

Christian Restorative Justice: Introduction & Application to *The New Jim Crow*

Mako A. Nagasawa

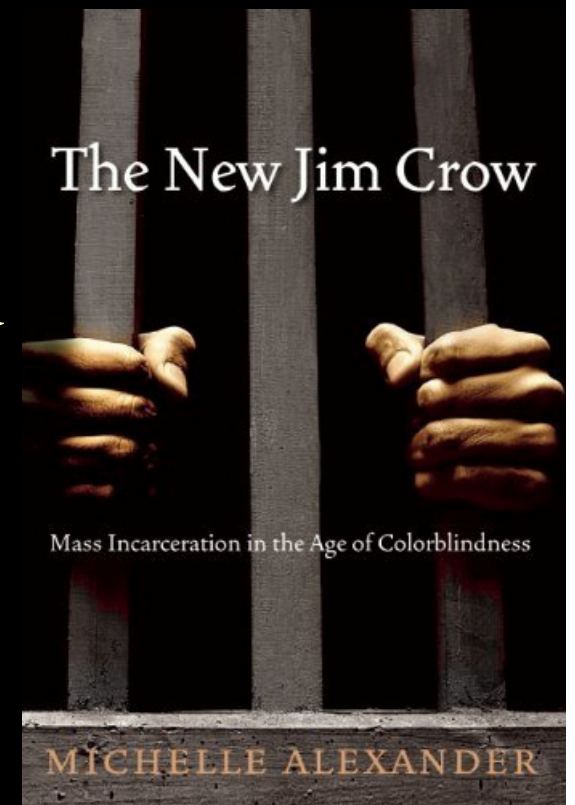


Crime and Punishment: Nationally

- The U.S. is ‘the incarceration capitol of the world.’
- Incarceration rates for drug related, non-violent crime is enormous:

‘The mass incarceration of African American men in our country, primarily through the “War on Drugs,” has created a new, legalized system of racial discrimination and social exclusion.’

(Michelle Alexander, author of *The New Jim Crow*)

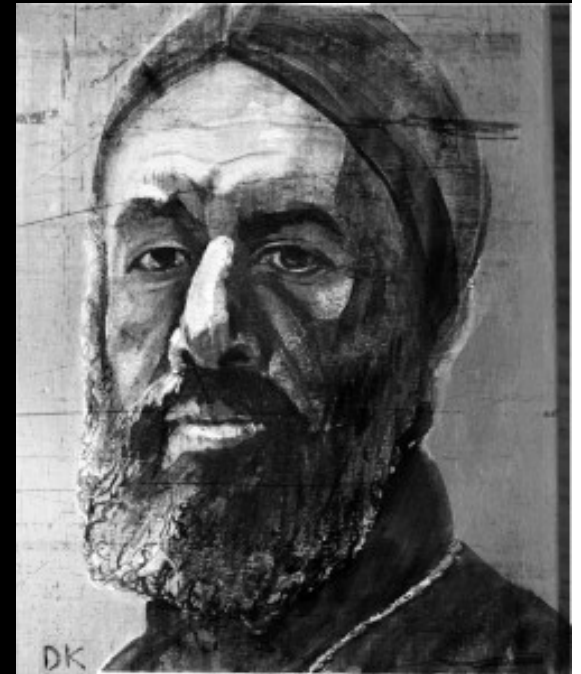


Outline

- Christian Restorative Justice
- Policing
- Prosecution
- Sentencing
- Reintegration

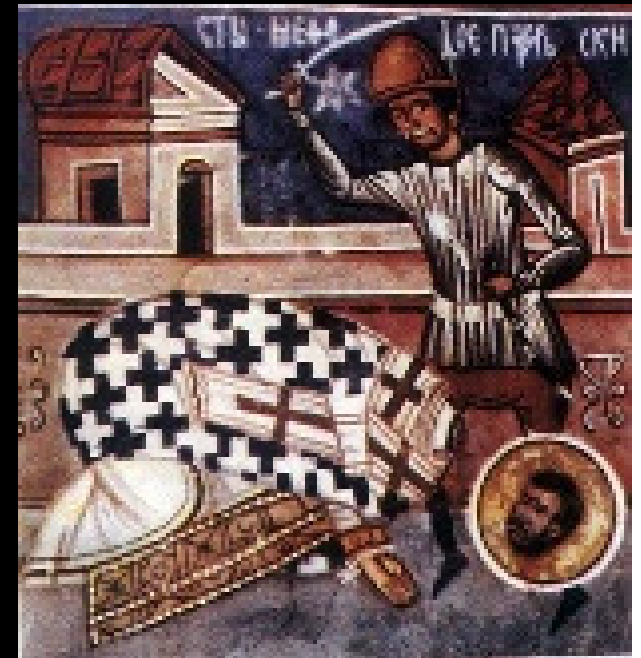
Restorative Justice in Scripture: God Works to Heal Self-Harm and Restore Relationship

- ‘Wherefore also He drove him out of Paradise, and removed him far from the tree of life, not because He envied him the tree of life, as some venture to assert, but because He pitied him, [and did not desire] that he should continue a sinner for ever, nor that the sin which surrounded him should be immortal, and evil interminable and irremediable. But He set a bound to his [state of] sin, by interposing death, and thus causing sin to cease, putting an end to it by the dissolution of the flesh, which should take place in the earth, so that man, ceasing at length to live to sin, and dying to it, might begin to live to God.’
 - Irenaeus of Lyons, *Against Heresies* 3.23.6 (2nd century)



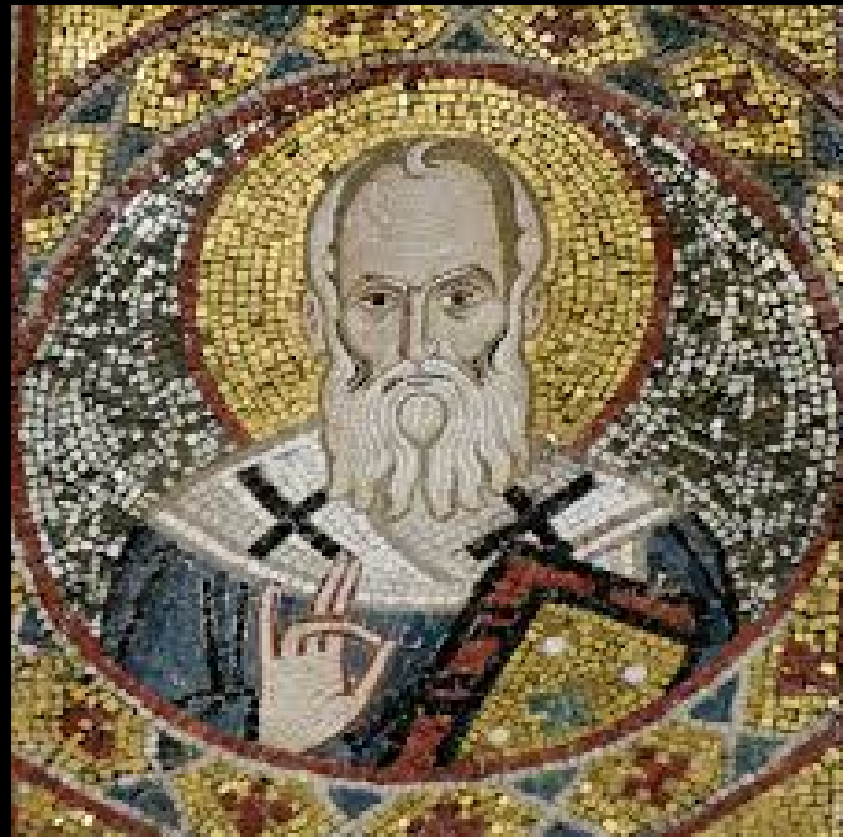
Restorative Justice in Scripture: God Works to Heal Self-Harm and Restore Relationship

- ‘In order, then, that man might not be an undying or ever-living evil, as would have been the case if sin were dominant within him, as it had sprung up in an immortal body, and was provided with immortal sustenance, God for this cause pronounced him mortal, and clothed him with mortality... For while the body still lives, before it has passed through death, sin must also live with it... For the present we restrain its sprouts, such as evil imaginations, lest any root of bitterness springing up trouble us, not suffering its leaves to uncloset and open into shoots; while the Word, like an axe, cuts at its roots which grow below. But hereafter the very thought of evil will disappear.’
 - Methodius of Olympus, *Discourse on the Resurrection* 1.4 – 5 (3rd century)



Restorative Justice in Scripture: God Works to Heal Self-Harm and Restore Relationship

- ‘Yet here too he makes a gain, namely death and the cutting off of sin, **in order that evil may not be immortal**. Thus, his punishment is changed into a mercy, for it is in mercy, I am persuaded, that God inflicts punishment.’
 - Gregory of Nazianzus, *Oration 45* (4th century)



Restorative Justice in Scripture: Restoring Injured Relationships

- Victim-Centered; the Offender Pays the Cost of Healing
 - ¹⁸ 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.** (Exodus 21:18 – 19)
 - 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.** (Exodus 21:29 – 30)
 - **‘An eye for an eye’** (Exodus 21:23) is an outer limit of proportionality for cases of bodily harm, meant to represent personal support, financial compensation (Talmud *Bava Kamma* 83b – 84a), or, in some cases, lashes (*Makot* 1:1) Jewish rabbis even made a joke of it: If a blind man injures the eye of another...

The Christian Restorative Approach to Criminal Justice

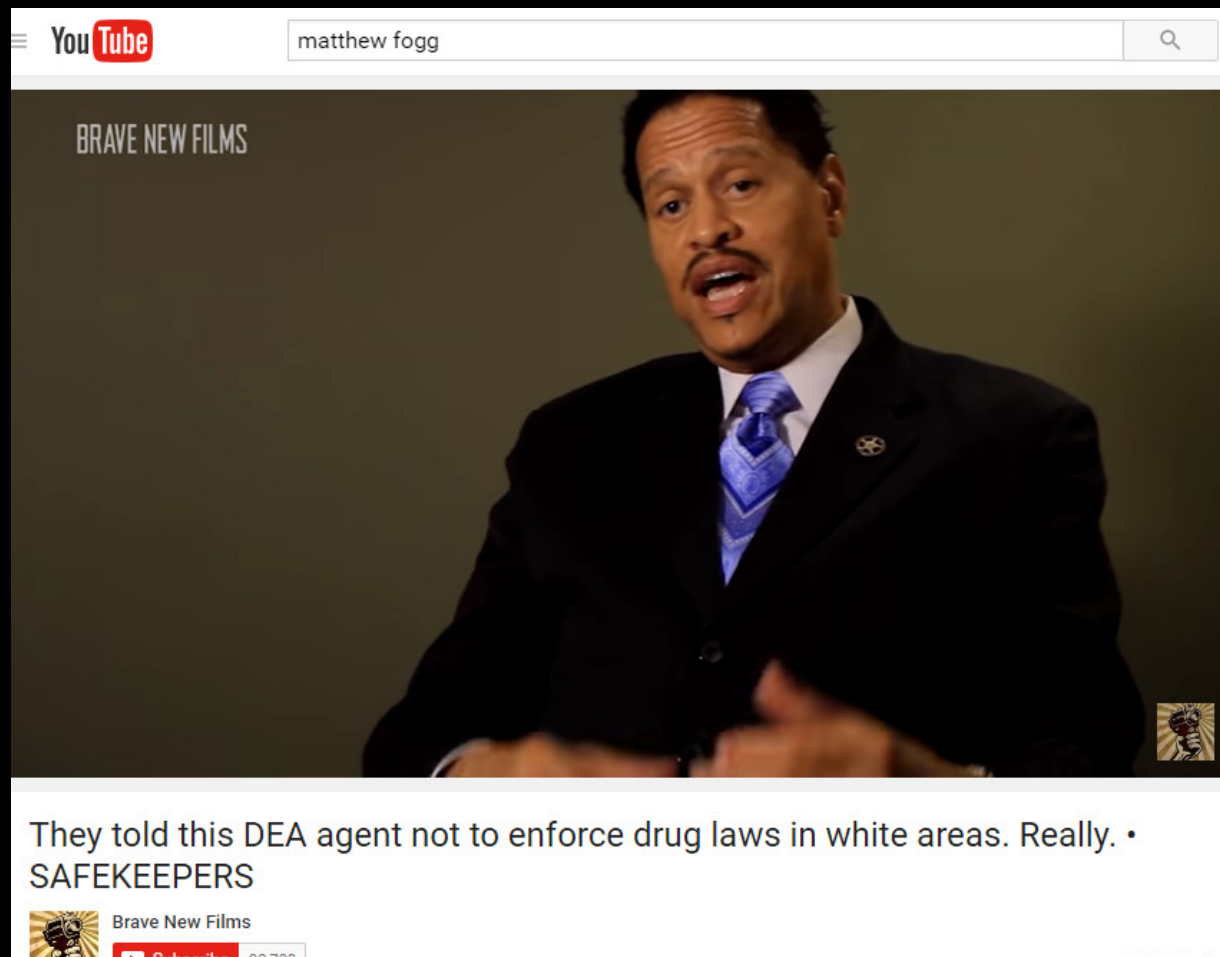
- Christian and Christian-Influenced Restorative Criminal Justice: A Partial History
 - Biblical Israel
 - Christianized Roman Empire
 - ...
 - Norway, Finland, Sweden
 - U.S. Mennonite Christians
 - New Zealand (youth violence)
 - U.S. (urban youth violence)
 - South Africa (Truth and Reconciliation Commission)
 - Rwanda
 - Uganda

The 'War on Drugs'

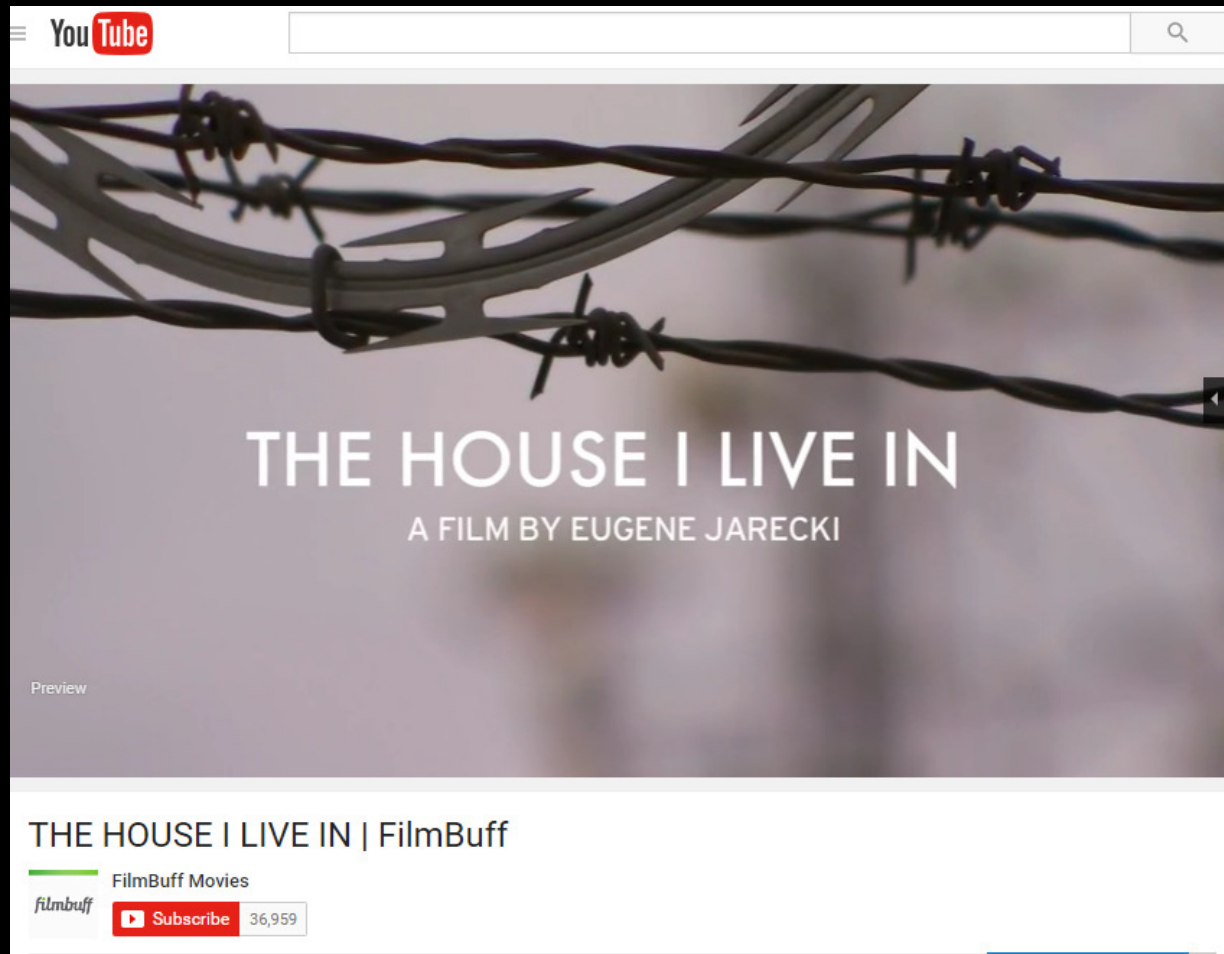
- We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities... We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.
- John Ehrlichman, former aide to President Richard Nixon (Tom LoBianco, 'Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies,' *CNN*, March 24, 2016)

Racialized Drug Policing

- Matthew Fogg, Drug Enforcement Agent and U.S. Marshall



The 'War on Drugs'



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Preview

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The 'War on Drugs'

- 'The first anti-opium laws in the 1870s were directed at Chinese immigrants. The first anti-cocaine laws, in the South in the early 1900s, were directed at black men. The first anti-marijuana laws, in the Midwest and the Southwest in the 1910s and 20s, were directed at Mexican migrants and Mexican Americans. Today, Latino and especially black communities are still subject to wildly disproportionate drug enforcement and sentencing practices.'
- Drug Policy Alliance, "A Brief History of the Drug War," <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war>

The 'War on Drugs'

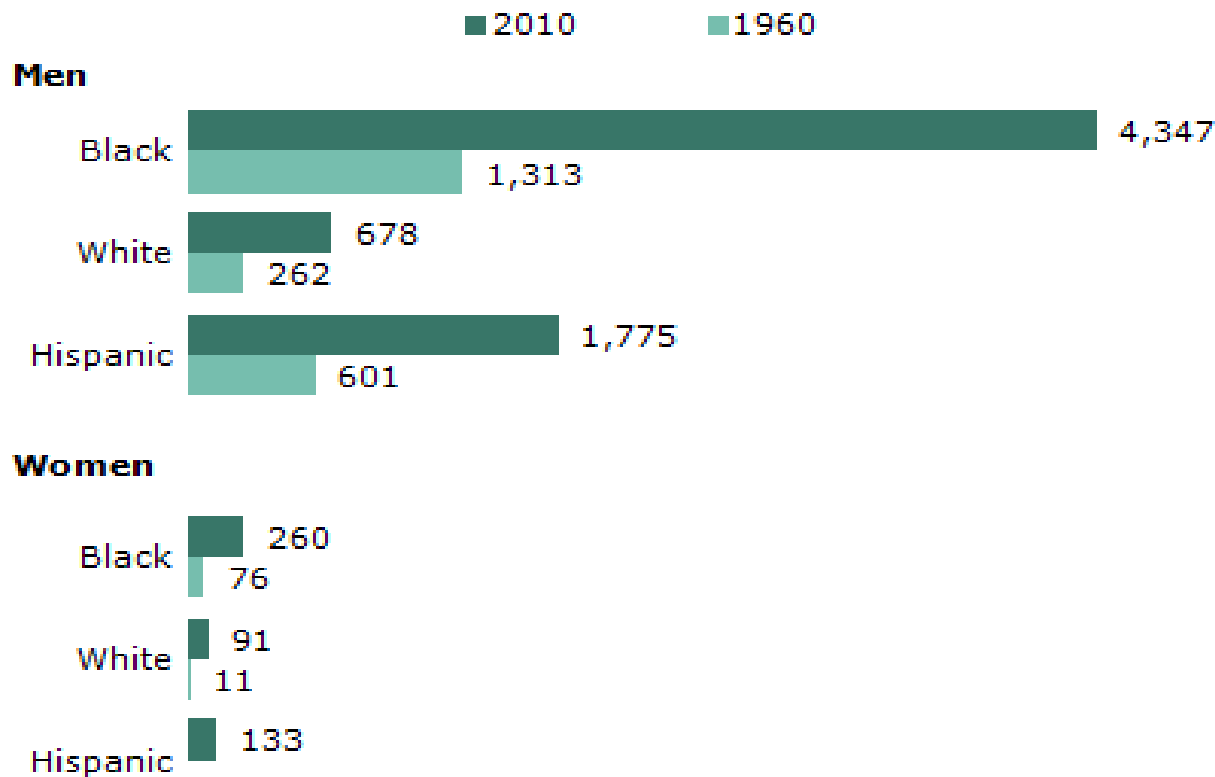
- 'People of all races use and sell illegal drugs at remarkably similar rates. If there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in illegal drug dealing than people of color.'
 - Michelle Alexander, *The New Jim Crow*, p.99

The 'War on Drugs'

- 'The National Household Survey on Drug Abuse reported in 2000 that white youth aged 12 – 17 are more than a third more likely to have sold illegal drugs than African American youth... White youth have about three times the number of drug-related emergency room visits as their African American counterparts.'
- Michelle Alexander, *The New Jim Crow*, p.99

Incarceration Rates, 1960 and 2010

Inmates per 100,000 U.S. residents



Note: Incarceration rates are for total prisoners in local, state and federal correctional facilities. Total prisoners includes persons under age 18. Hispanics are of any race. Whites and blacks include only non-Hispanics. In 2010, whites and blacks include only those who reported a single race. Asians, Native Americans and mixed-race groups not shown. A figure for Hispanic women in 1960 is not shown due to small sample size.

Source: For 1960, Pew Research Center analysis of Decennial Census data (IPUMS); for 2010, Bureau of Justice Statistics data <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>

PEW RESEARCH CENTER

Police Brutality: *City of Los Angeles v. Adolph Lyons* (1983)

- Lyons, an African-American man, was very roughly treated by white LAPD officers, placed in a chokehold, forced unconscious.
- SCOTUS decides he did not have the standing to challenge LAPD practice.
- Justice Thurgood Marshall dissented, citing chokeholds as potentially lethal – of the 16 chokehold victims who were killed by the LAPD in less than a decade, 12 were black – and officers' training being insufficient

Police Brutality: *City of Los Angeles v. Adolph Lyons* (1983)

- “The officers are taught to maintain the chokehold until the suspect goes limp, despite substantial evidence that the application of a chokehold invariably induces a “flight or flee” syndrome, producing an involuntary struggle by the victim which can easily be misinterpreted by the officer as willful resistance that must be overcome by prolonging the chokehold and increasing the force applied. In addition, officers are instructed that the chokeholds can be safely deployed for up to three or four minutes...”

Police Brutality: *City of Los Angeles v. Adolph Lyons* (1983)

- ‘Robert Jarvis, the city’s expert who has taught at the Los Angeles Police Academy for the past 12 years, admitted that officers are never told that the baton control can cause death if applied for just two seconds. Of the nine deaths for which evidence was submitted to the District Court, the average duration of the choke where specified was approximately 40 seconds.’
- Recall Eric Garner

Restorative Justice in Scripture: Equal Treatment Under the Law

- *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.
- *Leviticus 24* ¹⁷ If a man takes the life of *any human being*, he shall surely be put to death... ¹⁹ If a man injures his neighbor, just as he has done, so it shall be done to him: ²⁰ fracture for fracture, eye for eye, tooth for tooth... [The victim's right to name a compensation instead is also found in Exodus 21:22 and 30]... ²² 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.

Restorative Justice in Scripture: Equal Treatment Under the Law

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- *Leviticus 24:17* If a man takes the life of another man being, he shall surely be put to death... ¹⁹ If a man injures his neighbor, just as he has done so it shall be done to him: for fracture for fracture, for eye for eye, for tooth for tooth... [The right to name a compensation instead is also found in Exodus 21:22 and 30]... ²² 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.

How did this principle & the 14th Amendment become eviscerated?

Prosecution: *Armstrong v. United States* (1996)

- Christopher Lee Armstrong was arrested for possession of and conspiracy to distribute fifty grams of crack cocaine.
- His prosecutors chose to try him in the federal system, not the state.
- His federal public defenders were troubled that in the last 3 years, 48 defendants had been black, 5 were Hispanic, and none were white. Given that most crack offenders are white, they were puzzled. They suspected that whites were being diverted by federal prosecutors to the state system, where penalties for crack cocaine were far less severe.

Prosecution: *Armstrong v. United States* (1996)

- Armstrong's lawyers filed a motion asking the prosecutors to turn over their files to support their claim of selective prosecution under the Fourteenth Amendment.
- 'As in *McCleskey*, the Court did not question the accuracy of the evidence submitted, but ruled that because Armstrong failed to identify any similarly situated white defendants who should have been charged in federal court but were not, he was not entitled even to discovery on his selective-prosecution claim.

Prosecution: *Armstrong v. United States* (1996)

- With no trace of irony, the Court demanded that Armstrong produce in advance the very thing he sought in discovery: information regarding white defendants who should have been charged in federal court... The Court justified this insurmountable hurdle on the grounds that considerable deference is owed the exercise of prosecutorial discretion. Unless evidence of conscious, intentional bias on the part of the prosecutor could be produced, the Court would not allow any inquiry into the reasons for or causes of apparent racial disparities in prosecutorial decision making.'

Prosecution: *Armstrong v. United States* (1996)

- The Courthouse doors were closed. The Court gave prosecutors full discretion to have unspoken, implicit racial bias. This reversed *Yick Wo v. Hopkins*. Racially selective enforcement was now accepted.
- Consequently, ‘a report in 2000 observed that among youth who had never been sent to a juvenile prison before, African Americans were more than six times as likely as whites to be sentenced to prison for identical crimes. A study sponsored by the U.S. Justice Department and several of the nation’s leading foundations, published in 2007, found that the impact of biased treatment is magnified with each additional step into the criminal justice system.’

Prosecution & Plea Bargaining

- “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.”

Prosecution & Plea Bargaining

- “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.

Prosecution & Plea Bargaining

- “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.”
 - Frontline, “The Plea,” PBS WGBH, June 17, 2004

Innocent Until Proven Guilty

- *Ancient Greece:* ‘In the fourth century BCE, Aristotle listed five different ways to prove guilt that may be used in legal proceedings and he included torture among them. In general, torture was used by the Greeks only when it came to the testimony of slaves and, in certain situations, foreigners.’
- ‘**Jewish law has never authorized judicial torture.** In fact, judicial torture of an accused would serve no purpose in Jewish law because even voluntary confessions are inadmissible as evidence [because of the two eyewitness requirement of Deuteronomy 17:16; 19:15]... *Jewish law’s rejection of judicial torture is unique in Western civilization, especially because it is so ancient.*’ ‘The law against self-incrimination relates to the accused’s vulnerability.’

Innocent Until Proven Guilty

- *Ancient Rome*: 'Early Roman law is similar to Greek law in that it also limited torture to slaves... The institution of torture...was eventually expanded to include free men... Between the second and fourth centuries the institution was expanded to include new types of people and situations. The various emperors had the power to authorize torture for new cases and were responsible for expanding the institution of torture in Roman law.'
- 'Jewish law has never authorized judicial torture. In fact, judicial torture of an accused would serve no purpose in Jewish law because even voluntary confessions are inadmissible as evidence [because of the two eyewitness requirement of Deuteronomy 17:16; 19:15]... *Jewish law's rejection of judicial torture is unique in Western civilization, especially because it is so ancient.*' 'The law against self-incrimination relates to the accused's vulnerability.'

Innocent Until Proven Guilty

- *Pre-Modern and Modern Europe:* ‘By the sixteenth century a substantially similar law of torture was in force from the Kingdom of Sicily north to Scandinavia, from Iberia across France and the German Empire to the Slavic East. Well into the eighteenth century the law of torture was still current everywhere, and it survived into the nineteenth century in some corners of central Europe.’
- ‘Jewish law has never authorized judicial torture. In fact, judicial torture of an accused would serve no purpose in Jewish law because even voluntary confessions are inadmissible as evidence [because of the two eyewitness requirement of Deuteronomy 17:16; 19:15]... *Jewish law’s rejection of judicial torture is unique in Western civilization, especially because it is so ancient.*’ ‘The law against self-incrimination relates to the accused’s vulnerability.’

Innocent Until Proven Guilty

- *England*: 'According to available records, between 1540 and 1640 the Privy Council or the monarch ordered torture in eighty-one cases. Many of these cases involved political crimes, such as treason; but more than a quarter involved 'ordinary' crimes such as murder, robbery, burglary and horse stealing.'
- 'Jewish law has never authorized judicial torture. In fact, judicial torture of an accused would serve no purpose in Jewish law because even voluntary confessions are inadmissible as evidence [because of the two eyewitness requirement of Deuteronomy 17:16; 19:15]... *Jewish law's rejection of judicial torture is unique in Western civilization, especially because it is so ancient.*' 'The law against self-incrimination relates to the accused's vulnerability.'

Innocent Until Proven Guilty

- *Ancient Greece*
- *Ancient Rome*
- *Pre-Modern and Modern Europe*
- *England*
- *Jewish law's rejection of judicial torture is unique in Western civilization, especially because it is so ancient.'*
- *'Jewish law's criminal law paradigm is based on the Biblical verse, "And the congregation shall save" [Num.35:25]. According to the Talmud, this verse establishes a principle, in terms of which one of the key responsibilities of any criminal court is to protect the interests of the accused by finding legally acceptable ways to "save" him from conviction.'*

Innocent Until Proven Guilty

- Ancient Greece
- Ancient Rome
- Pre-Modern and Modern Europe
- England
- Jewish law's rejection of judicial torture is unique in Western civilization, especially because it is so recent.

Plea bargaining — a form of judicial torture? Weakening the 8th Amendment?

According to the principle, in terms of which one of the key responsibilities of any criminal court is to protect the interests of the accused by finding legally acceptable ways to “save” him from conviction.’

Sentencing: *McClesky v. Kemp* (1987)

- Warren McKlesky, a black man, had killed a white police officer during an armed robbery in Georgia.
- His legal team appealed the death sentence on the grounds that death sentencing was too racially biased to be fair, and thus it violated the Eighth and Fourteenth Amendments.
- The Court accepted the statistical study about racially different outcomes as factual and true. But it ruled that unless the prosecutor had consciously and explicitly called for the death sentence for racial reasons, that the case was invalid.

Sentencing: *McClesky v. Kemp* (1987)

- The Court's 5:4 majority opinion wrote, '[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.'
- Justice Brennan, writing his dissent, pointed out that the Court's decision 'seems to suggest a fear of too much justice.'

Sentencing: *McClesky v. Kemp* (1987)

- McCleskey was named one of the worst Supreme Court decisions since World War II by a *Los Angeles Times* survey among legal scholars.
- In a *New York Times* comment, Anthony Lewis charged that the Supreme Court had “effectively condoned the expression of racism in a profound aspect of our law.”
- Anthony G. Amsterdam, a law professor at New York University, said in speech at Columbia, “McCleskey is the Dred Scott decision of our time.”

Sentencing: *McClesky v. Kemp* (1987)

- “Implicit bias research has uncovered widespread and deep-seated tendencies among whites – including criminal justice practitioners – to associate blacks and Latinos with criminality.”
- “White Americans who associate crime with blacks and Latinos are more likely to support punitive policies — including capital punishment and mandatory minimum sentencing — than whites with weaker racial associations of crime.”
 - The Sentencing Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, 2014, p.3;
http://www.sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf

Jury Selection: *Purkett v. Elm* (1995)

- About 30% of black men are already ineligible for jury service for life because of the legal status attributed to their criminal background.
- And in many previous cases, the Supreme Court had already upheld convictions of black defendants by all-white juries in situations where the exclusion of black jurors was obvious.
- But *Purkett* went a step further. The prosecution used 'jury shuffling' to reduce the number of black jurors, and used different questions of juror candidates based on race. But as long as race was never explicitly stated, the Court upheld whatever reason the prosecutors gave for not selecting a particular juror.

Jury Selection: *Purkett v. Elm* (1995)

- In *Purkett*, the prosecutor used the following explanation for why he struck black jurors from being empaneled: ‘I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared not to be a good juror for that fact... Also, he had a mustache and a goatee type beard. And juror number twenty-four also had a mustache and goatee beard... And I don’t like the way they looked, with the way the hair is cut, both of them. And the mustache and the beards look suspicious to me.’

Reintegration

- Housing
 - The Anti-Drug Abuse Act of 1988
 - The Quality Housing and Work Responsibility Act of 1998:
 - *Rucker v. Davis* (2002)
- Work
 - The Equal Employment Opportunity Commission (EEOC) says to employers that flat bans on job applicants with a criminal record 'may be illegal,' but many employers still turn away anyone with a record.

Reintegration

- Debt
- Food Stamps
 - The Temporary Assistance for Needy Family Program (1996)
- Voting Rights
 - ‘The vast majority of states continue to withhold the right to vote when prisoners are released on parole... No other country in the world disenfranchises people who are released from prison in a way even remotely resembling the United States. In fact, the United Nations Human Rights Committee has charged that U.S. disenfranchisement policies are discriminatory and violate international law.’

Reintegration

- Jubilee Year in Leviticus 25: A Garden of Eden Image
 - Debts cancelled
 - “Slaves” (indentured, including to repay debt for theft) go free
 - People return to their family land inheritance
 - Family land returns to family

Action Steps

- Families Against Mandatory Minimums
 - www.famm.org
- Drug Policy Action
 - <http://www.drugpolicy.org/action>
- NHI's *Restoring the Captives* curriculum
 - <http://www.newhumanityinstitute.org/resources/curriculum.tnjc.htm>

