential election for fear of losing.<sup>20</sup> Fortunately, a federal judge saw beyond the drug war rhetoric and ordered the votes to be counted in *Turner v. D.C. Board of Elections & Ethics*.<sup>21</sup> The initiative passed by a margin of two-to-one, further demonstrating the chasm between public opinion and elected officials.<sup>22</sup>

The war on drugs has similarly decimated the Fourth Amendment's ability to limit the power of law enforcement to search and arrest. Other

13. See Lauretta Higgins Wolfson, *A Quality of Mercy: The Struggle of the Aids-Afflicted to Use Marijuana as Medicine*, 22 T. JEFFERSON L. REV. 1, 19 (1999) (discussing Proposition 215).

14. See *id.* at 21 (noting measures taken by Federal Government to stop Proposition 215).

15. See *id.*

16. 2000 WL 1281174 (N.D. Cal. 2000).

17. See *Conant*, 2000 WL 1281174, at \*17.

18. See Daniel Abrahamson, *Speeches: The Criminalization of Medical Marijuana*, 11 HASTINGS WOMEN'S L.J. 75, 89 (2000) (noting Washington, D.C. initiative).

19. See *id.* (describing Barr's amendment that kept marijuana votes from being tabulated).

20. See Tina Susman, *Another Try at Democracy; Nigeria Vote Moves to End Military Rule*, NEWSDAY, Feb. 28, 1999, at A4 (recalling 1993 Nigerian debacle).

21. 77 F. Supp. 2d 25 (D.D.C. 1999).

22. See Symposium, *The Criminalization of Medicinal Marijuana*, 11 HASTINGS WOMEN'S L.J. 75, 89 n.31 (2000) (stating that initiative was approved 69% to 31% (citations omitted)).

authors in this Symposium issue explore Fourth Amendment issues in more depth.<sup>23</sup> A brief explanation is in order, however, of the inevitability of Fourth Amendment violations in pursuing current drug policies. Unlike other crimes, drug offenses do not have complaining witnesses—people who come forward to request police assistance. All parties are consenting participants who likely wish to hide their drug activity. In order to unearth drug crimes, the police engage in wiretapping, surveillance, undercover operations, paying informants, entrapment by offering to buy or sell drugs, and countless other questionable police practices.<sup>24</sup>

Additionally, businesses, schools and government agencies have increasingly required intrusive drug tests.<sup>25</sup> For example, until the ACLU brought a halt to the practice in *Marchwinski v. Howard*,<sup>26</sup> the State of Michigan forced all welfare recipients to undergo mandatory drug testing regardless of suspicion.<sup>27</sup> Schools across the nation have sought to test their students for drug use, threatening to create the broad doctrine of treating students as second-class citizens under the Constitution.<sup>28</sup> Illustratively, in 1995, the Supreme Court declared in *Vernonia v. Acton*<sup>29</sup> that athletes retain a lesser degree of privacy than their fellow classmates.<sup>30</sup> The Court's upcoming decision in *Board of Education v. Earls*,<sup>31</sup> a case that involves a high school's policy of randomly drug testing students who wish to participate in any extracurricular activity, will establish a national standard for school drug testing and further define students' constitutional rights.<sup>32</sup>

Property rights, once sacred in America, have also been sacrificed in this war under the strange fiction that property could be "guilty." All assets suspected of "participating" in a crime can be seized and sold, with the

23. See Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897 (2002); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815 (2002).

24. See generally Dan Gardner, *The Failed War on Drugs*, CHI. SUN-TIMES, Feb. 4, 2001, at 30 (recognizing police methods used to prevent drug crimes).

25. See National Criminal Justice Reference Service, *Creating Safe and Drug Free Schools* 33-46 (Sept. 1996) (discussing drug tests required in schools), at <http://www.ncjrs.org/pdffiles/safescho.pdf>.

26. 113 F. Supp. 2d 1134 (E.D. Mich. 2000).

27. See *Marchwinski*, 113 F. Supp. 2d at 1135.

28. See National Criminal Justice Reference Service, *supra* note 25, at 33 (recognizing drug testing in schools).

29. 515 U.S. 646 (1995).

30. See *Vernonia*, 515 U.S. at 657 ("Legitimate privacy expectations are even less with regard to student athletes.").

31. 122 S. Ct. 509 (2001) (granting certiorari).

32. See *Vernonia*, 515 U.S. at 646; see also *Bd. of Educ. v. Earls*, 242 F.3d 1264, 1270 (10th Cir. 2001) (demonstrating that ACLU litigation has recently curtailed efforts to expand drug testing beyond student athletes); *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 920 (N.D. Tex. 2001) (same).

profits flowing to law enforcement budgets.<sup>33</sup> The burden of proof for demonstrating the property's innocence falls upon the rightful owner.<sup>34</sup> 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, and seize the money of unsuspecting bystanders whose only crime is to carry an unusual amount of cash.<sup>35</sup> Beyond the profoundly arbitrary process, asset forfeiture poses a deeper threat. A significant part of drug enforcement efforts have shifted from prosecuting drug crime to seizing property; indeed, by the late 1990s, many drug enforcement agencies were taking in more money from asset forfeiture than they received from their budgets.<sup>36</sup> Self-financed police groups need not justify their activities through any regular budgetary process, and accordingly, such groups have constructed a veil of secrecy, thus enjoying freedom from legislative oversight and setting an agenda accountable to no one.<sup>37</sup> In short, practices in the drug war have created a system that lies very far from the usual democratic institutional practices in the United States.

### III. THE RIGHT TO VOTE

Of all the constitutional deprivations of the war on drugs, felony disenfranchisement resonates for its continuing damage to democracy. 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.<sup>38</sup> 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 par-

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33. See William Patrick Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1309-13 (1992) (examining asset forfeiture activities conducted by law enforcement).

34. See *id.* at 1320 ("Once the government shows probable cause for forfeiture, the statute shifts the burden of proof, for both production and persuasion, onto the claimant.").

35. See generally *United States v. \$46,588.00 in U.S. Currency & \$20.00 in Canadian Currency*, 103 F.3d 902, 903 (10th Cir. 1995) (discussing asset forfeiture procedures).

36. See Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 894 (1987) (comparing amounts recovered in asset forfeiture to amount in budget).

37. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 41 (1998) ("[T]he forfeiture laws in particular are producing self-financing, unaccountable law enforcement agencies divorced from any meaningful legislative oversight.").

38. See generally Nora Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement As an Alternative*, 84 MINN. L. REV. 753, 774 (2000) (recognizing denial of right to vote as consequence of conviction).

ticularly solid political support. The following chart provides details of these states.

PERMANENT DISENFRANCHISEMENT	Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Virginia, and Wyoming
PERMANENT DISENFRANCHISEMENT AFTER 2ND FELONY	Arizona and Maryland
PERMANENT DISENFRANCHISEMENT IF CONVICTED BEFORE DATE IN PARENTHESIS	Tennessee (1986) and Washington (1984)

Source: HUMAN RIGHTS WATCH AND THE SENTENCING PROJECT, LOSING THE VOTE, 1998<sup>39</sup>

Earlier this year, New Mexico passed a law to re-enfranchise its ex-felons, leaving the shameful ranks of states that eliminate the right to vote even for those felons who have repaid their debt to society.<sup>40</sup> Not coincidentally, New Mexico's governor and legislature have also been among the most receptive to arguments for drug policy reform.

The political impact of felony disenfranchisement laws became starkly evident in the 2000 presidential election. The outcome of the Florida vote and of the presidential race turned upon just a few hundred votes.<sup>41</sup> Yet, butterfly ballots and hanging chads were not the only culprits in a controversial election. In Florida, even a minor drug offense, such as a low-level, nonviolent drug possession, is counted as a felony.<sup>42</sup> Such offenders often never face any time in jail, but they lose their right to vote forever.<sup>43</sup> Consequently, over 200,000 African-American men were barred from that election, as they will be from every other election in that state.<sup>44</sup> Considering that a reported 90% of African-American voters supported Vice President Al Gore, the permanent disenfranchisement of approximately one-third of all African-American men in Florida was significant enough to single-

39. HUMAN RIGHTS WATCH AND THE SENTENCING PROJECT, LOSING THE VOTE (1998) [hereinafter LOSING THE VOTE], available at <http://www.hrw.org/reports98/vote> (last visited Mar. 4, 2002).

40. See Donovan Kabalka, *Felons Might Be Able to Vote Again*, ALBUQUERQUE TRIB., June 29, 2001, at A2 (recognizing bill passed by New Mexico legislature as conferring right to vote for former felons).

41. See Laura Parker, *Palm Beach Judge: No New Election*, USA TODAY, Nov. 21, 2000, at 7A (discussing implication of election in Florida); Ben White, *Politics; 25 Electoral Votes, \$25 Million Pot of Political Gold*, WASH. POST, Nov. 26, 2000, at A14 (same).

42. See *Wilson v. State*, 584 So. 2d 147, 148 (Fla. Dist. Ct. App. 1991) (evaluating defendant's convictions of felony nonviolent drug possession).

43. See FLA. STAT. ANN. § 97.041(2) (2001) (providing that convicted felons are not entitled to register or vote unless right is restored pursuant to law).

44. See Noam Chomsky, *Elections 2000* (Jan. 2001) (discussing large number of African-Americans denied right to vote based on felony conviction), at <http://www.zmag.org/Zmag/articles/jan01chomsky.htm>.

handedly alter the outcome of the presidential election.<sup>45</sup> This phenomenon is far from being an argument for or against a particular political party, for it was the Clinton Administration that presided over the massive wave of incarceration that cost Al Gore this election.<sup>46</sup> The Florida situation exemplifies the inherent difficulty of reining in a drug war from which the elected officials creating drug policy directly benefit.

The tragedy of lost voting rights is not confined to Florida. Thirteen percent of all African-American men, totaling 1.4 million, are disenfranchised today.<sup>47</sup> More than ten states have disenfranchised more than 20% of their Black men.<sup>48</sup> The seduction of drug war rhetoric must be powerful indeed to have allowed 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, and to a unique form of American apartheid.

#### IV. THE BIRTH OF A NEW SLAVE NATION

The war on drugs subjects America 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 with appalling levels of support. Each has its own rhetoric and 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 our nation's children as its goals, while turning a blind eye to the racial injustice it promotes. The tie that binds all three systems of oppression is passive societal acceptance of blatant forms of discrimination and racism that stubbornly persist as part of our history. As with slavery and Jim Crow, the rhetoric of the war on drugs will one day seem corrupt and unjust. We will one day understand that the war on drugs was a war on people and communities.

Before examining the racial dimensions of the drug war, we should shed light on some common misconceptions. African-Americans do not

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45. See Sasha Abramsky, *Barring Democracy* (Oct. 17, 2000) (asserting that denial of right to vote for minorities results in Republican elections), at [http://www.motherjones.com/news\\_wire/felonvote.html](http://www.motherjones.com/news_wire/felonvote.html).

46. See Peter Gorman & Bill Weinberg, *US: The Clinton Drug War Legacy* (Feb. 1, 2001) (discussing Clinton's role and impact in drug war), at <http://www.mapinc.org/drugnews/v01/n087/a05.html>.

47. See Cedric Muhammed, *Black Ex-Felons Could Have Made the Difference for Al Gore*, at <http://www.supersphere.com/FrontPage/Politic/Article.html?ID=BushGore&Name=Felons> (last visited Mar. 8, 2002).

48. See generally Human Rights Watch, *Fact Sheet: States that Bar Ex-Offenders from Voting* (analyzing percentages of disenfranchised Black men in several states), at [http://www.hrw.org/press98/oct/vote\\_fact1022.htm](http://www.hrw.org/press98/oct/vote_fact1022.htm) (last visited Mar. 19, 2002).

use drugs more than white people.<sup>49</sup> In fact, Whites and Blacks use drugs at almost exactly the same rates.<sup>50</sup> Because there are five times as many Whites as Blacks in the United States, it follows that the overwhelming majority of drug users are white.<sup>51</sup> Nevertheless, African-Americans are admitted to state prison at a rate that is 13.4 times greater than Whites, a disparity driven largely by the gross racial targeting of drug laws.<sup>52</sup> In some states, even those outside the Old Confederacy, Blacks make up 90% of drug prisoners and are up to fifty-seven times more likely than Whites to be incarcerated for drug crimes.<sup>53</sup>

The war on drugs offers surprising 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 African descendants of their freedom. For African-American men between the ages of twenty and twenty-nine, almost one in three are currently under the thumb of the criminal justice system.<sup>54</sup> The number of Black men deprived of freedom is now approaching numbers seen only in the worst days of slavery. Already, this nation is locking up the same number of African-American men as were enslaved in 1820.<sup>55</sup> Assuming the average rate of imprisonment for the last decade continues, only fifteen years remain before the Black male inmate population will catch up with the number of male slaves on the eve of the Civil War.

*Table. BLACK MALE SLAVES AND PROJECTED BLACK INMATE POPULATION*<sup>56</sup>

YEAR	NUMBER OF AFRICAN-AMERICAN MALE INMATES	YEAR	NUMBER OF MALE SLAVES
2000	792,000	1820	783,781
2005	1,040,027	1830	1,001,986
2008	1,224,719	1840	1,244,000
2017	1,999,916	1860	1,981,395

49. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, 1999 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (Aug. 2000), at [http://www.samhsa.gov/OAS/NHSDA/99DetailedTables/whole\\_Table\\_of\\_contents.htm](http://www.samhsa.gov/OAS/NHSDA/99DetailedTables/whole_Table_of_contents.htm).

50. The percentage of drug use by race is as follows: White 6.6%, Black 7.7%, and Hispanic 6.7%. See *id.*

51. See *id.*

52. See *id.*

53. HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (May 2000), available at <http://www.hrw.org/reports/2000/usa>.

54. See Jan M. Chaiken, *Crunching Numbers: Crime and Incarceration at the End of the Millennium*, NAT'L INST. OF JUST. J., Jan. 2000, at 14.

55. See *id.*

56. The number of African-American male inmates is derived from the baseline of two million prisoners and the fact that African-American men represent 41.3% of the total inmate population. See *Prison and Jail Inmates*, *supra* note 4. The growth in prison population assumes a constant yearly growth rate of 5.6%. This was the average rate of growth for the decade from 1990 to 2000, and is a reasonable estimate given that the rate has been increasing overall and has

The right to vote did not exist for slaves, even though each slave counted as 3/5 of a person for representational purposes.<sup>57</sup> Today, 1.5 million Black men, out of 10.4 million who would otherwise be eligible, cannot vote because of criminal convictions. In many states, like Florida and Alabama, close to one-third of Black men have lost the right to vote forever.<sup>58</sup>

In yet another replica of the constitutive elements of slavery, disproportionate numbers of Black women have lost or stand to lose their children because of the war on drugs.<sup>59</sup> 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.<sup>60</sup>

Although the recent Supreme Court ruling in *Ferguson v. City of Charleston*<sup>61</sup> will set some limits on this practice, African-American mothers regularly lose custody of their babies when they test positive for drugs or show signs of past drug use.<sup>62</sup> In one South Carolina hospital, nurses and doctors ordered drug tests almost exclusively for African-American women or for the partners of African-American men.<sup>63</sup> In some instances, women

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increased even more for the African-American population, as well as for the fact that high rates of recidivism will have a multiplier effect. *See id.* The data regarding slavery are from Inter-University Consortium for Political and Social Research. *See* Inter-University Consortium for Political and Social Research, *Study 00003: Historical Demographic, Economic, and Social Data: The United States, 1790-1970*, available at <http://www.icpsr.umich.edu/cgi/archive2.prl?num=0003&path=ICPSR> (last visited Mar. 19, 2002).

57. *See* The Gilder Lehrman Institute of American History, *The Three-Fifth Compromise* (2001) (describing agreement to count slaves as three-fifths for representation and tax purposes), available at [http://www.gliah.uh.edu/documents/documents\\_p2.cfm?doc=306](http://www.gliah.uh.edu/documents/documents_p2.cfm?doc=306).

58. *See* LOSING THE VOTE, *supra* note 39; *see also* Pierre Thomas, *Study Suggests Black Male Prison Rate Impinges on Political Process*, WASH. POST, Jan. 30, 1997, at A3.

59. *See* *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001) (setting forth example of pregnant women being illegally tested for cocaine use).

60. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 2 (2001).

61. 532 U.S. at 76 (holding that urine tests are "searches" under Fourth Amendment).

62. *See* Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 938-41 (1997) (discussing disproportionate impact on African-American women of prosecuting for drug use during pregnancy).

63. *See id.* at 941-44 (discussing "Interagency Policy on Cocaine Abuse in Pregnancy" implemented at Medical University of South Carolina to press criminal charges against drug-using pregnant women). "The Interagency Policy resulted in the arrests of forty-two patients, all but one of whom were Black." *Id.* at 943.

who tested positive gave birth in shackles and were hauled away in chains to prison while their newborn infant was removed to foster care.<sup>64</sup>

The seduction 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 inhumane conditions with no control over their situation and no remuneration. Today, public authorities, intimidated by the rising costs of building and maintaining prisons, have introduced an innovative work 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 thirty-five to ninety-five cents per hour, before deductions.<sup>65</sup> A lucky inmate who made fifty cents an hour working eight hours every workday would make \$960 a year, and much of that amount would be taken to cover penalties and court imposed fees.<sup>66</sup> In this fashion, ordinary work is increasingly being transferred to prison complexes to take advantage of this seductively cheap labor force.

Slaves were kept purposefully illiterate and uneducated. Again, Frederick Douglass' description of his master's prohibition of his education reverberates with current drug 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.<sup>67</sup>

Under the war on drugs, Congress has once again moved to close the gates of education to many African-Americans and other minorities. Under the Higher Education Act (HEA) of 1998, federal financial aid, including loans, grants and work study, is denied to any student convicted of a drug related offense.<sup>68</sup> 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

64. *See id.* ("Disregarding the sanctity of the maternity ward; the arrests more closely resembled the conduct of the state in some totalitarian regime. Police arrested some patients within days or even hours of giving birth and hauled them to jail in handcuffs and leg shackles."); *see, e.g., Ferguson*, 532 U.S. at 70 (regarding petitioners who received obstetrical care from Medical University of South Carolina and were arrested for testing positive for cocaine).

65. *See* California Prison Industry Authority, *About the Prison Industry Authority—Overview* (describing inmate work program), available at <http://www.pia.ca.gov/onlinecat/about.html> (last visited Jan. 21, 2002).

66. Figure calculated based on fifty cents for eight hours a day working two hundred and forty days of the year.

67. Frederick Douglass, *Narrative of the Life of Frederick Douglass*, in *THE CLASSIC SLAVE NARRATIVES* 243, 274 (Henry Louis Gates, Jr. ed., 1987).

68. *See* Higher Education Act Amendments of 1998 § 483(f), 20 U.S.C. § 1091 (1965) (amended 1998) (explaining suspension of eligibility for drug related of-

financial aid, the HEA plainly targets low-income people of color.<sup>69</sup> Murder and rape do not render a person ineligible; however, being convicted of possessing small quantities of marijuana is enough to lose financial aid and the opportunity to better oneself through a college education.<sup>70</sup>

Finally, just as the health of African-Americans was constantly under attack on the plantation and under Jim Crow, United States drug policies also target the health and well being of African-American and minority communities. Today, AIDS is the leading cause of death for young Blacks and Latinos.<sup>71</sup> In fact, “[a]lthough Blacks make up only 12 percent of the population, they account for 41 percent of Americans with AIDS.”<sup>72</sup> Black and Latino adults and adolescents represented 68% of the AIDS cases reported in 1999.<sup>73</sup> Furthermore:

African-American and Hispanic 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.<sup>74</sup>

Forty-two percent of African-American women who are HIV positive became infected through injecting drugs.<sup>75</sup> Most advanced democracies have implemented harm reduction policies, including needle exchange programs to prevent the spread of AIDS and other blood transmitted dis-

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fenses). For information about the loss of federal financial aid and efforts to overturn the law, visit <http://www.aclu.org>.

69. See Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 944 (2001) (“[W]hile 76% of drug users are white, African-Americans comprise 35% of all drug arrests, 55% of all drug convictions, and 74% of all drug sentences.”).

70. See Higher Education Act Amendments of 1998, § 483 (amending sentencing guidelines but not addressing murder or rape as exclusionary criteria).

71. See Caroline Palmer & Lynn Mickelson, *Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 464-65 (2001) (“AIDS-related illnesses are now the leading cause of death for all African-Americans aged twenty-five to forty-four.”).

72. *Troubling New Figures on AIDS Among Blacks*, S.F. CHRON., Aug. 19, 1997, at A18 (discussing advancement of AIDS among African-Americans).

73. See NAT’L CENTER FOR HIV, STD, & TB PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVICES, HIV/AIDS SURVEILLANCE REPORT, Vol. 12 (No. 1), 31 (2000) [hereinafter HIV/AIDS SURVEILLANCE REPORT] (finding calculation by adding estimated adult/adolescent AIDS incidence in 1999 of Blacks (20,642) and Hispanics (8,540) divided by the total cases (42,697)), available at <http://www.cdc.gov/hiv/stats/hasr1201.pdf> (last visited Mar. 4, 2002).

74. See Nat’l Center for HIV, STD, & TB Prevention, *HIV/AIDS Among U.S. Women: Minority and Young Women at Continuing Risk* (providing statistics on increase in AIDS cases), available at <http://www.cdc.gov/hiv/pubs/facts/women.htm> (last visited Mar. 19, 2002).

75. See HIV/AIDS SURVEILLANCE REPORT, *supra* note 73, (examining trends in AIDS incidences during 1999 compared to earlier years).

eases.<sup>76</sup> However, American drug policies block funding for clean needles, and some states like New Jersey arrest anyone attempting to provide clean injection equipment using private funds.<sup>77</sup> These murderous policies exact a high price from minority populations in the United States.

#### V. CONCLUSION

Here lies the new Civil Rights Movement. As in a recurring nightmare, it revisits the same issues civil rights activists faced in the 1960s when fighting Jim Crow and the same issues abolitionists faced in the 19th century. The weakening of American democracy and the emergence of yet another institutionalized system that condones discrimination reflect our legacy of racism inherited from our "Founding Fathers." Like the original sin of the United States sanctioning slavery and enshrining racism in the Constitution in the form of the three-fifths compromise, each generation is uncomfortably confronted with its history. We chronically disavow the sin, distancing ourselves from the old, discredited form of racism. We denounce it. We say we have finally healed ourselves. 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 American apartheid, the new Jim Crow.

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76. *See, e.g.*, International Harm Reduction Development, Harm Reduction: Needle Exchange (explaining world-wide needle exchange programs as harm reduction method), *available at* [http://www.soros.org/harm-reduction/frame\\_harm.htm](http://www.soros.org/harm-reduction/frame_harm.htm) (last visited Mar. 19, 2002).

77. *See, e.g.*, *State v. McCague*, 714 A.2d 937, 944 (N.J. Super. Ct. App. Div. 1998) (finding members of nonprofit organization operating needle exchange program guilty of giving hypodermic needle to another, even if members acted with purpose of halting spread of AIDS virus).