



SESSION TWO: BOOK DISCUSSION OF *TNJC* CHAPTER 2: THE LOCKDOWN

Part One: Legal History Regarding the War on Drugs, from Alexander, *TNJC* ch.2

The Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. ‘Courts and scholars agree that the Fourth Amendment governs all searches and seizures by the police and that the amendment was adopted in response to the English practice of conducting arbitrary searches under general warrants to uncover seditious libels [i.e. anti-government conspiracies]. The routine police harassment, arbitrary searches, and widespread police intimidation of those subject to English rule helped to inspire the American Revolution... Until the War on Drugs, courts had been fairly stringent about enforcing the Fourth Amendment’s requirements.’¹

Operation Pipeline (1984): The federal Drug Enforcement Agency (DEA) starts training over 300 state and local law enforcement agencies (over 25,000 officers by 2000) to use pretext traffic stops and very intimidating ‘consent’-obtained searches for drug searches.

The Anti-Drug Abuse Acts (1986): Federal law which established extremely long mandatory minimum prison terms for low-level drug dealing and possession of crack cocaine. This gives prosecutors enormous power in plea-bargaining. Prosecutors promise to bring lesser charges in exchange for people pleading guilty to lesser offenses, cooperating with law enforcement, and snitching.

Drug Reform Act (1986): Passage of extremely harsh mandatory sentencing for drug offenses. ‘Prior to [this Act], the longest sentence Congress had ever imposed for possession of any drug in any amount was one year... a conviction for selling a kilogram of heroin yields a mandatory ten-year sentence in U.S. federal court, compared with six months in prison in England.’²

Byrne Program (1988): Reagan requests that Congress give federal grant money to local narcotics task forces, including military equipment and intelligence. This contributes to the militarization of police and the vast expansion of SWAT teams.

Harmelin v. Michigan (1991): SCOTUS rules that three strikes sentencing is not ‘cruel and unusual punishment,’ and upholds a sentence of life imprisonment for a defendant with no prior convictions who attempted to sell 672 grams of crack cocaine.

Florida v. Bostick (1991): SCOTUS rules that police may obtain ‘consent’ from passengers on buses to search their bags. Justice Thurgood Marshall dissented: ‘The basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable,’ referring to racial prejudice. Of course young black men would be targeted, rather than elderly white women.

Whren v. United States (1996): Any traffic offense committed by a driver is a legitimate legal basis for a search.³

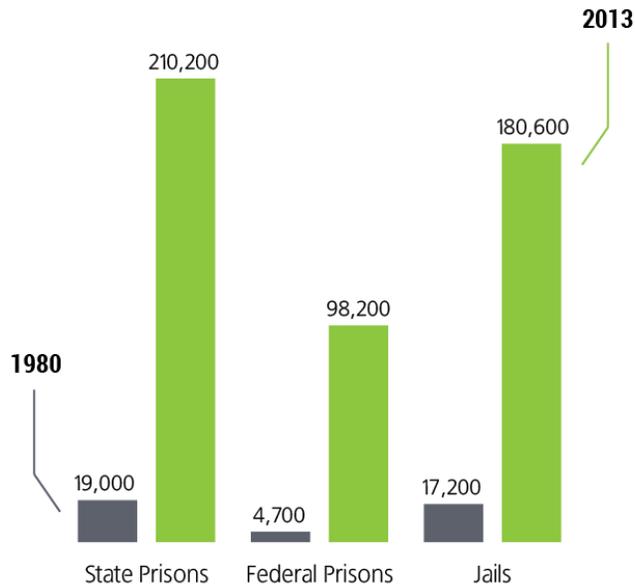
Civil Asset Forfeiture Reform Act (2000): Congress’ weak attempt to correct the financial incentive local police departments have to seize and keep property as part of the drug war (cars, houses, weapons, drug production tools, cash, etc.).

¹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2011), p.61 – 62

² *Ibid*, p.90

³ “The temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment’s prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective.” From Wikipedia, *Whren v. United States*.

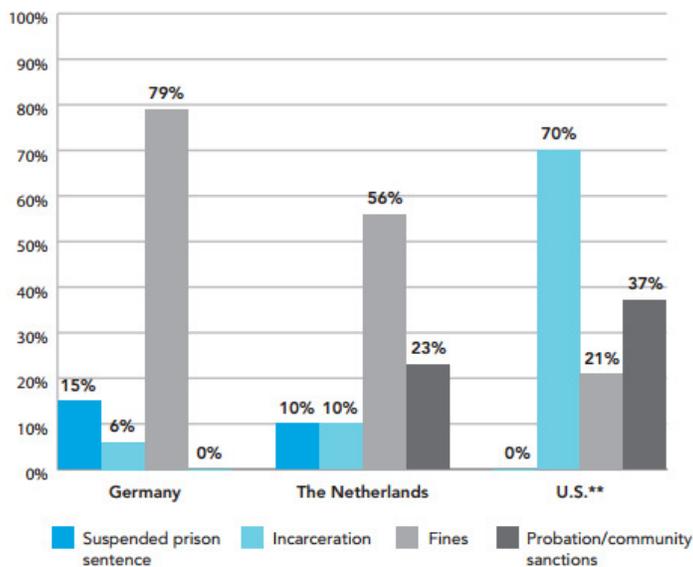
Number of People in Prisons and Jails for Drug Offenses, 1980 and 2013



Sources: Carson, E.A. (2014). *Prisoners in 2013*. Washington, D.C.: Bureau of Justice Statistics; Mauer, M. and King, R. (2007). *A 25-Year Quagmire: The War on Drugs and its Impact on American Society*. Washington, D.C.: The Sentencing Project; Glaze, L. E. and Herberman, E.J. (2014). *Correctional Populations in the United States, 2013*. Washington, D.C.: Bureau of Justice Statistics.



Figure 2. Comparison of German, Dutch, and American sanctioning practices*



*Year of data varies by country: Germany—2010, The Netherlands—2004, and U.S.—2004

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Data source for Germany: Dünkel, 2013 ("Not Suspended Prison Sentence" included in "Incarceration" category)

Data source for the Netherlands: van Kalmthout and Hofstee-van der Meulen, 2007 ("Non-conditional Prison Sentence" included in "Incarceration" category; "Transactions" included in "Fines" category; "Task Penalties" and "Penal Measures" included in "Probation/Community Sanctions" category)

Data source for U.S.: Petteruti and Fenster, 2011 ("Control of Freedom" included in "Probation" category; "Community Service" included in "Probation/Community Sanctions" category)



Part Two: Inspirations for Retribution or Restoration

Once again, in addition to looking at the policy details, we have to back up and ask the bigger question of whether our justice system should be more retributive or more restorative. Which kind of justice should win? Where does our sense of justice come from? I want to look at the Jewish law because the Jewish law was interpreted badly by the Puritans, who influenced our criminal justice system. So let's look again at the Bible, at the famous 'eye for an eye' principle. Let's also compare the Jewish law to the Code of Hammurabi from nearby Babylon just to get a sense for what laws were like back then:

The Code of Hammurabi

*Persons Unequal,
Retributive Justice*

Code of Hammurabi: ¹⁹⁷ If a man has broken another man's limb, his own shall be broken. ¹⁹⁸ If a man has destroyed an eye or a limb of *a poor man*, he shall pay one maneh of silver. ¹⁹⁹ If a man has destroyed an eye or a limb of *the servant* of another man, he shall pay one-half of a mina. ²⁰⁰ If a man has made the tooth of another to fall out, one of his own teeth shall be knocked out. ²⁰¹ If the tooth be that of *a poor man*, he shall pay one-third of a maneh of silver.

Historical and Cultural Background

- *The Code of Hammurabi* comes from Babylon about 1754 BC, about 400 years before Moses. Despite the difference in time, Moses and the Israelites probably would have been aware of law codes like this.
- Judging from use of 'one third of a maneh of silver,' the amount seems non-trivial and perhaps significant for a poor person, but not enormous either.⁴

⁴ Converting to present dollars is difficult, but as points of comparison, within the Code, one-third of a maneh of silver was the compensatory worth of a slave fatally gored by an ox, the penalty for causing the death of a pregnant slave girl, the penalty a creditor would have to pay if he wrongfully seized collateral from a debtor, and the payment a poor man would have to pay his wife to divorce her.



The Jewish Law: *Persons Equal, Restorative Justice*

Exodus 21¹⁸ If men have a quarrel and one strikes the other with a stone or with his fist, and he does not die but remains in bed,¹⁹ if he gets up and walks around outside on his staff, then he who struck him shall go unpunished; he shall only pay for his loss of time, and shall take care of him until he is *completely healed*...²² If men struggle with each other and strike a woman with child so that she gives birth prematurely, yet there is no injury, he shall surely be fined as the woman's husband may demand of him, and he shall pay as the judges decide.²³ But if there is any further injury, then you shall appoint as a penalty life for life,²⁴ eye for eye, tooth for tooth, hand for hand, foot for foot,²⁵ burn for burn, wound for wound, bruise for bruise...²⁸ If an ox gores a man or a woman to death... the owner of the ox shall go unpunished.²⁹ If, however, an ox was previously in the habit of goring and its owner has been warned, yet he does not confine it and it kills a man or a woman, the ox shall be stoned and its owner also shall be put to death.³⁰ If a ransom is demanded of him, then he shall give for the redemption of his life whatever is demanded of him.

Leviticus 19

(A)¹⁷ You shall not hate your fellow countryman in your heart;

(B) you may surely reprove your neighbor, but shall not incur sin because of him.

(A')¹⁸ You shall not take vengeance, nor bear any grudge against the sons of your people,

(B') but you shall love your neighbor as yourself; I am the Lord.

Leviticus 24²² There shall be *one standard* for you; it shall be *for the stranger as well as the native*, for I am the LORD your God.

Historical and Cultural Background

- *The Jewish Law*: Jewish tradition holds that this was given by God to Moses while Israel was in the wilderness. It takes the form of case law examples based on the Ten Commandments, so principles need to be reasoned out.
- '*An eye for an eye*' is a principle in Exodus 21:23 – 25 that Jewish rabbinical commentators interpret as *not* retributive. It is an outer limit of proportionality for cases of bodily harm, meant to represent proportional financial compensation (*Talmud BavaKamma* 83b – 84a) or, in some cases, lashes (*Makot* 1:1). They actually reason that because of the possibility that the offender is already blind: One cannot blind an already blind man! So they believe that the 'eye for an eye' is meant as proportional compensation: If you blind someone's eye, *you* become his 'second eye.'⁵

⁵ This restorative justice reading is reinforced by these facts: (1) In Exodus 21:18 – 19, just before this example of bodily harm, the offender must care for the injured victim until he is 'completely healed.' (2) In Exodus 21:22 and 30, financial compensation is named there, too. (3) In Leviticus 19:17 – 18, the law instructs Israelites to 'not take vengeance.' 'The Torah's command to love one's neighbor is put in parallel with a prohibition against taking vengeance upon one's neighbor,' such that these commands are mutually interpreting. Darren W. Snyder Belousek, *Atonement, Justice, and Peace: The Message of the Cross and the Mission of the Church* (Grand Rapids, MI: Eerdmans, 2012), p.408 says, 'In fact, the text gives us parallel sets of contrasting parallels. Taking these separate, we see the contrasts: in the first set, hating a neighbor in one's heart (A) contrasts with reproofing one's neighbor (B); in the second set, taking vengeance upon a neighbor (A') contrasts with loving one's neighbor (B'). Taking these together, we see the parallels: hating one's neighbor (A) is parallel with taking vengeance upon one's neighbor (A') – and both are prohibited; likewise, reproofing one's neighbor (B) is parallel with loving one's neighbor (B') – and both are commanded. Repaying harm for harm and injury for injury in due measure, while following the rule of the law (lex talionis), does not fulfill God's intent for his covenant people. Not retribution but reproof fulfills the righteousness that God wills; not hate but love is the holiness that God desires.' The entire book is an argument that God's justice is not retributive but restorative, and reparative. (4) God anticipated Israel's exile from the garden land and loss of political sovereignty (Dt.27 – 28; cf. Ex.20:4 – 6), reenacting Adam and Eve's exile from their garden land (Gen.3:20 – 24); and Israel would not be able to enact capital punishment while being ruled by another nation; so the principle of restoration and compensation was important to establish from the start. Therefore, Jewish law was victim-oriented and restorative, not primarily retributive in nature.



**SESSION TWO:
BOOK DISCUSSION OF TNJC CHAPTER 2: THE LOCKDOWN
Leader's Notes**

Introduction, Personal Question: How Close to Home?

Have you, or has anyone you know, been harassed by the police?

Overview

Recall Session One: In chapter one, Dr. Alexander talks about the rise of the system of mass incarceration as a racial caste system. Since our nation's founding, African Americans have repeatedly been controlled through white supremacist systems of racial and social control which appear to die, but are reborn in new forms. Time and again those who benefit from racial hierarchy have exploited our nation's racial divisions, stereotypes, and anxieties for political or economic gain—typically by pitting poor and working class whites against poor people of color. We ended last week by talking about the 'Southern Strategy' which was used by Nixon, Reagan, and then Clinton to win votes from working class whites in the South by playing on racial prejudice. The 'War on Drugs' was coded language that played on racial prejudice.

We also explored the question of which God do we imitate. Additionally, since the Bible has been influential in many areas of life, including criminal justice, we covered the origin story of sin and crime. We saw that the God of the Bible's justice is restorative, not retributive. In other words, that God seeks to restore every person.

In chapter two, Dr. Alexander talks about law and policy changes during the War on Drugs, especially during Reagan's presidency.

Optional: If you want to listen to a portion of the audiobook on youtube (<https://www.youtube.com/watch?v=nVcQEQj9mSc>). Otherwise: discuss the first page of this document, which is a summary of what Alexander presents.

- Police overreach in Bostick's case: 11:40 min mark. It is about the police boarding a bus and 'randomly' searching for drugs in people's bags. Police overreach.
- 'It Pays to Play': 30:51 min mark to the 39:02 min mark. Talks about the federal government giving financial incentives to local police forces for drug related policing. 43:30 min mark: federal subsidies to local police is not well publicized. They can retain and use cash, cars, and homes seized in the drug war. 50:00 min mark: The anti-drug unit in Oakland CA was called 'a wolf pack.'
- The idea that property could be guilty of a crime and can be seized by the police: 54:56 min mark to 1:00.05.
- The role of the prosecutor: 1:06.36 onward. The prosecutor has a lot of power in plea-bargaining. Prosecutors promise to bring lesser charges in exchange for people plead guilty to lesser offenses, cooperating with law enforcement, and snitching. 'Only three years in prison' for minor drug offenses. Other developed countries impose no more than 6 months in jail, if at all, for a first time offense. In the U.S., it could be up to 10 years.

Part One: Legal History Regarding the War on Drugs, from Alexander, TNJC ch.2

1. Notice that many of these laws were passed while Ronald Reagan was President, from 1981 – 1989. How does that relate to the 'Southern Strategy'?
 - a. Refer back to the session 2 handout on the coded racial language in politics.
 - b. The lesson for us is we have to call out 'dog whistle politics' that has coded language designed to appeal to racists. So yes, tired as we all may be from hearing this, race played a major role in the motivation and execution of the 'war on drugs.' I don't know how to assess all the factors, so I don't feel the need to say that it was the 'dominant' or 'most important' factor. I'm perfectly happy to grant other factors. But race cannot be overlooked.
2. Policing:
 - a. Notice Supreme Court Justice Thurgood Marshall dissented in the case *Florida v. Bostick*. He was the only African-American justice on the Supreme Court. If there were more African-Americans on the Supreme Court, would that have made a difference? Probably so!!



- i. Recall that Bostick was the African-American man who was on the bus when police stopped the bus randomly, and then saw him and asked to search his bag. He said yes, without knowing that he could have said no. He did have some drugs in his bag, so he was arrested. The Florida State Supreme Court had ruled that most people giving ‘consent’ to police under those circumstances weren’t really giving consent, because they would think they’re legally bound to obey a direct order.
 - ii. The U.S. Supreme Court reversed the Florida court’s decision. But Marshall dissented. He said that police searches are arbitrary, rarely result in finding actual drug traffickers, and are intimidating and intrusive.
 - iii. This suggests that having token minorities in positions of power is not always enough to make a difference.
- b. A University of Washington 2002 study of drug-law enforcement in Seattle, a racially mixed city, concluded ‘that the Seattle Police Department’s decisions to focus so heavily on crack, to the near exclusion of other drugs, and to concentrate its efforts on outdoor drug markets in downtown areas rather than drug markets located indoors or in predominantly white communities, reflect a racialized conception of the drug problem.’⁶
- c. (Note: I try to save this for session 3) Matthew Fogg, a former US Marshal, and DEA agent of 32 years, said (see the 2 minute video from Brave New Films where Matthew Fogg is interviewed: <https://www.youtube.com/watch?v=8ImeWd5gFT0>):

“We were jumping on guys in the middle of the night, all of that. Swooping down on folks all across the country, using these sorts of attack tactics that we went out on, that you would use in Vietnam, or some kind of war-torn zone. All of the stuff that we were doing, just calling it the war on drugs. And there wasn’t very many black guys in my position. So when I would go into the war room, where we were setting up all of our drug and gun and addiction task force determining what cities we were going to hit, I would notice that most of the time it always appeared to be urban areas. That’s when I asked the question, well, don’t they sell drugs out in Potomac and Springfield, and places like that? Maybe you all think they don’t, but statistics show they use more drugs out in those areas than anywhere. The special agent in charge, he says ‘You know, if we go out there and start messing with those folks, they know judges, they know lawyers, they know politicians. You start locking their kids up; somebody’s going to jerk our chain.’ He said, ‘they’re going to call us on it, and before you know it, they’re going to shut us down, and there goes your overtime.’ What I began to see is that the drug war is totally about race. If we were locking up everybody, white and black, for doing the same drugs, they would have done the same thing they did with prohibition.”⁷

This will raise the question: Why has racial bias been tolerated? We will explore that next week!

- d. Police incentives to profit
- i. There is the legal fiction that a car or a house can be guilty of a crime. So a woman whose husband is in his car with a friend carrying drugs is likely to lose her husband and their car!
 - ii. A similar thing happened in Ferguson, MO with regards to the city’s financial incentive to use the police force to generate income for the city: “Whites comprise 29% of the population of Ferguson but just 12.7% of vehicle stops. After being stopped in Ferguson, blacks are almost twice as likely as whites to be searched (12.1% vs. 6.9%) and twice as likely to be arrested (10.4% vs. 5.2%).” Lest anyone contend that blacks inherently merit greater police attention than whites, the report offers another statistic. “Searches of black individuals result in discovery of contraband only 21.7% of the time, while similar searches of whites produce contraband 34.0% of the time... The report goes on, “[A] Ferguson court employee reported that the bench routinely starts hearing cases 30 minutes before the appointed time and then locks the doors to the building as early as five minutes after the official hour, a practice that could easily lead a defendant arriving even slightly late to receive an additional charge for failure to appear.” The lawyers of Arch

⁶ Ibid, p.126 – 127 citing Beckett, Nyrop, Pfingst, Bowen, “Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle,” *Social Problems* 52, no.3 (2005)

⁷ John Vibes, “DEA Agent Speaks Out: We Were Told Not to Enforce Drug Laws In Rich Communities,” *Free Thought Project*, March 10, 2015; <http://thefreethoughtproject.com/dea-agent-drug-laws-intentionally-rich-communities/>.



City Defenders specialize in representing the indigent and the homeless. They noticed that many of their clients had multiple warrants on minor charges issued by municipal courts in Ferguson and the other 80 municipalities in St. Louis County that have their own courts and police. “They didn’t just have one case, they had 10 cases,” says Thomas Harvey, the organization’s 44-year-old executive director. The warrants too often precluded the clients from securing shelter and services, and access to job programs. The lawyers sought some remedy in the issuing courts.’⁸

- iii. Police who go to court get/got overtime pay.⁹ They go to court for any ticket that is contested, or any time they have to serve as a witness.
- e. Militarization of the police:
 - i. Queue up John Oliver’s segment on police militarization (from 6:12 min mark, to the end, for about 9 minutes – sometimes I start the session with this segment):
http://www.slate.com/blogs/browbeat/2014/08/18/john_oliver_on_ferguson_missouri_and_police_militarization_video.html
 - ii. SWAT team abuse example: Consider the case of Alberta Spruill, who was 57 years old, lived in Harlem, worked for the city of NYC, and was described by friends as a “devout churchgoer.” “On May 16, 2003, a dozen NYC police officers stormed her apartment building on a no-knock warrant, acting on a tip from a confidential informant who told them a convicted felon was selling drugs on the sixth floor. The informant had actually been in jail at the time he said he’d bought drugs in the apartment, and the target of the raid had been arrested four days before, but the officers didn’t check and didn’t even interview the building superintendent. Before entering, police deployed a flash-bang grenade, resulting in a blinding, deafening explosion. Alberta went into cardiac arrest and died two hours later. The death was ruled a homicide but no one was indicted.” Then, “Manhattan Borough President C. Virginia Fields held hearings on SWAT practices in NYC. According to the Village Voice, “Dozens of black and Latino victims – nurses, secretaries, and former officers – packed her chambers airing tales, one more horrifying than the next. Most were unable to hold back tears as they described police ransacking their homes, handcuffing children and grandparents, putting guns to their heads, and being verbally (and often physically) abusive. In many cases, victims had received no follow-up from the NYPD, even to fix busted doors or other physical damage.” In 1972, there were just a few hundred paramilitary drug raids per year in the U.S. By the early 1980’s, there were three thousand, by 1996, thirty thousand, and by 2001 there were forty thousand.’¹⁰
 - iii. Another example from 2008: William Lawrence helped start the SWAT team in Davis County, Utah in the northern suburbs of Salt Lake City. He watched that SWAT team kill his own son-in-law. ‘Basically, I felt betrayed by my profession,’ he said.¹¹ Now William Lawrence is fighting the militarization of the police. When someone close to us is hurt (even killed) by being thrown into the ‘criminal’ category, it has a different impact on us than someone distant from us.

3. Prosecution:

- a. The impact of mandatory minimums is that judges lose the ability to have discretion based on what they see of the support system around the defendant. Judges would sometimes have given lighter sentences or different sentences (go to rehab). Now, judges don’t have that
- b. Prosecutors have the power to plea bargain.

⁸ Michael Daly, ‘Ferguson Feeds Off the Poor: Three Warrants Per Year Per Household,’ *Daily Beast*, August 22, 2014;

<http://www.thedailybeast.com/articles/2014/08/22/ferguson-s-shameful-legal-shakedown-three-warrants-a-year-per-household.html>

⁹ Maria Cramer, ‘Police Overtime Pay Under Scrutiny,’ *Boston.com*, February 19, 2011;

http://archive.boston.com/news/local/massachusetts/articles/2011/02/19/overtime_pay_for_police_appearance_in_court_under_scrutiny/; Mary McCleary, ‘Police Officers Make Big Bucks for Court Appearances,’ *Opportunity Ohio*, August 9, 2010; <http://www.opportunityohio.org/police-officers-make-big-bucks-for-court-appearances/>

¹⁰Michelle Alexander, *The New Jim Crow*, p.75 – 76

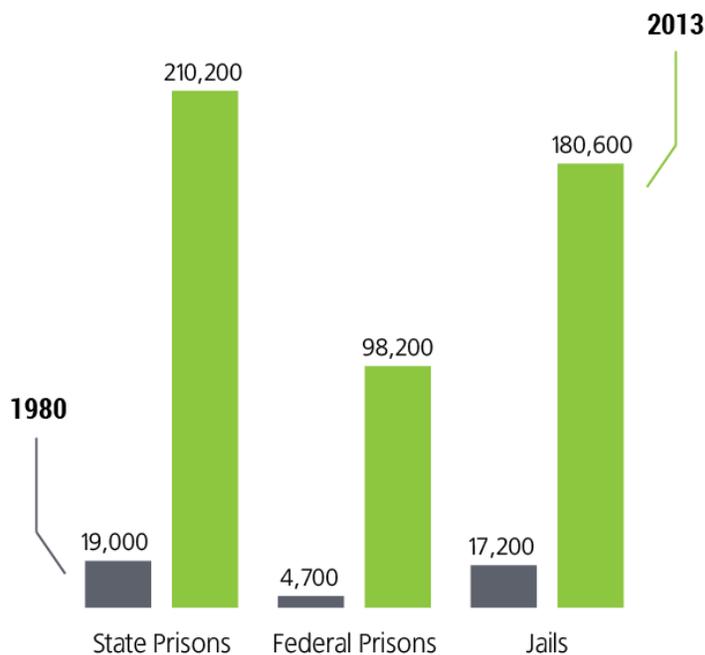
¹¹ Karen Foshay, ‘When the SWAT Team You Founded Kills Your Son-in-Law,’ *Aljazeera America*, March 19, 2015; Brian, 36, had a mental breakdown after fighting with his wife. He barricaded himself in his truck and threatened suicide. William Lawrence was by that time the former sheriff. He watched as the SWAT team escalated the situation, bringing in snipers, military hardware, tear gas, and flash grenades.



- c. Consider the case of Erma Faye Stewart in Hearne, Texas. “On Nov. 2, 2000, Erma Faye Stewart, then 30 and a single mother of two, and Regina Kelly, then 24 and a single mother of four, were arrested as part of a major drug sweep in Hearne, Texas. As reported by “Frontline,” the 27 individuals arrested in the sweep was indicted by a single informant later proven to be unreliable. All but one of the 27 are African-American. Both women proclaimed their innocence and were given public defenders who offered them little guidance and insisted that they plead guilty – Stewart’s lawyer reported not remembering Stewart, despite signing her plea agreement. Kelly and Stewart were both told that if they did not agree to a plea bargain, which amounted to probation, they would face “five to 99 years.” With a bail of \$70,000 and two small children at home, Stewart took the deal and was sentenced to 10 years probation. But after a five-month wait for the trial to begin, the state’s case fell apart. Everyone that didn’t take a plea bargain, including Kelly, was found not guilty. Stewart, on the other hand, fell into destitution because of the plea bargain – unable to secure food stamps or federal education money, unable to vote, evicted from public housing and forced to pay a \$1,000 fine and court fees on a minimum-wage salary. Kelly and Stewart’s stories are far from isolated incidents. In the United States, almost 95 percent of all felony convictions are secured without a jury. They are settled via a plea bargain — a unique facet of American law that allows the prosecutor to offer a reduced sentence in exchange for defendants waiving their rights to a jury trial and pleading guilty to the charges presented.”
(<http://www.mintpressnews.com/bargain-new-report-highlights-unfairness-drug-plea-agreements/174762/>).
4. Sentencing for drug-related offenses
 - a. Here is the federal Drug Enforcement Agency website: <http://www.dea.gov/druginfo/ftp3.shtml>. There is a chart which explains drug sentencing. But it might be more informative to compare these sentences over time, and compared to other countries. See below.
 - b. To see the increase of people serving time for drug-related offenses, and the change from 1980 to 2013, see <http://www.sentencingproject.org/template/page.cfm?id=128>:



Number of People in Prisons and Jails for Drug Offenses, 1980 and 2013



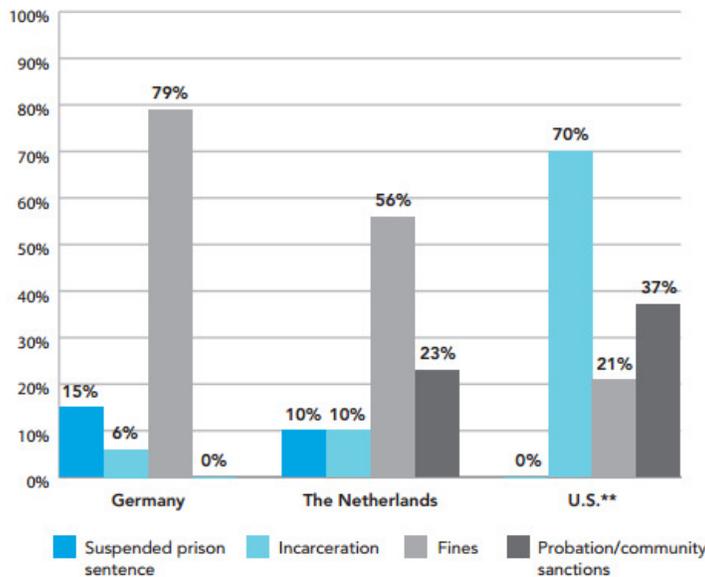
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- c. What do you feel is a reasonable response to those in possession of drugs currently defined as illegal? To those currently selling drugs that are currently defined as illegal?
- d. The following chart (from Vera Institute for Justice; *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the U.S.*, October 2013; <http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf>) compares Germany, Netherlands, and the USA on penalties for drug crimes:



Figure 2. Comparison of German, Dutch, and American sanctioning practices*



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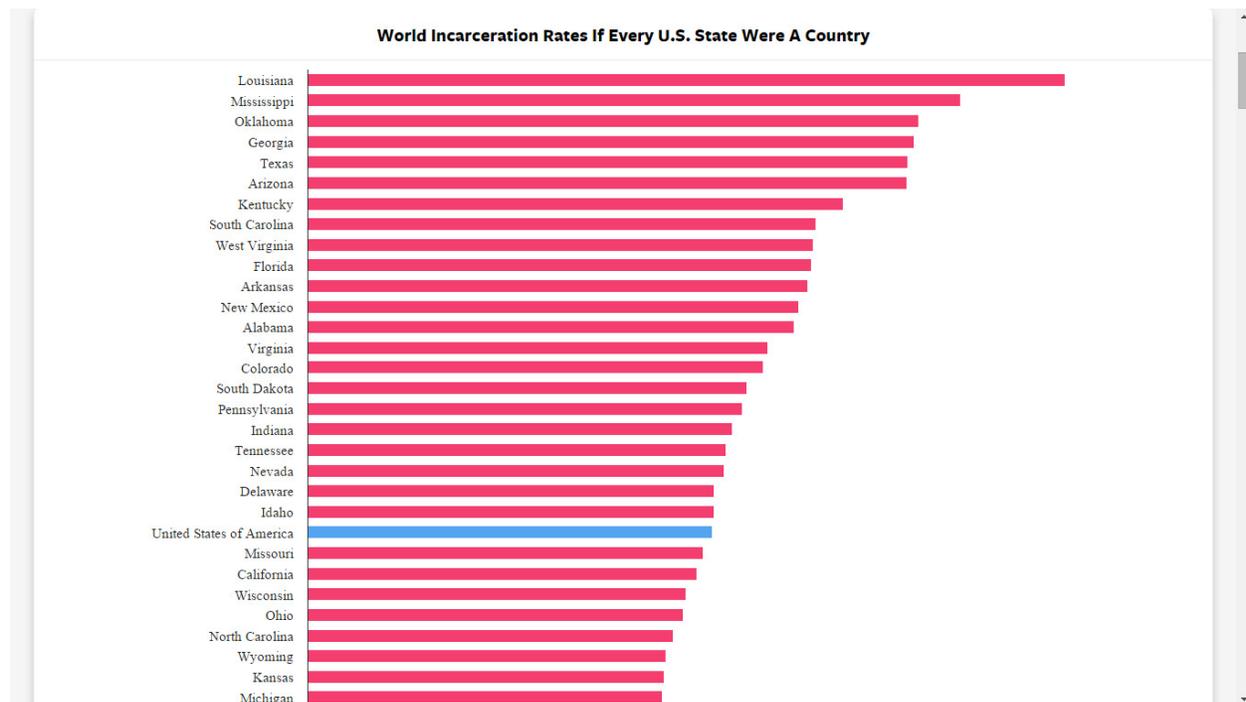
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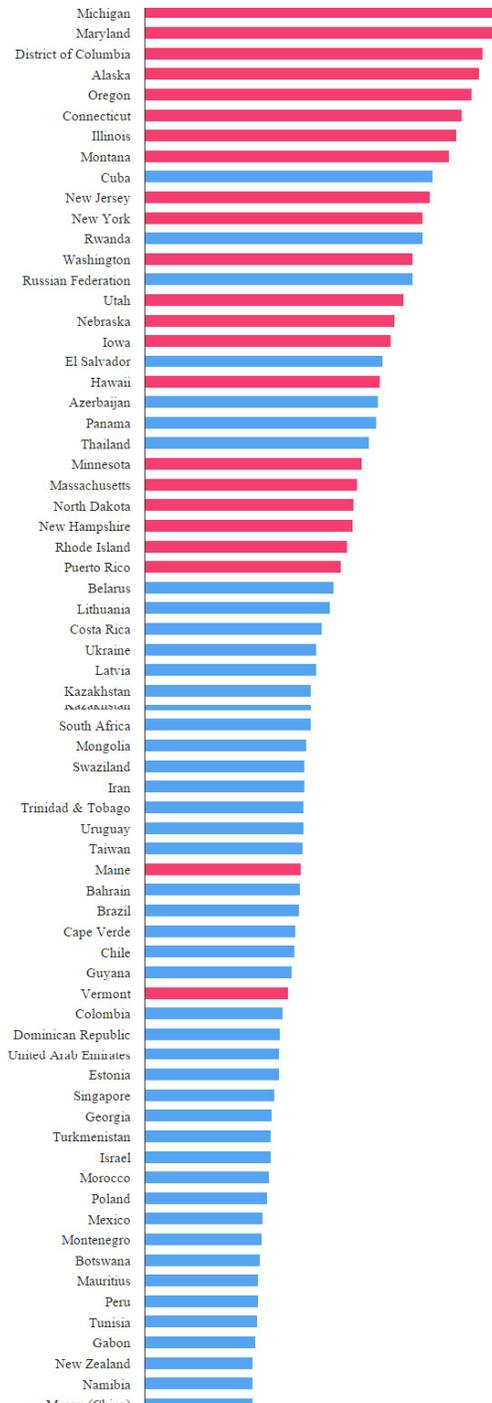
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Data source for U.S.: Petteruti and Fenster, 2011 ("Control of Freedom" included in "Probation" category; "Community Service" included in "Probation/Community Sanctions" category)

- e. The *Justice Policy Institute* also has collected a cross-country comparison of sentences: <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf>. See page 4.
- f. If Southern States in the U.S. have more racial prejudice, are more people incarcerated there? Yes. Check this out: <http://www.prisonpolicy.org/global/>. I've taken screen shots here:





- g. From 'Fair Sentencing Act' on *Wikipedia*: 'The Fair Sentencing Act of 2010 (Public Law 111-220) was an Act of Congress signed into law by U.S. President Barack Obama on August 3, 2010. Similar bills were introduced in several U.S. Congresses before its passage in 2010. The law reduced the disparity between the amount of crack cocaine and powder cocaine needed to trigger certain United States federal criminal penalties from a 100:1 weight ratio to an 18:1 weight ratio and eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine, among other provisions. Courts had also acted to reduce the sentencing disparity prior to the bill's passage. The Anti-Drug Abuse Act of 1986 implemented the initial disparity, reflecting Congress's view that crack cocaine was a more dangerous and harmful drug than powder cocaine.'



In the decades since, extensive research by the United States Sentencing Commission and other experts has suggested that the differences between the effects of the two drugs are exaggerated and that the sentencing disparity is unwarranted. Further controversy surrounding the 100:1 ratio was a result of its description by some as being racially biased and contributing to a disproportionate number of African Americans being sentenced for crack cocaine offenses. Legislation to reduce the disparity has been introduced since the mid-1990s, culminating in the signing of the Fair Sentencing Act.’

- h. Three strikes laws: There are two court cases that are important here.
 - i. *Lockyer v. Andrade*, decided with *Ewing v. California* (2003). Andrade’s third strike involved thefts of children’s videotapes worth \$153 which he intended as Christmas gifts for his nieces. In affirming the conviction, the U.S. Supreme Court upheld the California law in 2003 and he is now serving a sentence of 50 years to life.
 - ii. The case of Santos Reyes took Andrade’s 2003 verdict as determinative: In Dec 2003 a federal appeals court in SF upheld a ‘three strikes’ sentence of 26 years to life for Santos Reyes, whose third strike in California involved trying to take the written portion of a driver’s license test for his illiterate cousin. The court ruled that Reyes’ claim of cruel and unusual punishment had been foreclosed by a previous ruling on the law by the U.S. Supreme Court. Reyes admitted his perjury in filling out the license application, stating that his cousin needed the license in order to work as a roofer. The conviction followed two previous offenses, one for a juvenile burglary conviction in 1981 and another for an adult robbery conviction in 1987. Reyes had been offered a four-year prison term if he pled guilty, but chose to go to trial, believing he could demonstrate that he had not understood what constituted perjury when he took the exam. At the time of his sentencing in 1998, Reyes was married and had children ages 1 and 3.
 - iii. It seems to me that the ‘three strikes’ rule at the very least strips judges of the discretion that they used to have, and violates the ‘cruel and unusual punishment’ clause of the Eighth Amendment. It’s another form of ‘mandatory minimums’ that are just too blunt of a legal instrument.

Part Two: Inspirations for Retribution or Restoration

- 5. Read the comparison between the Babylonian Code of Hammurabi and the Jewish law. For non-Christians, I’m not asking you to take this text as authoritative, but as influential. This is one of the most influential ideas in the Jewish and Christian tradition: equal human rights. Now the context is important. How do the two law codes compare? They are roughly contemporary.
 - a. The neighbors of the Israelites had these attitudes that your punishment for a crime depended on your victim. In the Babylonian Code of Hammurabi, clearly people are not equal. You are punished for a crime based on how rich or important your victim is. If rich, you’re punished hard. If poor, you can just pay some money.
- 6. The Jewish law, by contrast, treats everyone equally. Including foreigners and servants. This is astounding because no one else did this!! Even today, our legal system allows for very different outcomes in how laws play out. It allows for implicit racial bias to police, prosecute, and sentence people differently according to race.
- 7. (optional, *if it comes up*) It also brings up the question of capital punishment. Why did the ancient laws use capital punishment?
 - a. It’s a very good question, and one part of the answer is that prisons require a certain kind of technology and a certain kind of state funded by taxes. The culture of the Israelites was partly nomadic and partly farming, with simple technology and no state to begin with.
 - b. So think of island cultures or nomadic cultures, and what kind of realistic options they had. They either exiled their criminals (also found in the Jewish law as excommunication), or executed them.
 - c. We can express our preference for imprisonment rather than capital punishment, given our forms of technology and government, without snubbing our noses at other cultures which did use the death penalty. I don’t think we are necessarily ‘more civilized’ than other cultures when we allow racial bias in sentencing, or imprison people the way we do.



8. Also, the Jewish law used the principle of *proportionality for each action*.
 - a. For each injury, there is a principle that the punishment would not go beyond the injury. So the 'eye for eye' principle handles each action separately.
 - b. Compare this to *Harmelin v. Michigan* (1991), where SCOTUS upheld a sentence of life imprisonment for a defendant with no prior convictions who attempted to sell 672 grams of crack cocaine. In Michigan at the time, the only other criminal act that warranted life imprisonment was murder. Is a first time drug trafficking offense *proportional to murder*???
 - c. Contrast that to our 'three strikes law,' for example
9. The Jewish law also used the principle of *restorative justice*.
 - a. That is, the victim was expected to name a compensation amount that is proportional to the emotional or physical injury, according to Exodus 21:22 and 29 – 30, which reads:

²² If men struggle with each other and strike a woman with child so that she gives birth prematurely, yet there is no injury, he shall surely be fined as the woman's husband may demand of him, and he shall pay as the judges decide.

²⁹ If, however, an ox was previously in the habit of goring and its owner has been warned, yet he does not confine it and it kills a man or a woman, the ox shall be stoned and its owner also shall be put to death. ³⁰ If a ransom is demanded of him, then he shall give for the redemption of his life whatever is demanded of him.

The law regulated the upper limit the victim would request. The principle of proportionality for each action was respected. This is different from American criminal law which is based on more strict retributive logic, where someone who commits an injury should immediately suffer themselves regardless of what the victim requests. The state demands that someone suffer. This is a carry-over from a medieval English view that a crime was committed against the monarch, not your neighbor per se.¹²

- b. Notice that the Jewish law treats each action separately, even when done by the same person. The three strikes law basically comes to a character-based conclusion by labeling a person 'criminal' after three felonies.
 - c. So it's possible that if someone deals drugs to my kids, that the consequence I could name is perhaps some jail time, but more importantly, renunciation from drug dealing and becoming a motivator speaking in public schools against drug use.
10. (optional) If this brings up questions about the treatment of slaves in the Bible, I'd recommend summarizing <http://newhumanityinstitute.org/pdfs/exodus.21.01-36.sg.pdf>. My key points there:
 - a. Basically, the word 'slaves' did not mean in the Bible what it meant in American history. God commanded Israel to never kidnap or abduct someone into slavery (Ex.21:16). That means no forced enslavement. God commanded Israel to help runaways wherever they wanted to (Dt.23:15 – 16). That means people could leave enslavement. You assumed if they ran away, things were bad enough. Also, any permanent damage to a slave like a chipped tooth or damaged eye was grounds for the slave to go free (Ex.21:27).
 - b. John Chrysostom, archbishop of Constantinople from 397 – 407 AD, said while preaching on Ephesians 6:5 – 9, 'Think not, [Paul] would say, that what is done towards a servant, He will therefore forgive, because done to a servant. Heathen laws indeed as being the laws of men, recognize a difference between these kinds of offenses. But the law of the common Lord and Master of all, as doing good to all alike, and dispensing the same rights to all, knows no such difference.' (<http://www.newadvent.org/fathers/230122.htm>)
11. (optional) If this brings up questions about women in the Bible, I'd recommend summarizing <http://newhumanityinstitute.org/pdfs/article-pentateuch-theme-women-part1.pdf> and <http://newhumanityinstitute.org/pdfs/article-pentateuch-theme-women-part2.pdf>.

¹²E.g. Sean McGlynn, 'Violence and the Law in Medieval England,' *History Today*, April 4, 2008; <http://www.historytoday.com/sean-mcglynn/violence-and-law-medieval-england> notes, 'The monarch, in his role as the supreme judge, was expected to employ whatever violence was necessary in pursuit of social stability and safety for his subjects.' For example, rape was considered 'an offence against the king's peace.'



- a. Basically, the impression people get of the Old Testament laws is that it's patriarchal. For example, in the divorce laws of Dt.24:5, husbands can divorce their wives for certain reasons. But can wives divorce their husbands?
- b. But we have to understand the language. Hebrew is like Spanish. The language and the pronouns are gendered. So if you say 'those guys,' you say, 'ellos.' If you say 'those women,' you say, 'ellas.' If you say 'those guys and girls,' or 'that group and I don't know their gender,' you use the word 'ellos.' But it's called the inclusive masculine form.
 - i. Jesus in Mark 10:12 interprets the divorce law of Dt.24:1 – 4 by talking about wives also divorcing their husbands. So he reads it as the inclusive masculine form. There are other reasons to take that as the general rule.
 - ii. If you want to argue that one instance is the exclusive masculine form, referring to only men and not women, then you have to make a special argument from the context. But generally, all the laws that are written in the masculine form should be taken as including women, not excluding them. So the laws speak of parents having authority over their children, but it's not just fathers over daughters.

Part Three: Action Steps

12. Action: We can encourage our representatives to repeal mandatory minimum sentencing. Judges used to have discretion about giving lighter sentences for first time offenders, or if they see that the defendant has a supportive community (like family, church, advocates) that will help with rehabilitation, school, employment, and character development. That's what gave prosecutors so much power. Let's write to our congresspeople to repeal mandatory minimums and 'three strikes laws.' Follow proposals from groups like *Families Against Mandatory Minimums* (www.famm.org). You can go to the FAMM website, click on the button 'Get Involved' or 'For Lawmakers' and see how they track the bills going through Congress, and write your Congressperson.
 - a. Federal Level
 - i. See this article by Sarah Childress, "Feds to Reconsider Harsh Sentencing for Drug Offenders," *PBS*, April 9, 2014; <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/locked-up-in-america/feds-to-reconsider-harsh-prison-terms-for-drug-offenders/>
 - b. State Level: Massachusetts. As of June 2015, Senator Sonia Chang-Díaz (D-Boston) and Representative Mary Keefe (D-Worcester) have filed an omnibus bill backed by our coalition to improve Massachusetts' systems of criminal justice, end mass incarceration, and re-invest in our communities through job and educational opportunity expansion. It's called the Justice Reinvestment Act (SD1874/HD3425). A coalition of 130 community groups called Jobs Not Jails rallied to support a part of the Act, on overturning mandatory minimum sentencing and reforming bail protocols. See:
 - i. Jobs Not Jails website (<http://jobsnotjails.org/jni/>)
 - ii. Article about Massachusetts reconsidering mandatory minimums (<http://www.mcan-pico.org/news/jobs-not-jails-hearing-report-back>)
 - iii. Article "4 Things To Know About The Mass. Debate On Mandatory Minimum Sentences" <http://www.wbur.org/2015/06/10/mandatory-minimum-sentences-primer>.
13. Action: Let's write to our congresspeople to repeal 'three strikes laws.'
 - a. Leader: research your state and any movements to repeal three strikes laws in your state. Examples:
 - i. California: [http://ballotpedia.org/California_Proposition_36_Changes_in_the_Three_Strikes_Law_\(2012\)](http://ballotpedia.org/California_Proposition_36_Changes_in_the_Three_Strikes_Law_(2012))
 - ii. Delaware: <http://www.delawareonline.com/story/opinion/contributors/2015/03/27/long-past-time-repeal-three-strikes-law/70564530/>
14. Action: Let's write to President Obama to continue demilitarizing the police



- a. You can go to this web page, <https://www.whitehouse.gov/blog/2015/05/18/why-president-obama-taking-steps-demilitarize-local-police-forces>, scroll down to the bottom, and email the White House using the email icon
 - b. 'Better late than never. Crossed off the Army-surplus distribution list now are tanklike vehicles, grenade launchers, bayonets, camouflage uniforms, and -- were these really included to begin with? -- armored aircraft and ships. Departments will have to justify the need for other kinds of equipment, including explosives and mine-resistant ambush protected, or MRAP, vehicles.'¹³
15. Action: The Black Body Survival Guide trains black people to know their rights in relation to the police. In light of the Sandra Bland police incident in 2015, this is especially important:
<http://www.theblackbodysurvivalguide.com/>

¹³ Editorial Board, 'Obama Demilitarizes the Police,' *Bloomberg View*, May 20, 2015; <http://www.bloombergvew.com/articles/2015-05-20/obama-demilitarizes-the-police>