

# AMERICAN DRUG LAWS

## THE NEW JIM CROW

### BIENNIAL SPEECH

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In 1942, over 120,000 Americans were stripped of their businesses and their homes and incarcerated for the duration of World War II. They committed no offense. They were convicted of no crime. They were suspected, arrested, had their property confiscated and imprisoned because of the color of their skin and their national origin or the national origin of their parents.

The Japanese-American internment in 1942 was an exercise in a traditional American abuse. That abuse was to substitute skin color and national origin for evidence and to punish on that basis alone.

When I say that the Japanese-American internment was a traditional American abuse, I mean that it did not occur in a cultural, legal or political vacuum. It was one of the worst abuses the United States government ever visited upon its own citizens, but it was not the only such abuse.

During the time of the internment, Jim Crow laws and formal racial segregation existed in the American South and was so reified that virtually no one in this country could imagine it ending. A nation that had long ago learned to tolerate and accept Jim Crow laws (victimizing African-Americans) was well-equipped and well-prepared to accept internment (victimizing Japanese-Americans). A kind of unified field theory of color discrimination existed back then, and thrived upon the same misbegotten principle, which, except in rare instances, went largely unchallenged.

Well, now it's 57 years later, and we like to congratulate ourselves. The country likes to congratulate itself. The polls reflect that we've congratulated ourselves. And even Congress, even this Congress, congratulates itself on being past all that. Jim Crow laws are a thing of the past. We don't punish on the basis of skin color anymore, we tell ourselves. Now, what disparities exist are predominantly based on class and economics.

The Japanese-American internment is now universally recognized as something we're all ashamed of, and even Ronald Reagan, in 1988, came to call it an act of war hysteria and racism. He was a tad late. The ACLU called it that in 1942. But that's often the way it is with expressions of civic morality. It's important to be there when the immorality occurs, so that something can be done about it. Retrospective morality is too easy, and rarely helps the victims. And so it must be said — now, not later — that in the United States today we are not yet past using skin color as a substitute for evidence and a proxy for suspicion.

On our highways, on our streets, in our airports, and at our customs checkpoints, skin color once again, irrespective of class, and without distinctions based on education or economic status, skin color once again is being used as a cause for suspicion and a sufficient reason to violate people's rights.

We all know what the statistics are, or at least most of us in this room know what the statistics are. In places like Maryland, for example, one of the few states where we've been able to gather systematic statistics, 17 percent of the drivers along a stretch of I-95, outside of Baltimore, are African-American. But 73 percent of those who are pulled over, stopped, and subjected to extensive, humiliating searches are African-American. Nor is this color discrimination limited to targeting African-Americans. 21 percent of all drivers along that stretch are racial minorities — African-Americans, Latinos, Asians and others. Yet 80 percent of those pulled over and subjected to searches are minorities. That degree of statistical disproportion is highly unlikely to be the product of chance. In fact, it is not the product of chance. It is the product of purpose.

Nor is Maryland an isolated instance. In those few states where we have been able to gather similar systematic statistics, like New Jersey and Pennsylvania, the same kinds of disparities have emerged. In other states where we have not yet been able systematically to gather statistics, the examples are legion and coming in at the rate of hundreds a day. These states include California, Oklahoma, Tennessee, Texas, Wisconsin, South Carolina, Oregon, Rhode Island, North Carolina, New York, Nebraska, Michigan, Maine, Massachusetts, Kentucky, Florida, Indiana, Connecticut, Colorado, and Arizona. If I've left any of your states out, I'm sorry. I'm sure it's going on there, too. We just don't know about it yet. It's a little bit like the secret bombing of Cambodia. You remember the secret bombing of Cambodia. The government went wild keeping the bombing in Cambodia a secret. And for a long time, it was a secret from us. But it was never a secret to the Cambodians.

Racial profiling on our highways has long been a secret from most Americans, and from virtually all white Americans. But it's never been a secret to its victims. There seems to be almost no one of color who has not been victimized by this practice or who does not know somebody close to them who has. It reminds me of the kind of situation that was reflected in the pamphlets of the American Revolution that chronicled the ubiquitousness of the general searches by British soldiers who came often and regularly into people's homes and ripped up furniture with bayonets looking for violations of the Stamp Act. These searches were so ubiquitous, that there seemed to be virtually no American colonist who had not been victimized by such searches, or did not know somebody close to them who had been victimized. Many historians regard anger over that colonial practice as the major incendiary spark of the Revolution. And it was because of the anger about that kind of intrusion that the Fourth Amendment was passed after the Revolution. That was the first and last time in American history where the majority of the population vigorously supported the Fourth Amendment. The reason was instructive. Most of them had their rights violated, or knew someone close to them who did, and they didn't like it, would not tolerate it. And that's why they insisted that a Fourth Amendment be included within the Bill of Rights that became a political condition of ratifying the Constitution.

The success we have had over 200 years making this a country where most people have never suffered a violation of their Fourth Amendment rights makes it peculiarly difficult to defend Fourth Amendment rights for those few — especially when racially defined — whose rights are still commonly violated and always at risk. For when most Americans have not experienced such violations themselves and do not even know about how pervasive such violations are to Americans of color, no constituency of support from the majority to end this abuse can be built. And so our first challenge is to publicize as widely as possible what is going on.

The fact is that if only a minority of American citizens had their Fourth Amendment rights violated the majority who did not would not be automatically sensitive to that violation, especially if they did not know about it. And when the violated minority is defined by skin color, it makes the problem immensely worse. And that is the problem we face today. This has gone on for years, and never been a secret to its victims. From time to time, a lawsuit or a press release has called attention to the violation, but it has always been met with official denials, which in the absence of sufficient proof, have prevailed. Cops have denied it, elected officials have denied it, and now that they can no longer deny it, they have begun the process of justifying it.

It is ubiquitous. It is happening in every state. And you have to ask yourself: In a country in which police power is so decentralized, 14,000 police departments, most of them don't talk to each other, really, how is it that this practice spreads? How is it that it's so uniform? Well, that's not an accident either. It's uniform because in 1986 the federal Drug Enforcement Agency started something called Operation Pipeline. The purpose of this program was to interdict drugs, and to get drug couriers. And to implement this program, they brought in, have brought in to date, some 27,000 state troopers from 48 states to teach them how to spot a car that is likely to be carrying drugs on the highways.

They are taught to look for things like: Is there a freshener hanging from the rearview mirror? Because what would you use a freshener for but to hide the telltale signs of marijuana smoke? If you have a bumper sticker on your car that indicates you've been to Jamaica (not Queens) that raises the odds that there are drugs inside that car, and, of course, there's skin color, especially if the driver is black and the car expensive. The plain fact is that the drug war hysteria has become an engine for the restoration of Jim Crow justice in this country, just as the real war hysteria was an engine for racial injustice in 1942.

It is important to talk about the federal DEA training program because many public officials who can no longer deny the fact of racial profiling would like us to believe it is the work of rogue cops. But we are not talking about freelance cowboys here and there who violate rights. No, we are not talking about rogue cops. We are talking about rogue policy. We are talking about rogue leadership. We are talking about a national policy which is training police all over this country to use traffic violations, which everyone commits the minute you get into your car, as an excuse to stop and search people with dark skin. Most of us are not familiar with the full range of traffic violations, but in fact

there is virtually no car on the road, when it's stopped, much less when it's going, that does not violate some aspect of the local traffic code.

Indeed, one of the peculiar results of racial profiling is that young blacks and Latinos are now the most educated people in this country on the traffic code. They know all the violations that most of us do not. And they go way beyond seat belts and loose bumpers and broken tail lights and muffler violations, signaling for turns, and things like that.

So when you have an offense that everyone commits virtually all the time, it ends up vesting enormous discretion in the police. And what happens is that traffic code violations are now used officially as a pretext. They're not interested in getting you to put your seat belt on, or in getting you to fix your tail light, or in getting you to move from lane to lane in the proper way, whatever that is. They're not interested in that when they stop you for those violations. The traffic stops are used as a pretext to look into the car and, one way or another, to obtain your consent to search for drugs, sometimes taking the whole car apart, just as the British soldiers ripped up furniture with their bayonets, and leaving its remains on the road, by the side, after they have failed to find drugs.

In the end, stopping cars on the basis of their drivers' skin color, is not a very efficient way to look for drugs. And so most of the time, they don't find them. When searches are based not on evidence but on things like political beliefs or skin color, most of those searched will be innocent. And so all along our highways innocent people of darker skin color are systematically stopped, searched, harassed, humiliated — and let go, as if letting them go remedied the violation.

Nor is this just about highways. Recently, attention has been focused on pulling cars over. But last year, there were 51,000 people selected for body searches by immigration officials at customs checkpoints. Body searches ranging from hand frisks to cavity searches and strip searches. 51,000 people selected. 96 percent of those searches were fruitless: nothing illegal was found. And the selection was not based on evidence. Two-thirds of the people selected for those body searches were black and Latino. That is policy. It is not freelance cowboys.

On the streets of our cities, people are stopped for so-called Terry frisks. So-called because their legality is based on a Supreme Court case names Terry v. Ohio, in which the Court ruled that it was constitutional for the police, without a warrant and without the normal evidentiary threshold of probable cause, to stop and frisk people they believe may be packing a gun. They're supposed to have at least reasonable suspicion that the person they stopped and frisked has a gun. But the reasonable suspicion often turns out to be that you're black, you're Latino, and you're young. Or that you're walking in a neighborhood you shouldn't be in, which is to say, not the ghetto.

In New York City, over the last two years, the police have admitted they've recorded 45,000 such stops. In 35,000, they found nothing. They arrested 9,500 people, but half of those arrests were dismissed immediately for insufficient evidence. So 8 out of 9 of those stops were fruitless. Reasonable suspicion? How can the suspicion be reasonably based

on any threshold of evidence when they are wrong nearly 90 percent of the time? And here's the kicker, no surprise: two-thirds of people stopped were black or Latino. And the New York State Attorney-General, who in the course of investigating this practice has interviewed police who do these frisks, says he believes that hundreds of thousands more occurred that were not recorded, and, of course, were also fruitless.

So you are dealing here with a result that amounts to a needle in a very large haystack. How can such suspicion be reasonable? Or based on real evidence? What evidence could possibly arouse suspicion when 8 out of 9 searches - and probably a much higher percentage - are mistakes? And the truth is that what arouses suspicion is not evidence, is not something that they see that rises to a reasonable suspicion of gun possession. It's skin color and age and where you are or where you're not supposed to be.

As I said, there's been a lot of official denials for a long time. The ACLU of New Jersey has been fighting this issue for at least 10, 12, years, that I'm aware. And during all that period of time, officials in New Jersey have steadfastly denied that this goes on as a matter of a policy or as a matter of practice. And when only isolated instances emerge over time, such denials prevail. The absence of systematic information acts as a blockade to reform.

Now they admit it. And miraculously, a lot of the media are giving Governor Whitman credit for admitting it. Well, you know, she was finally caught red-handed by the evidence. What could she do? She was in a position similar to Justin Volpe, the New York City cop who tortured Abner Louima; he finally admitted it, too, after the evidence overwhelmed his denials. Public officials ought to get no credit for admitting crimes that they first denied but then cannot escape because the evidence produced is overwhelming.

So now they've admitted to racial profiling in New Jersey, and they've admitted it in Maryland, and they are soon going to admit it in a lot of other places as well. So now the defense switches from denial to justification. And we're beginning to hear not that we're sorry, this is an outrage, we shouldn't be doing this, this is left over from another era in our history. Now we're beginning to hear: this is okay, and here's the reason why it's okay.

In an article on this subject in The Sunday Times Magazine last week, some cops who use racial profiling were quoted as saying, "Well, you know the ACLU is making a big deal about this in Maryland, but in all of those stops, 3 out of 10 produced some drugs. That's a World Guinness Book of Records result." Well, it means that 7 out of 10 who were stopped were innocent, and that they have no evidentiary idea what they're doing when they're stopping these people. Because 3 out of 10, in my book does not amount to probable cause.

There's an old Southern folk song whose refrain is "If you hang 'em all, you'll get the guilty." And the fact that you got some of the guilty does not justify you hanging them all.

But there are worse problems with that 3 out of 10 claim. First of all, as the New York Attorney-General found with Terry frisks, many stops of innocent people are not recorded, so the percentage of successful searches is likely much less than 30 percent. More importantly, if you go behind the statistics, you find out that of the 3 that they found, black drivers were no more likely to be among the 3 than white drivers. So that, in fact, the notion of stopping black and Latino drivers disproportionately because they are more likely to be carrying drugs, is not borne out even by the 3 of 10 where they do find drugs.

So here is what we have: 21 percent of all the drivers are minorities, 80 percent of those that they stop and search are minorities, but the handful of people where they find drugs are evenly split between whites and minorities. How that can justify racial profiling is difficult to fathom.

Now, there's another thing about that 3 out of 10 claim that I find curious. I will hazard a guess that if you went into any random apartment building on the west side of Manhattan, and searched every apartment, you would find 3 out of 10 where there was a little marijuana. I don't know anybody who doesn't giggle knowingly when I say that, including when I say it on the west side of Manhattan.

Now, really, the cops even smile. So the real interesting question is, why don't they do that? Why don't they just decide to go in and search all the apartments in some random apartment building the way they decide to stop cars? They don't do it because most of the folks who live in those apartment buildings are white. They don't do it because if they tried to do it, the outrage would become so big, so fast that it would become politically impossible to sustain.

But when you're stopping black and Latino kids in central Harlem, it's easy to sustain. And it feeds into the persistent prejudice in peoples' minds, which has been fomented through a campaign of disinformation by the government for decades that, in fact, most blacks and most Latinos do carry drugs and are drug dealers. And now the cops are actually beginning to say — in that article last Sunday in the Times Magazine — several cops were quoted as saying, "Get real. Most of the drug dealers along the Northeastern seaboard, most of the big-time drug dealers are black and Latino. That's why we're stopping all these people."

Well, it's interesting because they offer no statistics to document the fact that most of the drug dealers in the Northeast corridor are black and Latino. But let's accept that that's true. It does not follow that most blacks and Latinos are drug couriers. Even if most of the drug dealers in the Northeast corridor or in any particular neighborhood or city are black or Latino, it does not follow that most blacks and Latinos are drug dealers. And that, therefore, it's okay to stop people based on skin color. Think about it for a minute. Most players in the NBA are black. But if you were trying to get a team together, you wouldn't go out in the street and round up random African-Americans.

Most jazz musicians are black. But if you went to hire a band, you wouldn't go out in the street and round up random blacks and ask them if they played the saxophone. It wouldn't be a good way to find what you wanted. It's a very simple, logical fallacy. The fact that most drug dealers are X does not mean that most X are drug dealers. Yet they say that with impunity. The media repeats it without challenging it, and it feeds into everybody's belief. I have been in countless debates where people throw that at you. You think it's racism, they say. But most drug dealers are black and Latino in my neighborhood, so why shouldn't they — without evidence — search or arrest somebody's grandfather or somebody's grandson?

That kind of racism is now so deeply imbedded in our society, and it is a product of systematic, policy-driven drug war disinformation that has been going on in this country since the inception of the drug war in 1914.

I don't want to suggest that the civil liberties problems with drug prohibition, which is an engine for all of this, are only about race. We all know what the civil liberties problems with drug war prohibition is.

Criminal prohibition of drugs, which is a relatively recent experiment in this country's history, dating back to the early 20<sup>th</sup> Century, is profoundly wrong in principle, at least according to us.

On the most basic level, the government ought to have no legitimate power to intrude into anyone's personal life for things that they do, things that they eat, things that they drink, that may harm themselves. If I eat much too much red meat and much too much fat-laden ice cream, which I do, and which most Americans do, and that demonstrably leads to premature heart attacks and strokes, that is no warrant to put me in jail for it. Right?

Moreover, it also is no warrant to threaten me with jail in order to force me into low-cholesterol treatment. And, above all, it is no warrant to arrest and imprison somebody else who eats red meat and ice cream moderately and without danger, because I do so abusively and excessively.

Even with respect to alcohol and tobacco, that principle is plain to most Americans. There are 15 million alcoholics in this country whose lives are in disarray, and which disarray affects the lives of people close to them. But that does not lead to government authority to put those people in jail for their own good. And it especially does not lead to putting people in jail who have a glass of red wine at night because somebody else is drinking a quart of vodka every morning.

Tobacco. Compulsive use of tobacco is infinitely more dangerous than even the compulsive use, much less the moderate use, of a drug like marijuana. But not even the most fierce opponents of tobacco has yet suggested putting people in jail for using it. Nor does anyone suggest using prison as a club to force tobacco users into treatment, and certainly nobody suggests arresting moderate users of tobacco or alcohol for possession of these drugs because somebody else is abusing them.

If anybody tried to suggest such measures in this country, they would be laughed at even within this Congress, this White House, this Department of Justice. So why are we doing precisely that with marijuana?

Most of the drug arrests in this country, about half now of the approximate million and a half annual arrests for non-violent drug violations are for marijuana. I'm not talking about violent crimes associated with drug trafficking. I'm talking about possession, sale, buying. Half of them are for marijuana.

If you took marijuana out of the equation, there would be very little left of the drug war, because there aren't many people in this country who use cocaine or heroin or other drugs. But there are 70 million people who have used marijuana in this country and 17 million use it monthly now, according to federal surveys. When you have that widespread of a violation of a law, like the traffic offenses, since so many people are violating the law, you vest discretion in the police to determine whom to target with their limited resources. You invite selective enforcement, and you invite that discretion, which, in this country, with our history, usually ends up being racially defined.

That is part of the problem with drug prohibition, and why it leads predictably, inevitably, to the sort of racial disparity I've been discussing.

In 1859, John Stewart Mill offered this advice to free societies: He said, "The object of this essay," which was called, interestingly enough, *On Liberty*, and it had some very prescient words in it on women's rights and other aspects of liberty — "The object of this essay," he writes, "is to assert one very simple principle to govern absolutely the dealings of society with the individual in the way of compulsion and control. That principle is that the sole end of which mankind are warranted in interfering with the liberty of action of any of their number is self-protection; that the only purpose for which power can be rightfully exercised over any member of the civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do so or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others to do so would be wise or even right. There are good reasons for remonstrating with him or reasoning with him, in persuading him or entreating him, but not for compelling him. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."

Now that is a principle which might well encompass a great deal of what we do. The police power of the state, according to the ACLU, is legitimately used to prevent one citizen from harming others, from attacking others, and to punish him when he does. It is illegitimately used, always illegitimately used, to prevent adults from managing their own bodies and minds, and by punishing them when they do. That is true even in the absence of racial disparities.

But beyond neutral principles, we must also look at real-world consequences. And to vest that kind of power in the police of any state invites, in this kind of a state, the sort of



racial subjugation that drug prohibition has become. Racial profiling on our highways is not, by itself, the issue. Racial profiling is, in fact, part of a larger system of racial subjugation and separation. And that larger system is called drug prohibition. It has been with us, as I say, for 85 years. It is well to remember what it was like during the early part of the 20<sup>th</sup> Century, the historical period in which drug prohibition was first established. It was a period in which lynchings in this country, based on race, reached an all-time high. It was a period when an openly and unapologetically racist immigration law in 1924 was passed by Congress essentially limiting immigration to Northwestern Europe, which prevailed until 1965, during the Civil Rights movement, when that immigration law was changed.

It was a period which was marked by Supreme Court doctrine that was governed by the 1896 decision Plessy v. Ferguson, which rationalized, authorized, and legitimized racial segregation.

It was a period in which warped phrases like the yellow peril became popular, in which opium dens and the fear of opium dens, like crackhouses today, were used to whip up an anti-Asian, anti-Chinese sentiment.

It was a period when cocaine-crazed Negroes were said to be threatening the sexual safety of white women. This was the atmosphere in which drug prohibition was initially passed. It was also a period when alcohol prohibition was passed, and when a man named John Scopes went to prison for teaching evolution in Tennessee. It was a period of fundamentalist revival, not as a matter of religious belief, but as a matter of the fundamentalist takeover of the police power of the state, precisely the sort of thing we are struggling against now and for the past two decades, with respect to the religious right.

Once drug prohibition was established, things got steadily worse. Between 1914, when the Harrison Act was passed, and 1970, 55 federal laws and hundreds of state laws were passed making the possession and the sale, the buying and the selling of drugs for personal use a crime.

Over all those years prohibition had demonstrably not worked. It did not make drugs less available. It did not interdict drugs sufficiently to suppress supply. It did not make drugs safer. It did not make drug use safer, and it did not decrease the number of people using drugs.

In other words, the system designed to reduce drug availability and to interfere with the marketing of drugs demonstrably had not accomplished either purpose. Despite that, in New York, in 1973, Governor Nelson Rockefeller decided that the failure of these tough laws was that they weren't tough enough. And he introduced what came to be known as the Rockefeller Drug Laws, which created draconian mandatory minimum sentences, and helped legitimize the notion of mandatory minimums that plague us today and are responsible for the escalation of incarceration in this country. Mandatory minimums were brought to us, courtesy of the drug war.

The idea was that now we're really going to get tough. Now if you were caught with even a particle of a forbidden substance, you were going to go away for 15 or 20 years, and no judge could use discretion to vary that sentence.

There were other wonderful effects of the Rockefeller Drug Laws. They managed to accelerate the use of young people into the fine art of trafficking drugs. Because these harsh laws only applied to adults, and not juveniles, that was the time in New York, after those laws were passed, when 12-year-olds and 13-year-olds first began to be used extensively by drug traffickers to carry drugs, because they would be immune from these draconian sentences.

We were among those few who, at the time, in testimony, predicted that this harsh approach would not work. We were right, and every study of the impact of the Rockefeller drug laws has confirmed that we were right. But that has not prevented state and federal policies and laws from moving steadily and persistently in the same direction. When the Rockefeller law was shown to have failed, it was claimed that it was not tough enough. And since that time, we have had an exponential increase in incarceration and drug interdiction and law enforcement. Just since 1982, the amount of federal money that is spent on drug enforcement went up from 1.65 billion to 18 billion dollars. And that doesn't count the billions of dollars that the states spent.

The result? From a few hundred thousand people imprisoned in this country in local, state and federal jails, we now have close to two million people behind bars today. The bulk of that increase has been because of drug law violations, non-violent violations, possession, sale, buying.

The disproportion, the racial disproportion, in who gets arrested, who gets tried, who gets plea bargained, who gets convicted, and who gets sentenced and for how long is as stunning as the racial disparity in Maryland on I-95 for traffic stops. And it is not an accident, and it is not a surprise, because it is the same system.

There is a hundred-fold disparity between sentences for conviction of possession of equivalent amounts of crack cocaine and powder cocaine, despite the fact that there is no pharmacological difference in the effect it has on the body. It's a different system of delivery that creates a different feeling, but it is no more pharmacologically harmful. But the sentences are harsher for crack cocaine, which is crystallized cocaine, than it is for powder. And guess what? Most of the folks who use powder cocaine are white, and most of the folks who used crack cocaine during its heyday were black and Latino.

The racial profiling reflected in traffic stops reflects itself in every aspect of drug law enforcement. According to the National Institute of Drug Abuse, the federal agency that tracks these things, 13 percent of all monthly drug users in this country are African-Americans. That's just about their percentage of the population. Not disproportionate. But 35 percent of those arrested for drug possession are African-Americans. 55 percent of those convicted of drug possession are African-Americans and 74 percent of those imprisoned are African-Americans.

In this country, the major users of cocaine in the 1970s were people on university campuses. Lots of white women used cocaine in the 1970s. Many of them had babies. Most of them were stable and productive people. Most were well-nurtured and well-nourished and enjoyed the benefits of prenatal care. Their babies did not turn up in the hospital wards of anybody's city. Their babies did not create havoc in the nation's kindergartens five years later. And since the pharmacology of crack was no different, why did anybody expect it to be different when black women smoked crack in the 1980s?

Well, no one claims that it is healthy to use cocaine when pregnant. And certainly many poor, black women were having babies in the 1980s at abnormally low weights and with smaller head circumferences. This led to the crack-baby hysteria, predictions of permanent cognitive and emotional damage and warnings about the chaos that would result in our schools when these babies reached school age. Something had to be done, and what was done was predictable: many of those women were arrested.

The truth, as medical researchers now concede, was that those low-birth weight, smaller-head circumference babies were functions of poverty and not crack. It may have been true that some of those women were using crack. It was also true that they were using alcohol. It was also true that a lot of them were beaten by the men they were with. It was also true that a lot of them smoked cigarettes. And it was almost universally true that they did not have prenatal care, and did not get proper nutrition. What has always been true in all the medical literature is that such demographic descriptions produce low birth weight babies and babies with smaller head circumferences. Such babies are not born healthy, and face uncertain futures and daunting odds. But babies with low birth weights and smaller head circumferences are not monsters, and are not born with permanent and irreversible damage. If the medical research showed anything, it showed that low-birth weight and smaller head circumferences were correlated with a host of confounding factors, and that the use of crack brought with it no special correlation. Indeed, fetal alcohol syndrome was probably the most dangerous factor of all. These were characteristics traditionally associated with poverty, and the disabilities associated with poverty.

But sociologically and politically, if we had called them poverty babies, the responsibility to fix that might have been ours. If we had called them poverty babies, then we might have needed to create prenatal care programs for poor women. If we had called them poverty babies, then we might have had to do something about their lack of adequate nutrition, both before and after the birth of their children. If we called them poverty babies, we might have had to offer drug treatment to women who wanted it, instead of reducing access to treatment, as happened in the 1980s. But by calling them crack babies, we didn't have to do any of this. No social programs were implied. All we had to do was arrest the women. Because it was their fault, a form of child abuse. Thus, poverty itself became a form of child abuse, and the blame was shifted back upon the victims. And hundreds, thousands of black and Latino women were arrested, tried and in some cases convicted — in South Carolina, for example, -- of abusing their child, of delivering drugs to their child. And the means of delivery was the umbilical cord. They might as well have

been convicted of delivering poor nutrition. Certainly there was no credible research to distinguish one factor from another among the many associated with abject poverty.

And so it is no accident that among the increases in incarceration, we find that for black women between 1987 and 1991, incarceration on drug offenses increased by 800 percent, and has continued to go up since then.

What is happening to the children of these women? What new pressures are being put on the already inadequate and often destructive systems of foster care?

The increase in incarceration of African-Americans and Latinos and of women has now reached a proportion that is second to none in this world. And it is a civil liberties problem of such magnitude that it is hard to see what else could come first.

It goes deeper than that. Drunk driving is an offense in this country which resulted in 22,000 deaths last year. Drunk driving is an offense which is committed mostly by whites. That's not because they get drunk more often than blacks. It's just because there's more of them. 22,000 deaths, treated almost entirely as misdemeanors and by fines. In contrast, drug possession, without violence, no third-party deaths, two-thirds black and Hispanic, treated almost solely as felonies. Long prison sentences. And then guess what the kicker is? After you've been convicted of a felony and you get out, all but four states in this country disenfranchise you. Now you don't get to vote.

And the drug war has been largely responsible for this stunning statistic: 14 percent of all African-American males in this country are now disenfranchised as a result of felonies, which are heavily due to drug possession convictions. In some states in the South, it's 30 percent. All but four states do this. And the courts have upheld it. What the Voting Rights Act of 1965 provided, drug prohibition has to a significant degree taken away.

And I haven't even mentioned public health issues like the issue of clean needles, and the spread of AIDS heavily among poor populations, which are disproportionately nonwhite. And why are clean needles forbidden? Clean needles are forbidden in the service of the drug war. Providing clean needles would send a bad message, we were told. And so we for years tolerated the spread of AIDS disproportionately among blacks and Latinos.

Homicide is the leading cause of death among young black men aged 18 to 25, and a lot of those deaths are caused by drug trafficking. Al Capone didn't shoot people because he was drunk, and most people dealing drugs don't shoot people because they're high. They settle commercial disputes with their competitors and their customers in the streets with automatic weapons because that is what the law provides. That is why you had violence in Chicago in the 1920s, and that is why you have violence in the inner cities now. Not all the violence, but much of it. And much of the inner-city proliferation of automatic weapons has been an artifact of the illegal drug market. And so homicide is the leading cause of death for African-American males between the ages of 18 and 25.

One of every three African-American men between the ages of 20 and 29 are under the jurisdiction of the criminal justice system in this country. One of every three. And in places like the District of Columbia it is one of two. 14 percent are disenfranchised, and in some Southern states it is twice that. Hundreds of thousands are in jail at any one moment, and disproportionate numbers are arrested every day, not to mention all the innocent people who are stopped and searched along the highways and on our sidewalks.

What we see, in effect, is that drug prohibition has become a replacement system for segregation. It has become a system of separating out, subjugating, imprisoning, and destroying substantial portions of a population based on skin color. And then you pick up the sociology journals, and they all are talking about the American family. And they all want to know, what happened to the black men? Where are they? They're dead in the streets. They're stopped on our highways. They're languishing in our prisons, and they can't vote. And all of that has to do, not with poverty by itself, but with government policy.

And drug prohibition is an instrumentality of that policy. And yet drug prohibition is something which has not captured the imagination of liberals in this society for the most part. It has not captured the imagination of the black churches. It sure as hell hasn't captured the imagination of Charley Rangel in Congress. And, in fact, all of them have become by their inaction accomplices to a system in which the most damage that's done by drugs are not the drugs themselves or their pharmacological effects, but by the results of the law and policies designed to deal with the drugs.

Now, I do not mean to suggest that race is the only issue with drug prohibition. I do mean to say this: it is no longer possible in this country to talk about race discrimination without talking about drug policy, and it is no longer possible to talk about drug policy without talking about race. And we must, in talking about both, confront the issue of epidemic incarceration.

As always, we have a lot of things to do in this organization. Our greatest glory and our greatest problem in the ACLU is the fact that our mission encompasses the full range of the Bill of Rights plus the Civil War Amendments.

So I do not mean in this talk to suggest any diminution of importance of the rights of gay men and lesbians, of the rights of women to reproductive choice, of the rights of immigrants, of the rights of criminal suspects in general, of free speech rights or privacy rights, or any of the other rights that we're dealing with, the separation of church and state, so many of which are deeply and fundamentally under attack. I do mean to suggest this: that there is no greater moral problem that faces us as a nation than the problem of persistent and relentless racial subjugation in this country. And that requires us — that requires us to get engaged in the politics of the drug war and on the issue of incarceration, and to do it everywhere, in every affiliate, in every chapter from the ground up, and to take it on as only we are equipped to do.

Thank you.

