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### Criminal Justice and (a) Catholic Conscience

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# CRIMINAL JUSTICE AND (A) CATHOLIC CONSCIENCE

**Leo E. Strine, Jr.\* ♦**

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## INTRODUCTION

When I received the gracious invitation to be the Distinguished Visiting Scholar at the Markkula Center For Applied Ethics at the Santa Clara University Law School, it came with words I have come to find daunting and dispiriting. To wit, you can talk about any subject of your choosing! Although these words are kind, they are deceptive.

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For starters, the inviting party does not really mean what he's saying. If I were to have to announced my desire to speak about my views about what could help youth soccer development in the United States, or whether it is possible to identify a genuine triple threat genius in popular music other than James Taylor,<sup>1</sup> my hosts would have balked, and said, "well, we meant within some bounds of reason governed by the role of our Center." For another thing, invitations like these assume that the invited lecturer has some message he wants to deliver, and is just waiting for the opportunity to let it fly. But I exhausted many years ago any backlog in topics of interest to me, at least as to the subjects that forums like this find of interest. And having pushed out a large number of articles in the last few years, my pockets were empty.

But, the board of the Markkula Center contains someone for whom I have enormous respect and who has been patient in getting me out here,<sup>2</sup> so I committed in the hope that inspiration would arrive, and enable me to say something that might be meaningful to an intellectual community, committed as you are, to thinking about the place that ethics—which has the general meaning of "moral principles that govern a person or group's behavior"—has on society and law in particular.<sup>3</sup> Because the Markkula Center's mission is to engage the community in reflecting deeply on how their own moral values should play into their roles as professionals and citizens, I thought that it might be of some interest for you to hear one person's reflections on how an important influence on his own sense of moral values—Jesus Christ—affects his thinking about his own approach to his role as a public official in a secular society, using the vital topic of criminal justice as a focal point.<sup>4</sup> It also seemed

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1. That is, who else is considered a genius songwriter, singer, and instrumentalist? This is not to slight Paul McCartney, Joni Mitchell, Sam Cooke, Bob Dylan, Ray Charles, Al Green, Frank Sinatra, Carole King, or many other amazing musical talents. But, in my view at least, none of them was a genius in all three dimensions. James Taylor indisputably is.

2. David J. Berger.

3. *Ethics Definition*, OXFORD DICTIONARY, [http://www.oxforddictionaries.com/us/definition/american\\_english/ethics](http://www.oxforddictionaries.com/us/definition/american_english/ethics) (last visited Jan. 27, 2016).

4. In a way that goes beyond individual citations, my own sense of Christ's message has been deepened and influenced by the writings of Garry Wills, Reynolds Price, and Marilynne Robinson. See GARRY WILLS, WHAT JESUS MEANT (2006); GARRY WILLS, WHAT PAUL MEANT (2006); GARRY WILLS, SAINT

fitting, given Santa Clara's status as a Jesuit institution.

This is not a theoretical topic for me. For many years during my career in public service, I have been required to participate in various roles in our criminal justice system.<sup>5</sup> I got a relatively long respite from that during my years as Vice Chancellor. But, since I joined the Board of Pardons as Chancellor in 2011, and then even more since I've become Chief Justice in 2014, the topic of crime and punishment has been impossible for me to escape. By sheer numbers, criminal cases dominate my court's docket. Beyond that, the reality is that the overall role our Judiciary plays in criminal justice is central to how the public regards our mission, and involves some of our most important work. The excellent trial judges with whom I work are deeply engaged in and concerned about the duties they must perform in criminal cases, especially their role in sentencing. Many of them struggle at times over the tension between adhering to their duty to enforce the statutory criminal law as plainly written and their sense of conscience, when the written law seems to contravene their own sense of equity and justice.

This has been an ongoing struggle for me, too. And the struggle in this area is unsurprising because questions of criminal punishment divide many people of good faith and the most important of those questions rarely lead to consensus answers.

In approaching this topic, let me give fair disclosure. I do not purport to be a theologian, nor am I what could be described as a faithful Catholic, if by that term, you mean someone who gives the highest value to adhering to what the Vatican instructs at any moment. For many years, I have found myself rather estranged, in fact, from the official church, for a lot of reasons. But, as someone who did go to Mass weekly for his entire childhood, and who has never felt estranged from Christ, as I understood his message, the

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AUGUSTINE: *A LIFE* (1999); REYNOLDS PRICE, *THREE GOSPELS* (1996); REYNOLDS PRICE, *A PALPABLE GOD* (1978); MARILYNNE ROBINSON, *THE GIVENNESS OF THINGS* (2015); MARILYNNE ROBINSON, *GILEAD* (2004); MARILYNNE ROBINSON, *HOUSEKEEPING* (1980). Although each of them has a vocation that is other than as a theologian, their thoughtful considerations of Christ's teachings resonate with me, and I find myself regularly going back to them.

5. See generally Leo E. Strine, Jr., *Duty and the Death Penalty*, 21 *WIDENER L. REV.* 1 (2015).

reality is that my thinking about many issues is profoundly affected by being raised Catholic, and most particularly, by my respect for the central teachings of Jesus. Like many other Catholics, I suspect, I have also found resonant the words of our new Pope,<sup>6</sup> which seem to emphasize the Christ I revere.

This lecture is, by design, personal. Through my own modest efforts at candid, self-awareness about the influence of my own moral background on my thinking, I hope I can stimulate each of you to reflect on your own core values and what those values counsel for your own thinking about our nation's approach to criminal justice. I do not seek to urge your adoption of specific policy changes or even broader concepts of the good; rather, by surfacing some of my own thinking, I may spark some internal discussion on your own parts, about how your own sense of ethics confronts the harsh realities of our current criminal justice system.

#### I. CHRIST'S TEACHING AND THE ETHICS OF CRIMINAL JUSTICE: A PERSONAL OVERVIEW

I will begin this personal reflection by distilling down the teachings of Christ that I find most resonant and relevant to the subject at hand. To be fair, these teachings are not ones

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6. *E.g.*, Pope Francis, Address at a Joint Meeting of Congress (Sept. 24, 2015) ("The yardstick we use for others will be the yardstick which time will use for us. The Golden Rule also reminds us of our responsibility to protect and defend human life at every stage of its development. This conviction has led me, from the beginning of my ministry, to advocate at different levels for the global abolition of the death penalty. I am convinced that this way is the best, since every life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes. Recently my brother bishops here in the United States renewed their call for the abolition of the death penalty. Not only do I support them, but I also offer encouragement to all those who are convinced that a just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation."); *Read Pope Francis' Speech on the Poor and Indigenous People*, TIME (July 10, 2015), <http://time.com/3952885/pope-francis-bolivia-poverty-speech-transcript/> ("The globalization of hope, a hope which springs up from the peoples and takes root among the poor, must replace the globalization of exclusion and indifference."); *id.* ("Working for a just distribution of the fruits of the earth and human labor is not mere philanthropy. It is a moral obligation. For Christians, the responsibility is even greater: it is a commandment. It is about giving to the poor and to peoples what is theirs by right. . . . It is not enough to let a few drops fall whenever the poor shake a cup which never runs over by itself.").

that should or can be confined to the area of criminal justice, because they reflect Christ's most important instructions to us about the duties we owe to God and our fellow human beings.

We should begin with the most fundamental obligations we owe. Christ distilled all the prior commandments into two, in the "Greatest Commandment."<sup>7</sup> The first is perhaps less relevant to today's purpose, which is the obligation to "love the Lord, your God, with all your heart, with all your soul, and with all your mind."<sup>8</sup> But, the second is the axis on which all the more particular concepts relevant to our duties to fellow humans pivot. That is, of course, the famous commandment to "love your neighbor as yourself."<sup>9</sup> The reason why more particular concepts pivot off this one commandment is because those more particular concepts show what is required to fulfill the commandment in the most demanding circumstances that confront us as human beings.

As the new Pope is emphasizing, Christ's commandment to love your fellow brother was not a narrow one, which could be fulfilled by just loving those in your close family and those whose favor you seek for personal advantage or satisfaction.<sup>10</sup> That sort of love, although it can no doubt be genuine, is also fraught with the potential for the sort of self-love against which Christ warned. The kind of love Christ was talking about was a more selfless love, which involves extending consideration and empathy to those from whom no compensation of any kind can be expected.

Thus, Christ admonished his followers that they could best honor him by loving those who were most in need of comfort and care:

Then the king will say to those on his right, "Come, you who are blessed by my Father. Inherit the kingdom prepared for you from the foundation of the world. For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me, naked and you clothed me, ill and you cared for me, in prison and you visited me." Then the righteous will answer him and say, "Lord, when did we see you hungry and feed you, or

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7. *Matthew* 22:38.

8. *Matthew* 22:37.

9. *Matthew* 22:39; *Mark* 12:31.

10. See *supra* note 6 and accompanying text.

thirsty and give you drink? When did we see you a stranger and welcome you, or naked and clothe you? When did we see you ill or in prison, and visit you?" And the king will say to them in reply, "Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me."<sup>11</sup>

Jesus made clear that this duty to love one's fellow human beings did not have an exception for the "other."<sup>12</sup> Breaking with the religious tradition he came to fulfill, Jesus mingled with those who his society regarded as unclean, and as outside the Jewish community.<sup>13</sup> Christ extended care to Samaritans,<sup>14</sup> prostitutes,<sup>15</sup> and lepers.<sup>16</sup> He often did so at

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11. *Matthew* 25:34–40.

12. *See Matthew* 5:44–45 ("But I say to you, love your enemies, and pray for those who persecute you, that you may be children of your heavenly Father, for he makes his sun rise on the bad and the good, and causes rain to fall on the just and the unjust."); *Galatians* 3:26–29 ("For through faith you are all children of God in Christ Jesus. For all of you who were baptized into Christ have clothed yourselves with Christ. There is neither Jew nor Greek, there is neither slave nor free person, there is not male and female; for you are all one in Christ Jesus. And if you belong to Christ, then you are Abraham's descendant, heirs according to the promise.")

13. *See* WILLS, WHAT JESUS MEANT, *supra* note 4, at xviii ("According to the gospels, he preferred the company of the lowly and despised that of the rich and powerful. He crossed lines of ritual purity to deal with the unclean—with lepers, the possessed, the insane, with prostitutes and adulterers and collaborators with Rome."); *id.* at 30 ("Many of Jesus' miracles are worked for outsiders—for non-Jews like the centurion or the woman from Tyre or the leper from Samaria. But the greatest category has to do with people who are unclean, with whom observant Jews are to have no dealings—with lepers, with prostitutes, with the crippled, with the reviled, with the uncircumcised, or with those made unclean by their illnesses.") (internal citations omitted); PRICE, *supra* note 4, at 33 ("Orthodox Christianity, the church in most of its past and present forms, has defaced and even reversed whole broad aspects of Jesus' teaching; but in no case has the church turned more culpably from his aim and his patience than in its hateful rejection of what it sees as outcasts: the whores and cheats, the traitors and killers, the baffled and stunned, the social outlaw, the maimed and hideous and contagious. If it is possible to discern, in the gospel documents of Mark and John, a conscious goal that sent the man Jesus—himself an urgent function of the Maker of all—to his agonized death, can we detect a surer aim than his first and last announced intent to sweep the lost with him into God's coming reign?").

14. *See Luke* 17:25–37 (the Parable of the Good Samaritan); *John* 4:7–26 (Jesus talks with a Samaritan woman); *see also* PRICE, *supra* note 4, at 187 (explaining how Jesus shared a drink with a Samaritan woman).

15. *See Matthew* 21:31–32 (the Parable of the Two Sons); *Luke* 7:36–50 (the Pardon of the Sinful Woman). As to Christ's pardon of the prostitute, the punishment for adultery in Christ's time was death by stoning. Thus, this incident may be seen as bearing on this question, and whether a means of

times and in ways that were considered forbidden to a faithful Jew.<sup>17</sup> Among his own closest followers were men and women who came from elements of society that were viewed as disreputable.<sup>18</sup>

By his example, Christ also indicated to his followers his awareness of the tendency of humans to treat those unlike them as the other, and to resist that impulse.<sup>19</sup> By making plain the duty to see the common humanity in people unlike ourselves, Christ's teachings counsel for a self-awareness of

punishment like that for a sin like adultery accorded with Christ's own understanding of justice. It seems to me doubtful that Christ was condoning her sin, as he was rather continually reminding those who heard him to repent their sins and improve their behavior. To me, what seems more likely is that Christ was urging humans to be more modest and forgiving in their own capacity for judgment and administration of criminal punishment, recognizing the universal capacity for sin and the possibility of redemption for everyone, even a criminal or sinner.

16. See *Mark* 1:40–42; *Luke* 17:11–19; see also PRICE, *supra* note 4, at 249 (“Among them was a leper too grim to watch. The crowd stood back when the leper pressed through Simon’s door to stand above where Jesus sat. He said to Jesus ‘You can heal me if you want to.’ Jesus stayed in place but met the man’s eyes, managed a smile and said ‘I want to.’”).

17. See *Mark* 3:1–6 (Jesus heals man with withered hand on the Sabbath); PRICE, *supra* note 4, at 142–43, 190 (explaining that Jesus healed on the Sabbath, and told those Jews who challenged him, “My Father is even now working and I’m working.”).

18. See, e.g., *Mark* 2:16–17 (“Some scribes who were Pharisees saw that he was eating with sinners and tax collectors and said to his disciples, ‘Why does he eat with tax collectors and sinners?’ Jesus heard this and said to them, ‘Those who are well do not need a physician, but the sick do. I did not come to call the righteous but sinners.’”); see also PRICE, *supra* note 4, at 90 (interpreting this passage).

19. See *Matthew* 25:40 (“And the king will say to them in reply, ‘Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me.’”); *Luke* 14:11 (“For everyone who exalts himself will be humbled, but the one who humbles himself will be exalted.”); JOHN PAUL II, *EVANGELIUM VITAE: ENCYCLICAL LETTER ON THE VALUE AND INVIOABILITY OF HUMAN LIFE* 88 (1995), [http://www.catholic-pages.com/documents/evangelium\\_vitae.pdf](http://www.catholic-pages.com/documents/evangelium_vitae.pdf) (“In our service of charity, we must be inspired and distinguished by a specific attitude: we must care for the other as a person for whom God has made us responsible. As disciples of Jesus, we are called to become neighbours to everyone, and to show special favour to those who are poorest, most alone and most in need. In helping the hungry, the thirsty, the foreigner, the naked, the sick, the imprisoned—as well as the child in the womb and the old person who is suffering or near death—we have the opportunity to serve Jesus.”) (internal citation omitted) [hereinafter *EVANGELIUM VITAE*]; WILLS, *WHAT JESUS MEANT*, *supra* note 4, at 29 (“His miracles are targeted to teach lessons about the heavenly reign he brings with him, and one of the main lessons is that people should not be separated into classes of the clean and unclean, the worthy and the unworthy, the respectable and the unrespectable.”).



the dangers of dehumanizing those we don't understand, whose actions may disgust us, or who come from a different ethnic or racial group than we do. He reminded his followers that in each person they encountered, they would find him, and how they treated each person would reflect on how much they loved him and God. By seeing in each person Christ himself, his followers were urged to extend to each person the same love they owed the Lord.<sup>20</sup>

Jesus's erasure of the concept of the other extended explicitly to those who had committed crimes. As mentioned, when Christ taught what his followers could do to show him love, he gave as an example visiting a prisoner. Christ's concern for the wellbeing of those who have committed crimes is demonstrated continually in the gospels, from his forgiveness of prostitutes,<sup>21</sup> to preaching for the freedom of the prisoners,<sup>22</sup> to extending compassion and grace toward a common criminal who was crucified alongside him.<sup>23</sup>

From these teachings, I draw several important lessons from Jesus about the concept of the other that are relevant to issues of criminal justice. First and foremost, Jesus teaches us to try to erase that concept and to regard all human beings as deserving love. Relatedly, by recognizing that all of us are susceptible to viewing some of our fellow humans as lesser or other, Jesus calls us to vigilant self-awareness about how that human tendency might influence our thoughts and actions, even in ways of which we are not fully conscious. Finally, the Christian duty of love extends to those who commit crimes, and it might do well to give thought to the danger that when crimes are committed by those who might be viewed as the other for additional reasons, such as race or poverty, that we

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20. See *supra* note 18.

21. See *Luke* 7:36–50 (the Pardon of the Sinful Woman).

22. See *Luke* 4:18 (“‘The Spirit of the Lord is upon me, because he has anointed me to bring glad tidings to the poor. He has sent me to proclaim liberty to captives and recovery of sight to the blind, to let the oppressed go free . . . .’”).

23. See *Luke* 23:39–43 (“Now one of the criminals hanging there reviled Jesus, saying, ‘Are you not the Messiah? Save yourself and us.’ The other, however, rebuking him, said in reply, ‘Have you no fear of God, for you are subject to the same condemnation? And indeed, we have been condemned justly, for the sentence we received corresponds to our crimes, but this man has done nothing criminal.’ Then he said, ‘Jesus, remember me when you come into your kingdom.’ He replied to him, ‘Amen, I say to you, today you will be with me in Paradise.’”).

should be even more careful to ensure that our treatment of them is not compromised by prejudice.

Christ taught self-awareness of another kind, which also has resonance to me for addressing criminal justices issues. I admit to finding a relatively popular bumper sticker to be confusing. That is the one that says: “What would Jesus do?” Like many much more deeply schooled in Christ’s teaching than I am,<sup>24</sup> this bumper sticker seems to me to misapprehend our role as humans, at least as Christ himself understood it. “What would Jesus have you do?”—as a human being—is a more apt admonition, as I understand things.

Christ was very clear—and this is rather critical to whether one actually embraces his teachings in whole—that he was different than other human beings, as he was son of the Father and part of God in a way that the rest of us are not.<sup>25</sup> Scripture makes plain that the ultimate judgments to be made of our fellow human beings would not occur in this realm, and would not be ones rendered by us.<sup>26</sup>

Jesus urged his followers to remember that God, and not they, would make the ultimate judgments, and that they should be careful, as flawed humans who themselves were

24. See generally WILLS, WHAT JESUS MEANT, *supra* note 4.

25. See *John* 8:24 (“That is why I told you that you will die in your sins. For if you do not believe that I AM, you will die in your sins.”); *John* 8:58 (“Jesus said to them, ‘Amen, amen, I say to you, before Abraham came to be, I AM.’”). See generally WILLS, WHAT JESUS MEANT, *supra* note 4.

26. See, e.g., *Psalms* 9:8–9 (“The Lord rules forever, has set up his throne for judgment. It is he who judges the world with justice, who judges the people with fairness.”); *Matthew* 25:31–33 (“When the Son of Man comes in his glory, all the angels with him, he will sit upon his glorious throne, and all the nations will be assembled before him. And he will separate them one from another, as a shepherd separates the sheep from the goats.”); *Revelation* 20:11–15 (“Next I saw a large white throne and the one who was sitting on it. The earth and the sky fled from his presence and there was no place for them. I saw the dead, the great and the lowly, standing before the throne, and scrolls were opened. Then another scroll was opened, the book of life. The dead were judged according to their deeds, by what was written in the scrolls. . . . Anyone whose name was not found written in the book of life was thrown into the pool of fire.”); see also PRICE, *supra* note 4, at 191 (“‘Amen amen I tell you the hour is coming—it’s now—when the dead shall hear the voice of the Son of God and those hearing shall live. For as the Father has life in himself so he gave life also to the Son to have life himself. He gave him the right to render judgment since he is the Son of Man. Don’t wonder at this—an hour is coming when all those in the tombs will hear his voice and come out, the ones that did good to a resurrection of life, those that did evil to a resurrection of judgment.’”).

sinner, about judging others. Famous examples come from John<sup>27</sup> and Romans.<sup>28</sup>

We, unlike God,<sup>29</sup> make factual errors.<sup>30</sup> We fail to check our own biases and anger. We risk substituting our own moral sense for the ultimate judgment of God. Because we are different from God, we must be careful about throwing away the key to jail or executing someone, not only because we could be wrong about the underlying question of guilt, but also because our motives could be ones that Christ warns us to resist.

One of the most obvious human impulses is vengeance, to repay someone who has hurt you with pain. And that impulse reflects a rough kind of playground justice, and has a lengthy tradition in the Bible itself, as reflected in the Old Testament's "eye for eye, tooth for tooth."<sup>31</sup> But Christ urged his followers to resist the impulse toward vengeance when it was at its zenith, to rise above that impulse rather than to descend and indulge in it.<sup>32</sup>

Jesus urged his followers to forgive those who trespass against them, and to avoid returning a blow with a blow. As he said in the Sermon on the Mount: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, offer no resistance to one who is evil. When someone strikes you on [your] right cheek, turn the other one to him as

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27. See *John* 8:7 ("Let the one among you who is without sin be the first to throw a stone at her.").

28. See *Romans* 2:1-3 ("Therefore, you are without excuse, every one of you who passes judgment. For by the standard by which you judge another you condemn yourself, since you, the judge, do the very same things. We know that the judgment of God on those who do such things is true. Do you suppose, then, you who judge those who engage in such things and yet do them yourself, that you will escape the judgment of God?").

29. See *2 Samuel* 22:31 ("God's way is unerring; the Lord's promise is tried and true; he is a shield for all who trust him."); *Psalms* 147:5 ("Great is our Lord, vast in power, with wisdom beyond measure.").

30. See *Romans* 3:23 ("[A]ll have sinned and are deprived of the glory of God."); See *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*, USCCB Statement (United States Conference of Catholic Bishops), Nov. 15, 2000 ("We are all sinners, and our response to sin and failure should not be abandonment and despair, but rather justice, contrition, reparation, and return of reintegration of all into the community.") [hereinafter USCCB Statement].

31. *Exodus* 21:24.

32. See *Romans* 12:19 ("Beloved, do not look for revenge but leave room for the wrath; for it is written, 'Vengeance is mine, I will repay, says the Lord.'"); see also USCCB Statement ("We seek justice, not vengeance.").

well.”<sup>33</sup> And in Romans, Paul wrote: “Do not repay anyone evil for evil; be concerned for what is noble in the sight of all.”<sup>34</sup>

Jesus, of course, lived that teaching himself, and went willingly to his death without fighting back. When Peter responded to Jesus’s arrest by cutting off the ear of the high priest’s servant, Jesus admonished Peter to put down his sword and he healed the servant’s ear.<sup>35</sup> And, of course, on the Cross, Christ forgave those who sent him to his death.<sup>36</sup>

This idea that no one is beyond redemption is a powerful one. Criminals are continually among those to whom Jesus and his disciples extend that possibility.<sup>37</sup> The ultimate judgment will come in another realm, and Christ’s followers are urged to strive to forgive those who transgress and to give them an opportunity to repent their sins and make things right with their fellows and with the Lord. As Jesus said: “If you forgive others their transgressions, your heavenly Father will forgive you. But if you do not forgive others, neither will your Father forgive your transgressions.”<sup>38</sup>

Among the most famous examples of this possibility is Paul, who was known as Saul of Tarsus when Christ came to him and called him to service. Before that time, Saul had participated in persecuting Christ’s followers, and had actively called for the execution of one of the first Christian martyrs, Stephen. Among Jesus’s devout followers, there was obvious skepticism about taking into their brotherhood one who had supported violent acts against them.<sup>39</sup> But, consistent with Christ’s teachings, they forgave Paul for his sins and accepted him as a brother in Christ.

33. *Matthew* 5:38–39.

34. *Romans* 12:17.

35. *See Luke* 22:50–51.

36. *See Luke* 23:34 (“Then Jesus said, ‘Father, forgive them, they know not what they do.’”).

37. *See, e.g., supra* notes 22–23 and accompanying text; *see also* ANDREW SKOTNICKI, *CRIMINAL JUSTICE AND THE CATHOLIC CHURCH* 130 (2008) (explaining “that the path to criminal justice cannot be traveled faithfully until Christ is imaged as the prisoner”).

38. *See Matthew* 6:14–15.

39. Although not one of the twelve, Ananias questioned God when God directed him to go heal Saul. *See Acts* 9:10–16 (“But Ananias replied, ‘Lord, I have heard from many sources about this man, what evil things he has done to your holy ones in Jerusalem. And here he has authority from the chief priests to imprison all who call upon your name.’”).

As I understand it, Christ did not argue that criminals should not be punished.<sup>40</sup> In all I say today, it must be remembered that Christ did not understand himself as coming in the role of a Locke or Jefferson, by providing an ideology for governing human affairs.<sup>41</sup> He was focused on a different realm, but he did make clear the connection between how we treat each other and our access to that ultimate realm. It was through how we treat each other that we find our way to Christ and ultimate salvation.

But this pathway was not an easy one. At all times Christ tends to call for the difficult, self-renouncing option. And thus there is no reason to believe that he viewed crimes as consequence-free acts. To view them as such would disrespect the victims. Although he may have dispensed with an “eye for an eye” approach to justice, it is another thing to say that Christ somehow called for a murderer to suffer no penalty or a thief to get off Scot free. Rather, what Christ seems to call for is a recognition of the criminal’s fellow humanity, our own capacity for sin and error, and to extend to that criminal the possibility for redemption and forgiveness, if he repents of his sins.<sup>42</sup> As in any other situation, we are to see Christ in the criminal and to treat the criminal as we would treat Christ or someone in our family if they had committed a terrible act.<sup>43</sup>

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40. This understanding is consistent with that of much more learned commentators. See, e.g., Jeffrey G. Murphy, *Christianity and Criminal Punishment*, 5 PUNISHMENT & SOCIETY 261, 275 (2003); see also EVANGELIUM VITAE, *supra* note 19, at 9 (“But God cannot leave the crime unpunished: from the ground on which it has been split, the blood of the one murdered demands that God should render justice . . . .”) (emphasis added); USCCB Statement (“We believe in responsibility, accountability, and legitimate punishment. Those who harm others or damage property must be held accountable for the hurt they have caused.”).

41. See WILLS, WHAT JESUS MEANT, *supra* note 4, at 43 (noting that Jesus “avoided all direct political action”); *id.* at 52 (“Politics, calculation, compromises—all those things are ‘matters of Caesar.’ Let Caesar take care of them. But that is not the concern of Jesus. His work and demands are of a different order.”).

42. See USCCB Statement (“We believe in responsibility, accountability, and legitimate punishment. Those who harm others or damage property must be held accountable for the hurt they have caused. . . . At the same time, a Catholic approach does not give up on those who violate these laws. We believe that both victims and offenders are children of God. . . . We seek justice, not vengeance. We believe punishment must have clear purposes: protecting society and rehabilitating those who violate the law.”).

43. See *id.* (“Christians are asked to see Jesus in the face of everyone,

Thus, Christ would seem to call on us to avoid being vindictive or seeking to substitute our own sense of ultimate judgment for that of God. In meting out punishment, we should be concerned about going beyond what is necessary to do justice by the victim, and to protect the legitimate interests of society in self-protection.<sup>44</sup> To give a trifling punishment for a serious crime would disrespect the victim and also not send a signal to the offender of his need for repentance and improvement. But, the sense that any crime must be met with an equally horrific punishment is one that Christ counsels against; after all, that is precisely the “eye for an eye” approach Christ disavowed.<sup>45</sup> And, urging ultimate punishments such as death or life in prison without the possibility of relief, can be said to involve judgments best left to God himself; particularly if in the case of death, you are limiting the possibility for the offender’s redemption.<sup>46</sup> If God’s judgment will be exercised as an ultimate matter, then we should not fear that punishment of a more permanent kind will not be meted out if it is justified.<sup>47</sup> What we should worry more about is overreaching our bounds, and going beyond what is necessary to show fair respect to the victims and to protect society, by condemning criminals to sentences that leave no hope.<sup>48</sup>

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including both victims and offenders.”); *supra* note 10 and accompanying text.

44. *See supra* note 42.

45. *See supra* notes 33–34 and accompanying text.

46. *See* Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 53 (2000) (“First, by ending the offender’s life, capital punishment logically reduces his life to the act he has committed, and it denies the possibility of redemption. Capital punishment not only reduces the time in which remorse and rehabilitation are possible. In addition, the lack of possible rehabilitation serves as a key aggravating factor under many capital statutes. This logical feature of capital punishment conflicts with the Christian assertion that redemption is always possible.”); JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* 38 (1997) (quoting sermon cited in GUSTAVE COMBES, *LA DOCTRINE POLITIQUE DE SAINT AUGUSTINE 188–92* (1927)) (“‘Man’ and ‘sinner’ are two different things. God made man; man made himself sinner. So, destroy what man made but save what God made. Thus, do not go so far as to kill the criminal, for in wishing to punish the sin, you are destroying the man. Do not take away his life; leave him the possibility of repentance. Do not kill so that he can correct himself.”).

47. *See* USCCB Statement (“We believe that it is God who ultimately judges a person’s motivation, intention, and the forces that shaped that person’s actions.”).

48. *See* EVANGELIUM VITAE, *supra* note 19, at 56 (“Public authority must redress the violation of personal and social rights by imposing on the offender

But, in terms of victims, we should also pause a moment. As I understand Christ's teachings, we have a duty of love and compassion to all our fellow humans. That requires us to not lose sight of anyone whose dignity and well-being are affected by crime and the criminal justice system, and to be clear-eyed, as Christ was, that serious crimes are sins and that those injured by them deserve the respect of acknowledging that, and the harm they have suffered. In other words, when recognizing the need to be empathetic toward criminals, we must be mindful not to err in the other direction and to minimize the harm that violent and scary conduct does to victims. It is one thing to urge that an offender be punished in a proportionate way that allows for the possibility of redemption and hope. It is another to ignore or excuse, as some sometimes do,<sup>49</sup> the horrific conduct of an offender. That sort of disrespect toward the victim, however unintentional and well-intended, actually divides society, to the overall detriment of offenders.

Similarly, our duty of love and compassion extends to those who must do the hard work of providing for our safety. Police officers and correctional officers often have to deal with human beings at their worst, acting without respect or consideration for others, and violently. We should expect high levels of professionalism from them. But, we also should expect ourselves to not rush to judgment, to realize that these public officials have difficult jobs and hear the words "please" and "thank you" far less than they should, and again be careful that in urging for fairness in the criminal justice system, inexcusable behavior toward police and correctional officers is not minimized. Put simply, Christ gives us no

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an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfils the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated. It is clear that, for these purposes to be achieved, *the nature and extent of the punishment* must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society." (emphasis added).

49. See *The Case of Mumia Abu-Jamal*, N.Y. TIMES, (Aug. 17, 1995), <http://www.nytimes.com/1995/08/17/opinion/the-case-of-mumia-abu-jamal.html> (noting the debate regarding Mumia Abu-Jamal's 1982 death penalty conviction for the fatal shooting of a Philadelphia police officer).

shortcuts. When he says all, he means all.

With this overview in mind, I will now turn to some current issues in criminal justice and how my personal understanding of Christ's teachings bear on how one should ethically approach them. As I frame these issues, I am largely going to elide a rather large question for a Christian, which is whether our society is just enough, as an overall matter, that one can ethically serve it as a public official. To put it in Christ's terms, can we render unto Caesar fidelity to our public office, without compromising our fundamental moral duties as a Christian? This is a question that I have pondered continually throughout my career, and have come to the answer of yes.<sup>50</sup>

With that answer, however, comes what I consider to be complementary duties. In the first instance, one must have enough integrity to honestly play one's particular role as a public official with fidelity (for example, when acting as a judge in deciding a case, to remember the difference between the judicial and the legislative role). This duty of fidelity is critical if we are to be a society genuinely governed by law.

But the complementary duty as I understand it, is to not ignore the many ways in which our society falls short of the ideal and to use the legitimate means at one's disposal (that is, those means not foreclosed by professional duty) to speak out and improve the decency and fairness of our society. In my particular case, that means that when I wear a robe and decide a case, I must act as a judge, respect legislative judgments, and not seek to advance my own personal beliefs improperly in the guise of interpreting the law. But what it also means is that as the leader of a branch of government charged with a unique role in bringing to life the concept of justice,<sup>51</sup> it is incumbent on me and my judicial colleagues for us to be willing to speak out when we perceive systematic injustices and unfairness. No one must do what we say, as we have no vote in the legislative branch, but we do have a unique perspective, and there is a long tradition of judges being asked by the other branches to involve themselves in important areas of public policy affecting the administration

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50. See Strine, *supra* note 5, and accompanying text.

51. See Del. Const. art. IV, § 2 (providing that the Chief Justice of the Delaware Supreme Court shall serve as the head of the Judicial Branch).



of justice, and that is certainly so in the area of criminal justice.<sup>52</sup>

So let's turn to some specific criminal justice issues that seem to me to cry out to the Christian conscience for consideration. I'm going to spend more time identifying them and explaining why they deserve your consideration if the ethical considerations I've outlined have purchase for you. My goal today is not to outline a policy agenda, but to explain why these issues are worthy of your deep thought, in the first instance, and then, most important, action on your reflections to effect positive change.

## II. UNDERSTANDING WHY PROCEDURAL FAIRNESS IS IMPORTANT TO DOING SUBSTANTIVE JUSTICE

I start with a seemingly mundane and settled issue: that of the reasonable doubt standard. Why? Because it usefully illustrates the reality that embedded in our criminal justice system are brakes on the potential for human error and overreaching that have roots in the Christian faith, but which are often seemingly most lost sight of by those most vocally identifying themselves as Christian. The reasonable doubt standard is a good example of that, because it is often greatly frustrating for society when a jury is unable to conclude unanimously that a defendant accused of a particularly heinous or high profile crime is guilty. A California-based

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52. See 28 U.S.C. § 991 (2012) (establishing the United States Sentencing Commission, and providing that at least three of its members must be federal judges); 11 Del. Code § 8700 (“The Delaware Criminal Justice Council is an independent body committed to leading the criminal justice system through a collaborative approach that calls upon the experience and creativity of the Council, all components of the system, and the community. The Council shall continually strive for an effective system that is fair, efficient, and accountable.”); *id.* § 8701 (providing that the Criminal Justice Council’s members shall include, among others, the Chief Justice of the Delaware Supreme Court, the President Judge of the Superior Court, the Chief Judge of the Family Court, the Chief Magistrate of the Justice of the Peace Courts, the Chief Judge of the Court of Common Pleas, and a sitting judge of the U.S. District Court for the District of Delaware); 11 Del. Code § 6580 (establishing the Sentencing Accountability Commission (“SENTAC”) in Delaware to “develop sentencing guidelines consistent with the overall goals of ensuring certainty and consistency of punishment commensurate with the seriousness of the offense and with due regard for resource availability and cost,” and providing that four of its members must be members of the judiciary and that another four “shall, by training or experience, possess a knowledge of Delaware sentencing practices”).

trial—that of the “Juice”—might be the most famous example in recent decades, but there are many others.<sup>53</sup>

But, it seems to me to be useful for a Christian to keep in mind that genuinely Christian considerations helped inspire the adoption of the beyond a reasonable doubt standard, because there was a fear that a lesser standard would pose an unacceptable risk that human error, passion, and a desire for vengeance could lead to wrongful convictions on too frequent a basis.<sup>54</sup> Therefore, a risk was taken that a guilty person could go free of human justice (at least of the criminal kind—remember O.J. Simpson was held liable civilly), on the ground that a more rigorous standard would strike the better balance. That standard also has the wisdom built in that the high burden is a goal toward assuring that the jury genuinely is convinced beyond a reasonable doubt of the defendant’s guilt; that is, with the understanding that even with a rigorous standard some jurors will be inclined toward too easily believing a defendant to be guilty and overly certain of their own ability to discern the so-called “truth.”<sup>55</sup>

Seemingly lost sight of when things like the O.J. verdict come out is the Christian belief that the ultimate judgment of the defendant does not come from his fellow human beings. Although, as we shall discuss more, the promise of redemption for the truly repentant who find the way exists for everyone, the defendant who does not accept responsibility for his offenses compounds the harm he has caused to the

53. See generally David Margolick, *Not Guilty: The Overview; Jury Clears Simpson in Double Murder; Spellbound Nation Divides on Verdict*, N.Y. TIMES (Oct. 4, 1995), <http://www.nytimes.com/1995/10/04/us/not-guilty-overview-jury-clears-simpson-double-murder-spellbound-nation-divides.html>.

54. See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF CRIMINAL LAW 2* (explaining that the reasonable doubt standard “is the last vestige of a vanished premodern Christian world”).

55. The Old Testament permitted the death penalty, but only if certain procedural requirements were followed. See *id.* at 36 (“The death penalty is authorized and even commanded in Genesis and the Mosaic law, but only with certain crucial limits; and for Christians, perhaps Jesus’ message of mercy and reconciliation makes it inappropriate that humans should impose such a final penalty. Thus the Bible offers different approaches toward the death penalty.”); *id.* at 38 (“Moreover, the biblical authorization of the death penalty was also coupled with significant limits on its actual implementation. Jewish law required two eyewitnesses to convict someone of a capital crime, a higher standard than in other cases. It also impressed on witnesses the importance of their testimony by requiring them to carry out the execution if the accused was convicted.”).

victim and her family and friends and society, and is moving himself farther from Christ, not closer. Not a promising move for eternity, as I understand the teachings.

For today's purposes, though, what I think is notable is how much is often overlooked when discussing even fundamental aspects of the criminal justice system in the heat of the moment. What I have said about the reasonable doubt standard can also be said about other features of the criminal justice system. The much maligned and rarely successful insanity defense represents a view that someone who is genuinely insane should not be held criminally responsible for his actions. Juries are incredibly suspicious of this defense and often reject it in cases where the evidence that the defendant was insane was overwhelming.<sup>56</sup>

So, too, are frustrations over the rules preventing witness statements from coming in that are the result of coercive interrogation techniques. Why should a defendant walk free just because it took a good beating or threats to get him to confess or a witness to talk? Well, perhaps it is good to be mindful of the reality that the flesh is weak,<sup>57</sup> and that when people are threatened or beaten, they are prone to say things that are not truthful. To have a jury subject to human error and bias and then use evidence like that to convict heightens the risk of a wrongful conviction. Behind these and other procedural rules can be seen a deeper intuition about human nature and the contingency of any form of human justice. Truth is something ultimately for God, but humans should strive for it too. Humans, however, must recognize that to find the truth we can either be self-aware about human nature and try to prevent that nature from polluting the

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56. The famous case involving DuPont heir John Eleuthère du Pont, subject of the movie *Foxcatcher*, is a good example. The evidence of his serious mental illness and delusional behavior—which was exploited by many around him for personal gain at John's expense for years and without any attempt to help him—was rejected by a jury, likely in my view because another kind of other can come into play in jury rooms, the lack of sympathy more ordinary people may have for a hugely wealthy person. See Jeré Longman, *John E. du Pont, Heir Who Killed an Olympian, Dies at 72*, N.Y. TIMES (Dec. 9, 2010), [http://www.nytimes.com/2010/12/10/sports/olympics/10dupont.html?\\_r=0](http://www.nytimes.com/2010/12/10/sports/olympics/10dupont.html?_r=0); FOXCATCHER (Sony Pictures Classics 2014).

57. See *Mark* 14:37–38 (“When he returned he found them asleep. He said to Peter, ‘Simon, are you asleep? Could you not keep watch for one hour? Watch and pray that you may not undergo the test. The spirit is willing but the flesh is weak.’”).

information stream critical to doing our human best to determine the state of things, or allow our human flaws to make the difficult task of making factual judgments even harder by making the source materials from which we have to do that—something we call evidence in the law—even less reliable.<sup>58</sup>

Impatience with braking systems has also infected a more ultimate subject I will talk about in a few minutes, the death penalty. In most states, including my own, it used to be the case that a death sentence could be given out only when the jury unanimously recommended that outcome. Not satisfied with a life sentence in situations when juries were unable to come to full agreement a defendant should die, legislatures and governors decided that the death sentence could be given if the trial judge decided that was the correct sentence. In some states, a judge can do that even if a minority or, as is the situation in Alabama right now, no juror supported death.<sup>59</sup> In other states, a bare majority is okay. To a Christian, I would argue that these laws are worthy of profound consideration. If Christ has urged us to be mindful of our own potential for error, to resist the vengeful eye for an eye impulse,<sup>60</sup> to be self-aware that we may judge people who are different from ourselves more harshly than we should,<sup>61</sup>

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58. The rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), can be seen as a check on this. By limiting the extent to which the state can use its preemptory challenges in a racially discriminatory manner, it helps limit the concept of the other influencing a jury verdict.

59. See Ala. Code § 13A-5-47; Paige Williams, *Double Jeopardy: In Alabama, a Judge Can Override a Jury that Spares a Murderer From The Death Penalty*, NEW YORKER (Nov. 17, 2014) (explaining the case of Shonelle Jackson, whose judge imposed the death penalty despite a jury unanimously voting against that sentence).

60. See *Matthew* 5:38–39 (“You have heard that it was said, ‘An eye for an eye and a tooth for a tooth.’ But I say to you, offer no resistance to one who is evil. When someone strikes you on [your] right cheek, turn the other one to him as well.”).

61. See *James* 2:1–4 (“My brothers, show no partiality as you adhere to the faith in our glorious Lord Jesus Christ. For if a man with gold rings on his fingers and in fine clothes comes into your assembly, and a poor person in shabby clothes also comes in, and you pay attention to the one wearing the fine clothes and say, ‘Sit here, please,’ while you say to the poor one, ‘Stand there,’ or ‘Sit at my feet,’ have you not made distinctions among yourselves and become judges with evil design?”); see also *Matthew* 7:1–5 (“‘Stop judging, that you may not be judged. . . . Why do you notice the splinter in your brother’s eye, but do not perceive the wooden beam in your own eye? . . . You hypocrite, remove the wooden beam from your eye first; then you will see clearly to remove the

that everyone, including a criminal, has a potential for redemption,<sup>62</sup> and that God, not man, is the ultimate judge,<sup>63</sup> how does that counsel for putting someone to death when the jury that convicted him cannot reach unanimous agreement he warrants being killed? However one ultimately comes out on this, it seems to me difficult for one to come out on the side of the easier route to death without a great deal of struggle, much less to do so without a duty to continually reflect on whether that policy choice remains the just one after experience with it.

### III. CHRIST AND CAPITAL PUNISHMENT

This is an easy point to transition to the larger question of punishment itself, and how the teachings of Christ, as I understand them, might cause one to reflect on current public policy discussions. Let's start with the awful subject of capital punishment, something that has rarely been far from my mind during my career in public service, because I've been suffused, for worse in my view and no better at all, in its implementation as law and fact. I've reflected at length on this in the past, and won't do so today.<sup>64</sup> For my own part, Christ's teachings are difficult to reconcile with support for capital punishment,<sup>65</sup> except in circumstances where that

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splinter from your brother's eye.'").

62. See *John* 8:3–11 (Jesus forgave woman who had committed adultery rather than condemning her); PRICE, *supra* note 4, at 109 ("They were much amazed saying to themselves 'Who can be saved?' Gazing at them Jesus said 'With people it's impossible but not with God for everything is possible with God.'").

63. See *Luke* 6:37 ("Stop judging and you will not be judged. Stop condemning and you will not be condemned. Forgive and you will be forgiven."); *James* 4:12 ("There is one lawgiver and judge who is able to save or to destroy. Who then are you to judge your neighbor?").

64. See Strine, *supra* note 5.

65. See *Genesis* 4:13–15 ("Cain said to the LORD: 'My punishment is too great to bear. Look, you have now banished me from the ground. I must avoid you and be a constant wanderer on the earth. Anyone may kill me at sight.' Not so! the LORD said to him. If anyone kills Cain, Cain shall be avenged seven times. So the LORD put a mark on Cain, so that no one would kill him at sight."); EVANGELIUM VITAE, *supra* note 19, at 2 ("Man is called to a fullness of life which far exceeds the dimensions of his earthly existence, because it consists in sharing the very life of God. The loftiness of this supernatural vocation reveals the *greatness* and the *inestimable value* of human life even in its temporal phase."); (emphasis added) *id.* at 10 ("[God] thus gave [Cain] a distinctive sign, not to condemn him to the hatred of others, but to protect and defend him from those wishing to kill him, even out of a desire to avenge Abel's

can genuinely be seen as self-defense for the community.<sup>66</sup> The reasons I conclude this have already been highlighted: Christ counsels us against human error and judgment, asking us to leave that to God when we can, and to avoid striking back.<sup>67</sup> He leaves open the possibility of forgiveness and redemption for everyone.<sup>68</sup> For me, at least, that means that so long as a dangerous offender is given a sentence that respects the victim and society's expectation that a serious crime will be accompanied by a serious consequence, and society can be rendered safe from further predation, the justification for killing the offender is hard to identify,<sup>69</sup>

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death. *Not even a murderer loses his personal dignity*, and God himself pledges to guarantee this. And it is precisely here that the *paradoxical mystery of the merciful justice of God* is shown forth.”) (emphasis added); Berg, *supra* note 46, at 36 (“The death penalty is authorized and even commanded in Genesis and the Mosaic law, but only with certain crucial limits; and for Christians, perhaps Jesus’ message of mercy and reconciliation makes it inappropriate that humans should impose such a final penalty.”).

66. See EVANGELIUM VITAE, *supra* note 19, at 55 (“There are in fact situations in which values proposed by God’s Law seem to involve a genuine paradox. This happens for example in the case of *legitimate defence*, in which the right to protect one’s own life and the duty not to harm someone else’s life are difficult to reconcile in practice. Certainly, the intrinsic value of life and the duty to love oneself no less than others are the basis of a *true right to self-defence*.”); *id.* (“Unfortunately it happens that the need to render the aggressor incapable of causing harm sometimes involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about, even though he may not be morally responsible because of a lack of the use of reason.”).

67. See *supra* note 26.

68. See *Galatians* 3:26–29 (“For through faith you are all children of God in Christ Jesus. For all of you who were baptized into Christ have clothed yourselves with Christ. There is neither Jew nor Greek, there is neither slave nor free person, there is not male and female; for you are all one in Christ Jesus. And if you belong to Christ, then you are Abraham’s descendant, heirs according to the promise.”); 2 *Peter* 3:9 (“The Lord does not delay his promise, as some regard ‘delay,’ but he is patient with you, not wishing that any should perish but that all should come to repentance.”); 1 *John* 3:3 (“Everyone who has this hope based on him makes himself pure, as he is pure.”).

69. See Del. Bd. of Pardons, Board of Pardons Recommendation to Governor Markell Regarding Clemency of Robert Gattis, State of Del. (Jan. 15, 2012), <http://news.delaware.gov/2012/01/15/board-of-pardons-recommendation-regarding-clemency-of-robert-gattis> (recommending that the defendant’s death sentence be commuted, because, among other reasons, “Mr. Gattis does not pose a threat of violence within the prison setting and is not regarded as dangerous by the Department of Correction,” and explaining that “[then-Chancellor Strine] believes even more fundamentally that once a prisoner has been incapacitated and poses no threat of future harm to society, then there is no moral justification for taking his life. When the taking of life is not required as a

especially because it deprives the offender of a full chance to redeem himself in God's eyes.<sup>70</sup>

This is the case for me, even when I think there is no doubt the offender has without any mitigating circumstance committed a heinous offense. Even more so is it the case when there is the possibility that the wrong man has been convicted, or the defendant's own human circumstances—such as serious mental illness or having been regularly abused by and taught by sociopathic parents who were role models for sickness—seem to mitigate toward mercy, at least in the sense of stopping short of killing the offender. And how does it weigh in the calculation that, despite strenuous legal efforts to screen out the potential for racial and other bias, the chances of being executed if one kills a white person rather than a black person seem to be higher?<sup>71</sup> What does

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matter of self-defense, that member believes that one cannot ethically or morally take that act”).

70. See *EVANGELIUM VITAE*, *supra* note 19, at 27 (“Modern society in fact has the means of effectively suppressing crime by rendering criminals harmless without definitively denying them the chance to reform.”).

71. See David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *CORNELL L. REV.* 1638, 1677–78 (1998) (finding, among other things, that (1) 78% of defendants in capital cases were black, yet 85% of all defendants sentenced to death were black; and (2) “when the victim is nonblack, a death sentence is much more likely because of the jury’s failure to find mitigation after it has found aggravation”); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 *MICH. J. RACE & L.* 135, 165 (2009) (finding that prosecutors sought the death penalty in 23.5% of cases involving a white victim, compared with just 10.8% of cases involving a black victim, and that prosecutors sought the death penalty in 13.8% of murders when the defendant was black, but only 7.14% of murders when the defendant was white); *RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND’S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION* 34, 36 (2000) (“The probability that the state’s attorney will file a notification to seek the death penalty is highest in cases where a black offender kills a white victim, and is twice as high as when a black slays another black or other racial combinations, and 1.7 times higher than when a white kills a white. Even when case characteristics and jurisdiction are controlled, blacks who cross racial lines and kill whites are more likely to be death notified. . . . [B]lacks who kill whites are two and one-half times more likely to be sentenced to death than are whites who kill whites, three and one-half times more likely than are blacks who kill blacks, and almost eleven times more likely to be sentenced to death than ‘other’ racial combinations.”); Frank R. Baumgartner, *The Impact of Race, Gender, and Geography on Missouri Executions*, University of North Carolina at Chapel Hill, 1 (July 16, 2015), <http://www.unc.edu/~fbaum/articles/MissouriExecutions-2015.pdf> (explaining

that say about the possibility that the concept of the other Christ sought to erase cannot be eradicated in this most serious context?<sup>72</sup>

Others, of course, disagree and do so while avowing themselves to be Christ's adherents. I do not seek today to convince any of you in that camp. What I would say is that the subject is one that is a serious one for Christians, as there are many, many hurdles a Christian must get over to conclude with a clear conscience that execution is just, at least as measured by Christ's own teaching. When society kills, it kills in all our names, and if anything in criminal justice should cause us to reflect on what our own moral ethics counsel for our view of public policy, it is when we take a life in the name of justice.

In struggling with this issue for myself, I have tried to be self-aware about the reality that there are good-faith reasons why Christians have come to different conclusions about this issue. Obviously, the Catholic Church's own history with capital punishment is complicated,<sup>73</sup> as complicated as its

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that a study on capital convictions in Missouri found that: (1) "[e]ven though the vast majority of murders involve an offender and victim(s) of the same race, 54% of the African-American men executed by Missouri were convicted of crimes involving White victims"; (2) "[e]ighty-one percent of the individuals executed in Missouri were convicted of killing White victims even though White victims are less than 40% of all murder victims in the state"; and (3) "[h]omicides involving White female victims are nearly 14 times more likely to result in an execution than those involving Black male victims"; David R. Dow, *Death Penalty, Still Racist and Arbitrary*, N.Y. TIMES (July 8, 2011), <http://www.nytimes.com/2011/07/09/opinion/09dow.html> (explaining that of the 470 executions in Texas since 1976, only two involved a white murderer and a black victim).

72. See Berg, *supra* note 46, at 45 ("Likewise, when the application of the death penalty systematically values white victims more than black victims, and white murderers more than black murderers—and when the public realizes that this is so—the message undermines the inherent value of life rather than affirming it. And when innocent people are sentenced to death, often because of inadequate, underfunded legal representation, the message could hardly be clearer that some human life is cheap.").

73. See *id.* at 39–41 (explaining the Catholic Church's historical stances on the death penalty, including the Church's endorsement of the death penalty that lasted for over 1,000 years); see also SKOTNICKI, *supra* note 37, at 130–31 ("As many are aware, the church long justified the death penalty in conjunction with its commitment to the primacy of the common good: killing cannot be a legitimate end but one can kill a threat to the well-being of the social body. Recently, however, the church has amended its teachings in favor of a commitment similar to the one enunciated by Ambrose: 'God, who preferred the correction rather than the death of the sinner, did not desire that a homicide be



general involvement in secular affairs. But one reason for that was, of course, the sense for some time that protecting society from dangerous criminals could be assured only by a death sentence. As that justification has waned through our proven capacity—however dubious an achievement it is, to incarcerate offenders for generations—the Church has been more assertive about arguing that the use of the death penalty is inconsistent with Christ’s teachings.<sup>74</sup>

Self-awareness among death penalty opponents, though, is critical, as is the danger of fetishizing one’s sense of moral purity. By that I do not mean that a death penalty opponent should compromise for the sake of compromise. But I do

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punished by the exaction of another homicide.’”).

74. See *supra* note 6 (quoting Pope Francis’s address to Congress); USCCB Statement (“We join Pope John Paul II in renewing our strong and principled opposition to the death penalty. We oppose capital punishment not just for what it does to those guilty of horrible crimes, but for how it affects society . . . .”); *EVANGELIUM VITAE*, *supra* note 19, at 53 (“*Sacred Scripture* in fact presents the precept ‘You shall not kill’ as a divine commandment. As I have already emphasized, this commandment is found in the Decalogue, at the heart of the Covenant which the Lord makes with his chosen people; but it was already contained in the original covenant between God and humanity after the purifying punishment of the Flood, caused by the spread of sin and violence. God proclaims that he is absolute Lord of the life of man, who is formed in his image and likeness. Human life is thus given a sacred and inviolable character, which reflects the inviolability of the Creator himself. Precisely for this reason God will severely judge every violation of the commandment ‘You shall not kill,’ the commandment which is at the basis of all life together in society. He is the ‘*goel*,’ the defender of the innocent. God thus shows that he does not delight in the death of the living.”) (internal citations omitted); *EVANGELIUM VITAE*, *supra* note 19, at 55 (“It is a known fact that in the first centuries, murder was put among the three most serious sins—along with apostasy and adultery—and required a particularly heavy and lengthy public penance before the repentant murderer could be granted forgiveness and readmission to the ecclesial community. This should not cause surprise: to kill a human being, in whom the image of God is present, is a particularly serious sin. *Only God is the master of life!*”); see also Berg, *supra* note 46, at 33 (explaining that a 1998 survey revealed that “only 65%” of Catholics favored the death penalty, which is a level of support lower than any other major group except African Americans (58% support)); Michael Lipka, *Some Major U.S. Religious Groups Differ From Their Members on the Death Penalty*, Pew Research Ctr. (July 13, 2015), <http://www.pewresearch.org/fact-tank/2015/07/13/some-major-u-s-religious-groups-differ-from-their-members-on-the-death-penalty/> (reporting that 56% of American adults support the death penalty, including 53% of Catholics and 63% of white Catholics); Joseph Carroll, *Who Supports the Death Penalty?*, GALLUP (Nov. 16, 2004), <http://www.gallup.com/poll/14050/who-supports-death-penalty.aspx> (reporting that in 2004, 66% of American adults supported the death penalty, including 71% of Protestants, 68% of Catholics, and 59% of Catholics who regularly attend church).

mean that the sort of self-love against which Christ warns should be avoided. A desire to remain personally pure does not absolve Christians of the moral duty to make progress by engaging with people of good faith who have reached different judgments. In my state, for example, there is the potential to close the window on the death penalty. But, there are supporters of the death penalty who might be willing to consider positive changes, but who view some cases as special. Those cases involve, for example, when the defendant is convicted of murdering a law enforcement officer in the line of duty. The reason for the difference is, I think, one that we all have to consider. Law enforcement officers are charged with protecting us all and have to run toward the gun or knife when we can hide. When someone strikes at them intentionally to kill, isn't there a special justification, akin to self-defense, for making sure they can't do it again? There are all kinds of permutations of this discussion, of course, which could include making sure that the death penalty was available only if a defendant knowingly killed a law enforcement officer.

My point, for today, though is that Christ's counsel for modesty should extend to giving consideration to other points of view and whether we are willing to risk getting our hands dirty to make this temporal world more just while we can. By way of an example I find especially hard, what does one say about the issue of a convicted murderer who then knowingly kills a prison guard? If the maximum penalty for murder is a life sentence, what is the consequence for repeatedly killing? And who do we ask to guard this person again? As a death penalty opponent, are you willing to do a weekly shift to guard Hannibal Lecter yourself? At that point, isn't there an argument that capital punishment of that offender is in fact self-defense, as we have no reasonable way to assure that he will not kill again and he knew we had already given him mercy and chance for redemption after his first killing? And what if the people who want a law enforcement exception might be willing to allow consideration and adoption of a bill otherwise eliminating the death penalty for other murders, and to even have the law enforcement exception only available when a unanimous jury recommends execution? For those drawn to the public realm, what I am suggesting is that there are many other ways to show our purity in a way

that Christ might respect more (giving away our possessions, for example) than risking, when that is necessary for progress, the imperfect compromise that moves the world as effectively as possible toward being a more just place.<sup>75</sup>

#### IV. EXPLODING INCARCERATION RATES, MANDATORY MINIMUM SENTENCES, AND STARK RACIAL DISPARITIES

The death penalty, of course, is just the most extreme example of a situation that tugs at the Christian conscience. But, it's difficult for someone steeped in Christ's teachings to ignore the prisoners. After all, Christ did not.<sup>76</sup> And what does it mean for a Christian to live in what is the world's wealthiest nation, and to know that we imprison more of our fellow humans than any other nation on Earth?<sup>77</sup> On an international basis, the United States' only rivals in this unsavory category are nations whose values we consider antithetical to our own, nations like North Korea, China, and Russia.<sup>78</sup> And we are taking the Gold Medal from them.

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75. As I was finalizing this lecture, I learned the, to me, disappointing news that a bill to eliminate the death penalty was rejected by the Delaware State House of Representatives. It is my hope that a compromise that might at least narrow the death penalty's availability is possible. The bill that was rejected was, after all, premised on a compromise itself: the bill only eliminated the death penalty prospectively and did not by own its terms apply to those already on death row in Delaware. See S.B. 40, 148th Gen. Assemb., Reg. Sess. (Del. 2015).

76. See *supra* note 11 and accompanying text.

77. See Michelle Ye Hee Lee, *Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/> (explaining that according to the International Centre for Prison Studies, the United States has 2.24 million prisoners, or about 22% of the world's prison population, the highest percentage of any country)

78. See *id.* (explaining that after the United States, China and Russia have the largest prison populations); *America and Its Fellow Executioners*, N.Y. TIMES (Jan. 10, 2016), [http://www.nytimes.com/2016/01/10/opinion/america-and-its-fellow-executioners.html?\\_r=0](http://www.nytimes.com/2016/01/10/opinion/america-and-its-fellow-executioners.html?_r=0) ("According to the annual report of Amnesty International, executions were carried out in 22 countries in 2014, the year covered; there were 25 in 2004. The total number of people known to have been executed also fell. To its disgrace, the United States was still among the five countries that most often used capital punishment—alongside China, Saudi Arabia, Iran and Iraq—but the number of executions in America continued to decline."); Alex Kozinski, *Worse Than Death*, 125 YALE L.J. F. 230, 235 (2016) (There are currently 3,000 prisoners on death row [in the United States], but as

The incarceration rate in the United States has grown almost tenfold in a century: from 75 in 100,000, some one hundred years ago, to over 700 per 100,000 now.<sup>79</sup> Does this signal that we are now more confident that we can discern those who are guilty? And identify those among the guilty for whom safe re-entry into society can never be expected? Have we been able to overcome the concept of the other, such that we can be confident that similarly situated offenders are being treated similarly, and that we are enforcing the laws on the books against all communities and offenders equally?

For someone who listens to Christ, the evidence is provocative and sleep-disturbing. We know that despite best efforts, mistakes have been made. Defendants have been sentenced to twenty-year, life, and even death sentences when evidence of their actual innocence has emerged.<sup>80</sup> That reality emphasizes how dangerous it is for humans to make ultimate judgments that leave an offender with no hope and

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many as 100,000 prisoners are in some form of so-called 'administrative segregation,' including at least 25,000 in long-term solitary confinement." See generally DAVID R. HAWK, *THE HIDDEN GULAG: THE LIVES AND VOICES OF "THOSE WHO ARE SENT TO THE MOUNTAINS,"* VIII (2003) (reporting that although North Korea has not released prison statistics, the Korean gulag system incarcerates between 150,000 and 200,000 people, or 660–800 people per 100,000).

79. Margaret Werner Callahan, *Historical Correction Statistics in the United States: 1850–1984*, U.S. Department of Justice, Bureau of Statistics 30 (1986); Roy Walmsley, International Centre for Prison Studies, *World Prison Population List* (10th ed. 2013), [http://www.prisonstudies.org/sites/default/files/resources/downloads/wpppl\\_10.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/wpppl_10.pdf); see also Amy Levad, "I Was in Prison and You Visited Me": A Sacramental Approach to Rehabilitative and Restorative Justice, 31 J. SOC'Y CHRISTIAN ETHICS 93, 93 (2011) ("In 1980, the rate of incarceration in prisons was 139 people per 100,000 US residents. Over thirty years, this rate has increased by more than 360 percent; it was 504 people per 100,000 US residents in 2008. Although the United States has less than 5 percent of the world's population, it holds nearly 25 percent of the world's incarcerated people."); see also Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xiv (2015) (explaining that there are currently 2.2 million incarcerated people in the United States).

80. See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii-xiv (2015) (explaining that there have been 1,576 exonerations in the United States since 1989, including 91 in 2013 and 125 in 2014); Mike McPhate, *Record Number of False Convictions Were Overturned in 2015, Study Finds*, N.Y. TIMES, Feb. 4, 2016, available at <http://www.nytimes.com/2016/02/04/us/record-number-of-false-convictions-overturned-in-2015.html> (reporting that 149 people were found in 2015 to have been falsely convicted in prior years in the United States—nearly 40% of whom were exonerated of murder—and explaining that those exonerated spent an average of over 14 years in prison).

no possibility for some period of life that is meaningful and free if a mistake can be identified and corrected. And remember, it must be true that not all mistakes are corrected. That is in the nature of things human.

Not only that, there has been a sharp increase in mandatory sentences, triggered not just by serious crimes of violence, but by the repeated commission of minor offenses.<sup>81</sup> More and more, discretion has been taken out of the hands of judges to tailor punishment to the crime before the court, and become a matter of applying rigid statutory rules, rules that involve a ratcheting up of the sentences that offenders serve from historical levels. More and more, the incarcerated population includes not just those found guilty, but poor offenders who cannot make bail, a disproportionate amount of whom are black.<sup>82</sup> Estimates put the bail population at 60%

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81. See REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, U.S. SENT'G COMM'N 63 (2011), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm) (finding that mandatory minimum sentences now apply to more offenses, impose longer punishments, and have been used increasingly more in recent years); John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 379–80 (2013) (“The average length of prison sentences has increased by 36% since 1990.”); H.B. 3818, 187th Gen. Ct., Reg. Sess., (Mass 2012) (expanding the class of offenders exposed to an automatic sentence enhancement under the state’s habitual offender statute and creating a new violent habitual offender category).

82. Cynthia E. Jones, *“Give Us Free”: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 941 (2013) (reporting that blacks and Latinos are 66% and 91% more likely to be in jail pretrial than whites, respectively); *id.* at 944 (“[I]n jurisdictions across the country, when bail officials make the discretionary decision to grant pretrial release and decide the bond amount to be imposed, the race of the arrestee plays a role in a way that disproportionately and adversely subjects African Americans to pretrial detention and harsher bail conditions. Race-neutral explanations of the persistent patterns of racial disparities are belied by the fact that the relevant information that bail officials could legitimately use to differentiate bail outcomes for white and African American defendants is rarely known by the bail official at the time of the bail determination. Moreover, even when the relevant background information of white and African American arrestees is taken into account by researchers, studies confirm that white defendants still receive more favorable bail decisions than do African American defendants with comparable backgrounds.”); Delaware Access to Justice Commission’s Committee on Fairness in the Criminal Justice System, *A Report on Bail & Pretrial Detention*, Equal Justice Initiative, at 2 (Oct. 2015) (“In Delaware, African American men, women, and children represent disproportionately high number of individuals detained prior to trial, representing 56 percent of the pretrial detention population despite comprising only 22 percent of the state

of the total population of inmates in local or county jails nationally.<sup>83</sup> And the evidence is clear that whether an offender gets released or not, has a large effect on whether he will plead guilty, and that many defendants plead guilty simply so they can obtain release from pre-trial incarceration.<sup>84</sup>

For the Christian, the imposition of sentences that involve mandatory sentences of a generation or more for crimes that do not involve the taking of a life, a rape, or other serious crime of violence, must also give pause. The calculus for many of these laws is that certain patterns of criminal activity are good predictors of future criminal activity. By incarcerating offenders in these categories for long periods of time, we supposedly make society safer. That is not only a debatable empirical proposition—because there is no convincing proof that declining crime rates can be attributed largely to the huge increases in incarceration<sup>85</sup>—it also

population. Though the state has initiated reforms in the bail process, the rate of pretrial detention rose from 2012 to 2014 by 20 percent even as violent crime fell in the same period.”); RAM SUBRAMANIAN ET AL., VERA INSTITUTE OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 49 n.25 (2015) (“The population of the Rikers Island jail is 57 percent black, 33 percent Latino, and 7 percent white. The population of New York City is 22 percent black, 29 percent Latino, and 33 percent white.”).

83. Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), [http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?\\_r=1](http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=1); see also *id.* (explaining that in New York City, 45,000 people are jailed each year simply because they cannot afford bail, and that when bail is set at \$500 or less, only 15% of defendants are able to come up with the bail money to avoid jail); SUBRAMANIAN ET AL., *supra* note 82, at 32 (explaining that the majority of inmates who remained incarcerated until the disposition of their case, remained incarcerated because they could not afford bail of \$2,500 or less).

84. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1516 (2013) Shaila Dewan, *When Bail Is Out of Defendant’s Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html>.

85. See William Spelman, *The Limited Importance of Prison Expansion*, in THE CRIME DROP IN AMERICA 97–129 (Blumstein, A. & Wallman, J., eds., 2005) (finding that only about 25% of the decline in violent crime in the United States in the 1990s was attributable to increased incarceration rates, and that other factors like the growing economy, changes in the drug market, and strategic policing also had major effects); Inimai M. Chettiar, *The Many Causes of America’s Decline in Crime*, ATLANTIC (Feb. 11, 2015), <http://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/> (explaining the author’s empirical research results that the “growth in incarceration was responsible for approximately 5 percent of

involves an impersonalization of the justice process that is problematic from a Christian perspective. Once a sentence is long enough to involve real punishment and respect for the victim, going beyond that as a general societal prophylactic sacrifices the individual offender to an overall calculus that imprisoning an entire class of offenders, regardless of individual circumstances or improvement, will make society safer.

One clear limitation Christian thought would seem to impose on criminal justice policymaking would be on that which was rigidly utilitarian, in the sense of being willing to forsake individual considerations of justice and mercy, just because there is evidence that doing so might produce greater overall societal safety.<sup>86</sup> In the first instance, of course, this means that we cannot impose punishment on anyone who we do not in good faith believe to be guilty in fact of the crime of which they have been accused. But that, of course, is a relatively easy proposition, or so I hope, for most to embrace. But another implication is perhaps more contestable. That is the reluctance we should have to implement systems of criminal justice that treat all offenders in one way, simply because empirical evidence might suggest that doing so would maximize social welfare.

For decades now, American legislators have enhanced criminal penalties, enacted crimes that largely are redundant of existing crimes, and in other ways taken action to make it easier and easier to send defendants to prison for decades at a time. Much of this legislation was in good faith and a natural reaction to a society that wants to be safe. But good faith requires reflection when prior good-faith action has serious negative consequences. What was created by the pens of those we elected can be fixed.

For the Christian, the question is whether you wish to look clearly at your own role as a citizen in a society that now

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the drop in crime in the 1990s,” but that since 2000, “increases in incarceration have had essentially *zero* effect on crime,” and other factors like growth in income, changes in alcohol consumption, the aging population, decreased unemployment, and policing have contributed to the lower crime rates).

86. See Carl Anderson, *Christianity on Trial*, 9 AVE MARIA L. REV. 207, 211 (2011) (“The Christian—like Christ himself—has an approach that is *personalist* rather than *utilitarian*, caring about each person as a ‘subject’ and not treating him as an object.”).

puts more of its members behind bars than any other, and does so especially to the least among us, those who are poor and who faced the worst oppression in our history. The lengthy mandatory minimums, redundant crimes that promote overcharging, and overburdened public defender resources are all matters that result from societal action.<sup>87</sup> As members of this society, Christians share in the responsibility for their perpetuation, if they do not act to reform them to make them more true to Christ's teachings.

Now, I also think it is important to acknowledge that almost everyone in prison is in fact guilty of a crime.<sup>88</sup> But that does not mean that the punishments they receive are necessarily just. Another fairness issue cries out for our attention. If, for example, an affluent, suburban, young person who uses and deals dope is far less likely to be in prison than an urban impoverished one, is that equitable and just? We know, for example, that white people are about as likely as black people to use illegal drugs, and even to sell them.<sup>89</sup> But we also know that black people are more likely to be in prison because of their involvement in that illegal industry.<sup>90</sup> The reasons for that are complex, but the bottom line is rather simple; our society's decision to make drugs illegal is fought largely by targeting a few communities whose economic circumstances make them the locus for the industry that emerges when products and services that humans desire, but cannot obtain legally, are sold. Thus, when there is a demand for an illegal product or service, those with the

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87. See Levad, *supra* note 79, at 94 ("In 1998 about two-thirds of federal felony defendants required public defense. In 1996 more than four-fifths of felony defendants in the 75 most populous counties in the United States required public defense.").

88. As I discuss, the small percentage who are in fact in prison mistakenly present their own moral challenge to our society. See McPhate, *supra* note 80 and accompanying text.

89. See Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 *CRIME & JUST.* 49, 67 (2015) (explaining that the percentage of the white, black, and Hispanic populations that sell illegal drugs is very similar); THE SENTENCING PROJECT, *RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT OF PUNITIVE POLICIES*, AT 25 (reporting that a recent U.S. Department of Health and Human Services survey found that blacks used marijuana at 1.3 times the rate of whites, but were arrested for marijuana possession at 3.7 times the rate of whites).

90. See Spohn, *supra* note 89, at 63–64 (explaining that "the arrest rate for blacks is—and has been since 1980—substantially higher than the rate for whites, for both drug possession or use and drug manufacture or sale").



money to buy it may often constitute a somewhat different class than those who, because of economic circumstances, find themselves laboring in the production class of that illicit form of commerce, given the lack of opportunities for them in the legal economy. It is also, of course, true that law enforcement may target the drug trade where it involves the most violence (fights between rival dealers) rather than where it involves the affluent suburban high school kids who form a regular part of the distribution network to their user friends.

But, it must suggest to the Christian conscience that the concept of the other might be infecting our criminal laws when we seem to adopt laws that are not genuinely intended to be enforced in all communities. Perhaps the easiest example of this is the disproportionate number of black people who are in prison for their role as sellers or users of illegal substances, when virtually all respected sources believe that black people are not more likely than white people to use illegal drugs.<sup>91</sup> As a respected Christian scholar has pointed out, the easiest laws to pass in our society are ones increasing the penalties for crimes, especially when those laws are not expected to be enforced rigorously against the lawmakers voting for their adoption.<sup>92</sup> This concept of the other can also be seen in the disparate treatment given to crack cocaine—which is more likely to be used by poor and minority users—and to more expensive powder cocaine, under federal law.<sup>93</sup> It can also be seen in the greater focus society

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91. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (2010) (explaining that blacks in some states are between twenty and fifty times more likely to be imprisoned for drug-related offenses); Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1628 (2012) (noting that “whites and blacks use illegal drugs at the same rates, yet African-Americans are many times more likely to be stopped, searched, arrested, charged, convicted, and sentenced to prison for drug crimes”).

92. See William J. Stuntz, *Law and Grace*, 98 VA. L. REV. 367, 378–79 (2012) (“America’s political system makes criminal laws easy to enact, and other kinds of legislation much harder. Criminal statutes require less work and attract less opposition than just about any other category of legislation.”); *id.* at 382 (“If there is one core mistake my religious community has made in our approach to the justice system, I think it is this: we have been far too willing to support rules and policies designed not for ourselves and our own neighborhoods, but for others who live in neighborhoods far removed from our homes. That is often a bad way to do politics, and it is a terrible way to do criminal justice.”).

93. See *United States v. Watts*, 775 F. Supp. 2d 263, 267–68 (D. Mass.

puts on punishing those who are involved in vice crimes to make money to live—*i.e.*, because of economic compulsion—than those who create a demand for drug dealing and prostitution, because they are consumers.

Suburban parents would be appalled if their houses were raided when their teenage kids held parties at which the parents had turned a blind eye to rampant underage drinking and use of illegal substances. They would be horrified if they, as hosts, were incarcerated for running a drug house and knowingly providing illegal substances to minors. They would cry foul if the ringleaders among these privileged children who are the sellers to their friends were put in adult prison for a minimum mandatory sentence for distribution. Youth, they would say, make mistakes and go through rites of passage. If you want to fine them or give them probation, fine, but don't ruin their promising college prospects and life chances.

As Christ taught, however, one of our central duties is to “[d]o to others as you would have them do to you.”<sup>94</sup> As I understand Christ, this means that we cannot justly apply different standards of and consequences for conduct to others than we would have them be applied to ourselves and our own families and friends. To do so is to violate a fundamental teaching of Christ, and to treat our fellow human beings as

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2011) (explaining that in the Anti-Drug Abuse Act of 1986, “Congress somehow decided to mandate sentences for crack cocaine offenses that were one hundred times more harsh than penalties for offenses that involved cocaine in powder form, despite the fact that the two substances were chemically identical and that powder cocaine could be transformed into crack by anyone with a frying pan and baking soda”); Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PENN. ST. L. REV. 503, 504–05 (2012) (“Since 1986, federal law has imposed stricter sentences on crack cocaine offenders than on powder cocaine offenders, despite the two substances being chemically identical. Under the Anti-Drug Abuse Act of 1986 . . . , first-time possession of a small amount of crack yielded a mandatory minimum sentence of five years in prison. Meanwhile, the same offender found guilty of possessing powder cocaine would have to be in possession of 100 times that amount to receive the same five-year sentence. This scheme was known as the 100:1 sentencing ratio. The 100:1 ratio was notoriously criticized for both its undue harshness and its disparate impact on the African American community. Because crack cocaine convictions are statistically higher among African Americans—whereas powder cocaine convictions are spread across the population—this sentencing ratio inequitably affected the African American community.”).

94. *Luke* 6:31; see also *Matthew* 7:12 (“Do to others whatever you would have them do to you.”).

others not worthy of the same regard as we give to ourselves. This form of self-love is the opposite of the selfless love that Christ asks us to give to others.

As or more troubling than the differential approach to enforcing certain laws is the disturbing evidence that black people in general—and black men, in particular—are regularly treated differently than others by the police, taxi drivers, and many others in society.<sup>95</sup> Behavior that would not trigger a police stop when engaged in by a white person too often does when it involves a black person. As I will discuss, this does not mean that we should assume that all police officers or taxi drivers are racists. But, for a Christian, it would seem to counsel for a clear-eyed consideration of the problem and what can be done about it. That includes a requirement to acknowledge that explicit racism is far from gone in our society, and that there are those in every profession who in fact harbor racial animus. But, on an even deeper level, it would seem to command us to look inward, at our own hearts and minds, and at the nature of our key institutions, to see whether any of our own actions, or those of the institutions that act on our behalf, require change. To my mind, Christ would not condemn us for pondering the possibility that our own actions might be influenced by biases of which we are not fully conscious, or that the institutions of our society might also be. Rather, what would seem to concern him is that we were not engaged in that exercise in reflection, and calling on ourselves and our society to improve our capacity to extend the same empathy and compassion to all our human brothers and sisters, as we do to our flesh and blood family. When practices impinge on the freedom of and endanger the lives of people of color, Christ's teachings compel us to be a witness and force for change.

Some of you may feel that I have dwelt too much on how our criminal justice system affects our black brothers and

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95. See Steve Volk, *Racial Profiling on the Main Line*, PHILA. MAG. (Nov. 22, 2015), <http://www.phillymag.com/articles/racial-profiling-main-line/>; *New Report Shows Wide Racial Differences In Police Conduct*, EQUAL JUSTICE INITIATIVE (Oct. 29, 2015), <http://www.eji.org/node/1169> (explaining the “wide racial disparities in police conduct” in Greensboro, North Carolina, where the police force is 75% white despite a population that is 48% black, and where black drivers make up 54% of the drivers pulled over despite making up only 39% of the driving population).

sisters. But the realities compel that focus. The facts regarding mass incarceration are dire enough in the aggregate. They are dismaying and dispiriting when a focus is given to how many people in prison are black. One in twelve black men aged 25 to 54 is imprisoned compared with just one in sixty nonblack men.<sup>96</sup> And one in 200 black women in this age range is imprisoned, compared with one in 500 nonblack women.<sup>97</sup> Further, black men age 18 to 34 are six times more likely to be incarcerated than white men in that age range.<sup>98</sup> Black men in that age range without a high school diploma are actually more likely to be incarcerated than to be employed.<sup>99</sup> In my home state of Delaware, black citizens make up 22% of the population, but 56% of the prison population as a whole and 68% of prisoners aged 18 to 25.<sup>100</sup> Among children, the disparity is even greater; of the 200 incarcerated children in Delaware, 76% are black and only 17% are white.<sup>101</sup> And black people represent 87% of those

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96. Justin Wolfers et al., *1.5 Million Missing Black Men*, N.Y. TIMES (Apr. 20, 2015), [http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html?\\_r=0](http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html?_r=0).

97. *Id.*

98. Levad, *supra* note 79, at 94; Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, POPULATION REFERENCE BUREAU (2012), <http://www.prb.org/Publications/Articles/2012/us-incarceration.aspx>; *see also* Conyers, *supra* note 81, at 378 (citing E. ANN CARSON & WILLIAM J. SABOL, PRISONERS IN 2011, BUREAU JUST. STAT. 6 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>) (“The incarceration rate among African-American men is more than 3,000 per 100,000 citizens, roughly four times the national average, and roughly six times the rate among white men. In 2010, African Americans made up 13.6% of the U.S. population, but amounted to thirty-eight percent of those who are incarcerated.”)

99. *See* Tsai & Scommegna, *supra* note 98 (explaining that 37% of black men between the ages of 18 and 34 without a high school diploma are incarcerated, compared with 26% of this demographic who are working); *see also* Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, at 10 (Summer 2010) (“In 1980, around 10 percent of young African American men who dropped out of high school were in prison or jail. By 2008, this incarceration rate had climbed to 37 percent . . . .”); *id.* (“Among young African American men *with* high school diplomas, about one in ten is in prison or jail.”) (emphasis added).

100. STATE OF DELAWARE DEPARTMENT OF CORRECTION, POPULATION STATISTICS – JANUARY 2015 2, 16 (2015) [hereinafter POPULATION STATISTICS]; Jessica Masulli Reyes, *Six in Ten Delaware Inmates are Black*, NEWS J. (Oct. 19, 2015), <http://www.delawareonline.com/story/news/crime/2015/10/17/six-10-delaware-inmates-black/73585456/>. Of the fifteen Delaware prisoners currently on death row, nine are black. *Id.* And of the Delaware inmates serving life sentences, 66% are black. POPULATION STATISTICS at 3.

101. Reyes, *supra* note 100.

imprisoned for drug offenses.<sup>102</sup> How does a Christian reconcile this with our duty to avoid treating our fellows as the other? I would suggest that is very difficult, and that one common conscience-salver is a circular argument that leads one into a difficult face-to-face with Jesus.

That is the argument: that what we are seeing is not racial disparities, but economic ones. In other words, many more black people are in prison, not because they are black, but because they are more likely to be poor, and that people without other economic opportunities are more likely to sell some drugs, steal, or otherwise be less able to stay on the straight path. The reasons why this circles one back to Christ are rather easy to identify.<sup>103</sup>

Perhaps the most important one is that it calls on us to ask why it is that black people are much more likely to be poor than white people.<sup>104</sup> Could it be that five centuries of

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102. Reyes, *supra* note 100.

103. See USCCB Statement (“The Option for the Poor and Vulnerable: This principle of Catholic social teaching recognizes that every public policy must be assessed by how it will affect the poorest and most vulnerable people in our society. Sometimes people who lack adequate resources from early in life (i.e., children—especially those who have been physically, sexually, or emotionally abused—the mentally ill, and people who have suffered discrimination) turn to lives of crime in desperation or out of anger or confusion. Unaddressed needs—including proper nutrition, shelter, health care, and protection from abuse and neglect—can be steppingstones on a path towards crime. Our role as Church is to continually work to address these needs through pastoral care, charity, and advocacy.”).

104. See Ta-Nehisi Coates, *The Cost of Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (explaining that “white households are worth roughly 20 times as much as black households, and that whereas only 15% of whites have zero or negative wealth, more than a third of blacks do”); *id.* (reporting that “black families making \$100,000 typically live in the kinds of neighborhoods inhabited by white families making \$30,000”); Jordan Weissmann, *The Wealth Gap Between Blacks and Whites is Even More Enormous (and Shameful) Than You Think*, MONEYBOX (Dec. 15, 2014), [http://www.slate.com/blogs/moneybox/2014/12/15/the\\_black\\_white\\_wealth\\_gap\\_it\\_s\\_bigger\\_than\\_you\\_even\\_think.html](http://www.slate.com/blogs/moneybox/2014/12/15/the_black_white_wealth_gap_it_s_bigger_than_you_even_think.html) (explaining that the median white household in the United States is “worth \$141,900, 12.9 times more than the typical black household, which was worth just \$11,000”); UNIVERSITY OF DELAWARE CENTER FOR COMMUNITY RESEARCH & SERVICE, AN OVERVIEW OF POVERTY IN DELAWARE 3, 5 (2015) (reporting that 12.4% of white individuals live under the poverty rate in Delaware, compared with 27.3% of blacks, and explaining that 56% of black individuals are living below 200% of the poverty level in Delaware); Median Household Income by Race/Ethnicity, Delaware Focus, <http://delawarefocus.org/financial-self-sufficiency/financial-resources/median-household-income-by-race-ethnicity/data-tables> (providing that the median household income in the

racial oppression and inequality have something to do with it? And that the work of overcoming that history of oppression is not done, and that impatience with a half-century of serious, but by no means full-bore, efforts to remedy past discrimination is a human temptation that white Christians should reflect upon deeply and resist? Put simply, if, upon reflection, it is no coincidence that black people and their children are on average more likely to have profound economic and educational disadvantages that are associated with a higher potential for lapsing into criminal behavior, what is the Christian's duty to do something to address that problem?

And there is another reason why it is virtually impossible for a Christian to avoid this reflection. Imagine that someone somehow answers that being black in a country with a lengthy history of racial oppression has nothing to do with poverty. Christ would still be there, perhaps even more urgently, as his admonitions that his followers have regard for the poor are impossible to ignore.<sup>105</sup> His reminder that we should be reluctant to judge is particularly apt when it comes

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United States is \$56,300 and \$35,415 for whites and blacks, respectively, and that the median household income in Delaware is \$64,068 and \$45,945 for whites and blacks, respectively).

105. See, e.g., *Matthew* 5:3 ("Blessed are the poor in spirit, for theirs is the kingdom of heaven."); *Luke* 6:20–21 ("And raising his eyes toward his disciples, he said: 'Blessed are you who are poor, for the kingdom of God is yours. Blessed are you who are hungry, for you will be satisfied.'"); *Matthew* 23:22–12 ("The greatest among you must be your servant. Whoever exalts himself will be humbled; but whoever humbles himself will be exalted."); *James* 2:5 ("Listen, my beloved brothers. Did not God choose those who are poor in the world to be rich in faith and heirs of the kingdom that he promised to those who love him?"); see also *EVANGELIUM VITAE*, *supra* note 19, at 32 ("It is above all the 'poor' to whom Jesus speaks in his preaching and actions. The crowds of the sick and the outcasts who follow him and seek him out find in his words and actions a revelation of the great value of their lives and of how their hope of salvation is well-founded.") (internal citation omitted); PRICE, *supra* note 4, at 49 (noting that Jesus "demand[ed] that a certain young rich man must sell what he has and give all proceeds to the poor" and "warn[ed] of the near fatality of personal wealth"); *id.* at 109 ("Then Jesus . . . said to him 'One thing is lacking you. Go sell what you have and give to the poor—you'll have treasure in Heaven. Then come follow me.' But he was shocked by the word and went away grieving since he had great belongings. Looking round Jesus said to his disciples 'How strenuously the rich shall enter the reign of God!' The disciples were stunned by his words. But Jesus speaking again said to them 'Children, how strenuous it is to enter the reign of God! It's easier for a camel to go through a needle's eye than for a rich man to enter the reign of God.'").

to the poor, as it calls on us to reflect on what we might be capable of doing if our ability to feed ourselves and our family depended on it. The examples of truly wealthy people committing huge economic crimes just to get a little bit more of something they really don't "need,"<sup>106</sup> should chasten us all about what we might do if our own belly or our child's was empty.

For a person concerned about the poor, our current criminal justice system poses many issues of deep concern. They start above all else with what the criminal justice system says about the opportunities available to poor kids. How does a Christian look at the large number of poor and black kids who early on get involved in criminal activity? Is it because we believe they are intrinsically evil? Or do we reflect on the universal capacity for human failure and understand that the conditions in which many children live affect their life choices in profoundly negative ways. Involvement in the juvenile justice system is often the symptom of far earlier failure, manifesting the lack of supportive economic, educational, health, and social structures that make it possible for poor kids and their parents to make progress. Is the Christian called on to consider what can be done, in the world's wealthiest nation, to close the inequality gap, especially when much of the gap in wealth for black people has its origins in racial discrimination?<sup>107</sup> To lengthen school years and school days to help children reach their full potential? To support working parents? To increase the minimum wage and provide chances for working people to learn new skills and increase their earnings?

And if we are going to punish and incarcerate offenders at this rate, where is the corresponding commitment to giving them a chance for rehabilitation and redemption? For a Christian, that is no small consideration.<sup>108</sup> Christ was clear

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106. See, e.g., Julie Creswell & Landon Thomas Jr., *The Talented Mr. Madoff*, N.Y. TIMES, (Jan. 24, 2009), [http://www.nytimes.com/2009/01/25/business/25bernie.html?\\_r=0](http://www.nytimes.com/2009/01/25/business/25bernie.html?_r=0); David Winzelberg, *Cosmo Sentenced to 25 Years in LI Ponzi Scheme*, LONG ISL. BUS. NEWS (Oct. 14, 2011), <http://libn.com/2011/10/14/cosmo-sentenced-to-25-years-in-li-ponzi-scheme/>.

107. See Ta-Nehisi Coates, *supra* note 104 and accompanying text.

108. See Pope Francis, *supra* note 6 (quoting Pope Francis's address to Congress); USCCB Statement ("Centuries ago, St. Thomas Aquinas taught us that punishment of wrongdoers is clearly justified in the Catholic Tradition, but

that everyone has the potential for redemption.<sup>109</sup> That hope of redemption in Christ can be one that we either support or make less likely. A defendant who gets a rigorous program of community supervision that requires him to engage in drug treatment, vocational education, and good behavior would seem to have greater hope and a greater chance for redemption than one put behind bars for a relatively minor offense, and whose reaction to the disproportion of his punishment makes him less able to focus on his own responsibility, need for repentance, and improvement.<sup>110</sup>

Likewise, for those whose crimes surely deserve a serious sentence of imprisonment, as a matter of respect to the victim and to protect society, do we just commit them to a cell and provide them with no prospect of a future life in society that has value and the possibility of joy? If those offenders tend to have few job skills and little education, do we offer good chances to improve? Do we make sure they can stay as connected as possible with their children and relatives? When they leave prison, do we have support systems in place to help them reintegrate?

V. COMPASSION FOR ALL: CHRIST'S COMMAND THAT WE RESPECT, AND EMPATHIZE WITH, THE VICTIMS OF CRIME AND THOSE WHO DO THE TOUGH JOB OF LAW ENFORCEMENT AND CORRECTIONS

To this point, I have focused on a lot of the reasons why a Christian might want to give serious thought to whether our criminal justice system is fair from the standpoint of those accused of and convicted of committing crimes. And I don't apologize for that, as many of the most urgent issues do involve those who are subject to prosecution, punishment, and potentially even execution.

But there is a danger of self-righteousness that no Christian should ignore, as well as a danger of dehumanizing

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is never justified for its own sake. A compassionate community and a loving God seek accountability and correction but not suffering for its own sake. Punishment must have a constructive and redemptive purpose.”).

109. See *Galatians*, *supra* note 68.

110. See Levad, *supra* note 79, at 100 (“I contend that few Catholics would view the prison as a redemptive, or even an accurate, representation of the core of their tradition.”); *supra* note 42 and accompanying text (explaining the U.S. Bishops’ view of the need for repentance).



those who are victimized by crime, and those who do the difficult work of policing our communities and guarding prisoners. Our duty of compassion toward those who commit crimes does not obviate our duty of compassion toward those they have harmed.

The reality is that most prisoners on death row have taken another person's life without justification. It does not display a lack of compassion to the victim's family for a Christian to believe that the death penalty is wrong. But, it can involve a lack of compassion and a denial of dignity to the victim's family to seek a lesser sentence for a murderer by obscuring undeniable facts or minimizing the horror of what he did, conduct that is reminiscent of the Ninth Commandment's prohibition against false testimony.<sup>111</sup> Lies should not be told in the pursuit of mercy. It is one thing to argue that a defendant's horrible act should be considered in light of the difficult circumstances of his life and that those circumstances should be considered in the sentencing determination; it is another thing to contend that a defendant did not do a horribly evil act when there is no rational, good-faith basis for doing so. Most of all, arguments that a dead victim was somehow responsible for her own death do little to promote healing for all concerned, and show little contrition on the part of the offender. Likewise, a failure to understand why a victim's family is less able to forgive when an offender will not own up to his crime reflects a lack of Christian empathy itself.

As I understand Christ's teaching, everyone has the possibility of redemption.<sup>112</sup> That does not mean it's an easy, free one. When an offender has grievously harmed a victim and that is inarguable, his own denial of responsibility shows disrespect to the victims, and advocates for criminal justice reform should be careful to not cross lines themselves that dehumanize those directly harmed by serious crime. Contrition by the offender is the best way to help the victims toward forgiveness, and as I understand it, without genuine repentance, the offender cannot find redemption in Christ.<sup>113</sup>

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111. See *Exodus* 20:16 ("You shall not bear false witness against your neighbor.").

112. See *Galatians*, *supra* note 68 and accompanying text.

113. See *1 John* 1:9 ("If we acknowledge our sins, he is faithful and just and will forgive our sins and cleanse us from every wrongdoing.").

This danger of dehumanization by advocates of reform also manifests itself in discussions about police and correctional officers. No doubt, every year and perhaps every day, there are instances of inexcusable behavior by people who do these jobs. The genuine outrage flowing from situations when police have killed black people is an emotion I share. I have no doubt that many black people face far too many situations with police in our society that they should not and that would not happen if they were white. No white person, for example, has ever been stopped for popping his seat belt while pulling up to a gas pump, much less than to be shot by a police officer. That, sadly, happened in South Carolina in 2014.<sup>114</sup>

But, we cannot treat every situation the same, nor deny the difficult job police officers and correctional officers do. Anyone who spends any time on the sideline of a youth soccer, football, or baseball field or basketball court knows the coarseness that now characterizes American behavior toward referees. Seemingly rational people find it okay to “f-bomb” youth and volunteer referees, to intimidate them, and encourage them to do the same. This coarseness pervades a society, where please and thank you no longer play much of a role in written or spoken communication.

Now translate this to the work of a police officer or prison guard. Do they see human nature most often at its best? I would argue not. Does that mean that they should descend? No. As we have discussed, Christ calls on us all to avoid that temptation. Officers and prison guards should try to rise above, to show great patience, restraint, and courtesy—to cool heads and warm hearts if they can—and to suppress instinctive reactions to disrespect. But, they are human, and they make mistakes.

Not only that, as I said, not every situation is the same. Policemen face dangerous situations. They have to make quick judgments to protect the public and themselves. Although they should be held accountable for their actions, we should not caricature them or turn into saints those with

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114. See David Zucchino, *South Carolina Trooper Charged in Shooting of Unarmed Man*, L.A. TIMES (Sept. 25, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-south-carolina-trooper-shooting-20140925-story.html>.

whom they come into contact. In the Ferguson situation, for example, there is absolutely no excuse for leaving Michael Brown's body in the street for four hours after he was shot and killed. At the same time, there is also no excuse for ignoring that within an hour of when Brown had his confrontation with Officer Darren Wilson, he had robbed a convenience store upon threat of violence against the proprietor. The video showing that incident displays a very large man clearly threatening physical violence against a much smaller person.<sup>115</sup> Certainly, it is relevant that Mr. Brown was demonstrably capable of engaging in violent, threatening behavior in assessing what happened that sad day when Mr. Brown lost his life.

Now, I do not pretend to know what happened between Brown and Officer Wilson later, and I dearly wish it had not resulted in Mr. Brown's death. That outcome was awful. But it cannot promote understanding among us, if we do not take a clear-eyed look at all aspects of each incident, and give fair and individualized consideration to each officer and the situation he confronted. No doubt there are situations when officers have used force wrongly and should be punished. No doubt there are situations when officers' use of force has been impelled by racial motivations.<sup>116</sup> But, there is also no doubt that in many situations, police officers use force only

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115. As Brown walked out of the convenience store with stolen cigarillos, the store clerk rushed from around the counter to prevent Brown's exit from the store. The clerk, who the surveillance video shows was a fraction of Brown's size, also told Brown that he would call the police. Brown violently shoved the clerk and left the store laughing. Thomas Barrabi, *Michael Brown Robbed Convenience Store, Stole Cigarillos Before Darren Wilson Shooting, Dorian Johnson Says*, INT'L BUS. TIMES (Nov. 25, 2014), <http://www.ibtimes.com/michael-brown-robbed-convenience-store-stole-cigarillos-darren-wilson-shooting-dorian-1729359>.

116. See Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 37 U. HAW. L. REV. 339, 359 (2015) ("[A]n analysis of federally collected data on police shootings shows young Black males were twenty-one times more likely of being shot dead by police than their White counterparts in [2010 to 2012]."); Kimberly Kindy, *Fatal Police Shootings in 2015 Approaching 400 Nationwide*, WASH. POST (May 30, 2015), [https://www.washingtonpost.com/national/fatal-police-shootings-in-2015-approaching-400-nationwide/2015/05/30/d322256a-058e-11e5-a428-c984eb077d4e\\_story.html](https://www.washingtonpost.com/national/fatal-police-shootings-in-2015-approaching-400-nationwide/2015/05/30/d322256a-058e-11e5-a428-c984eb077d4e_story.html) ("About half the victims [of fatal police shootings] were white, half minority. But the demographics shifted sharply among the unarmed victims, two-thirds of whom were black or Hispanic. Overall, blacks were killed at three times the rate of whites or other minorities when adjusting by the population of the census tracts where the shootings occurred.").

reluctantly and as a last resort, and harbor lifelong guilt even when their use of force was fully justified.<sup>117</sup> Labeling police officers as intrinsically suspect because they wear a uniform is a way of making them into the other, and not giving them the full respect they deserve as human beings.

The same is also true when there is a failure to recognize that being a prison guard is one of the most difficult jobs in society. Being outnumbered by a population that, by definition, is comprised of people not known for following rules is unlikely to be like a leisurely tea at Harrod's on a London vacation. I don't know about you, but if someone threw urine or excrement at me, my reaction is likely to be more like Peter's toward the high priest's servant than Jesus's.<sup>118</sup> Daily, prison guards face provocation, insulting remarks, and the possibility of having to protect themselves from violence or to risk themselves preventing it between others. As with police officers, there are no doubt situations when guards exploit their power and authority, as do wardens. But again the criminal justice reformer must be careful not to make blanket assumptions. From my own personal experience, I know of few Americans who wish there was more job training, educational, and other opportunities provided to prisoners than those who work in corrections. Being realistic, I realize their opinion may be motivated by the reality that more valuable activities for prisoners means better working conditions for them. But, it is also a reflection of the reality that correctional professionals are often people with strong values, and able to extend compassion toward those they guard. We must be mindful not to label all those who do the difficult jobs that come with the realities of our collective approach to punishment as people lacking in good faith. Rather, we must consider the facts and accord each person involved in these situations the respect and contrition Christ commands.

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117. See, e.g., Michael Schwirtz, *New York Police Officer Is Shot Breaking Up a Brawl in the Bronx*, N.Y. TIMES (Jan. 9, 2016), <http://www.nytimes.com/2016/01/10/nyregion/new-york-police-officer-shot-breaking-up-a-brawl-in-the-bronx.html> (explaining a recent situation in which a black police officer, under fire from an armed gunman, returned fire and hit the gunman).

118. See *supra* note 35 and accompanying text.

## CONCLUSION

For me then, as Chief Justice of a Branch of government, charged with giving life to the concept of imperfect human justice, these troubling realities disturb my conscience. And I am not alone in that. My brothers and sisters on the bench feel the strong pull to address them, a pull that crosses lines of faith. Each of us recognizes that when we wear the robe, we must hew to the precise role we owe our society when deciding cases.<sup>119</sup> But we also are aware that society charges our Branch of government with giving real life to concepts of justice, and that we have a voice we are allowed to use. In fact, at both the national and state level, it is a tradition to consult with judges on difficult issues of criminal justice. Judges see patterns and examples of how the law actually operates that they can usefully bear witness to and help policy makers and citizens make better decisions.<sup>120</sup>

In Delaware, what that has long meant is that the

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119. For example, as this article makes clear, I am no fan of the death penalty as a policy matter. But, as an appellate judge, I have authored and supported decisions affirming the death penalty in two of Delaware's most high profile murder cases. See *Cooke v. State*, 97 A.3d 513 (Del. 2014); *Powell v. State*, 59 A.3d 1090 (Del. 2012). And, as Counsel to the Governor, I had to personally participate in the execution process for seven executions. See Strine, *supra* note 5, at 10–11. When I was on the Board of Pardons, I was free to exercise my discretion and supported the commutation of a death sentence. Strine, *supra* note 5, at 15–16. For a republican democracy to function, however, faithful adherence to role is critical and I believe strongly in it. See *id.* at 3; see also Leo E. Strine, Jr., *Regular (Judicial) Order as Equity: The Enduring Value of the Distinct Judicial Role*, 87 TEMP. L. REV. 99, 100–01 (2014); William T. Allen et al., *Judge "The Game by the Rules": An Appreciation of the Judicial Philosophy and Method of Walter K. Stapleton*, 6 DEL. L. REV. 223, 236–37 (2003).

120. See Hon. Ruth Bader Ginsburg, *Reflections on Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 13–14, 19 (1983) (explaining that legislators and judges need to work together more efficiently, especially on issues of which judges have greater knowledge); Deanell Reece Tacha, *Judges and Legislators: Enhancing the Relationship*, 44 AM. U. L. REV. 1537, 1550–51 (1995) (calling for a restoration to the working relationship between judges and members of Congress that existed in the past); Adam Liptak, *Opposition Rises to Crime Bill's Curb on Judicial Power in Sentencing*, N.Y. TIMES (Apr. 18, 2003), <http://www.nytimes.com/2003/04/18/us/opposition-rises-to-crime-bill-s-curb-on-judicial-power-in-sentencing.html> (explaining that Judge John F. Keenan of the U.S. District Court for the Southern District of New York critiqued Congress's bill that took away judicial independence in sentencing, saying: "I'm a republican, but I don't think this is good legislation." "I don't know of any federal judge who thinks it's a good idea. It further erodes the discretion and power that trial judges have.").

Judiciary tries to make a positive contribution to making our justice system fairer, by innovating and adopting approaches to sentencing that give offenders more of a chance to remain in the community, and by pointing out when sentencing laws have become inequitable. Right now, what that means for us is addressing head on, through our Access to Justice Commission, the problem of racial disparities in the criminal justice system;<sup>121</sup> the problem of over-incarceration of poor defendants through the use of money bail; the problem of ever increasing mandatory minimums and a sprawling criminal code; taking a direct look at how to improve the relationship between and the effectiveness of police in protecting communities of color; and other issues critical to doing real justice for all citizens. For me, my own ethical sense commands that I support my judicial colleagues and other branches of government in identifying areas of inequity and injustice, and trying to do something about them.<sup>122</sup> And, of course, we cannot duck our core responsibility to enforce the legal rights of defendants in cases before us, however unpopular that might be in a particular case.

But, in pushing for positive reform, I believe Christ calls on us to accord respect and dignity to all who are affected by

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121. See *in re Del. Access to Justice Comm'n*, Amended Order (Del. Dec. 15, 2014) (establishing the Access to Justice Commission to study and make recommendations as to, among other things, “identifying the causes of the stark disparity between the percentage of Delawareans who are black and the percentage of those incarcerated in Delaware’s prisons who are black, and recommending measures to ensure that this disparity does not result from racial discrimination and to reduce any inequities that are not justified as a matter of sound criminal justice policy”).

122. In July 2011, for example, the General Assembly established the bipartisan Delaware Reinvestment Task Force, which is tasked with, among other things, reviewing factors driving growth of the incarceration rate and recommending policies to increase public safety and reduce recidivism. See Press Release, State of Delaware, *Governor Announces Bipartisan Effort to Improve Public Safety Efficiency & Effectiveness* (July 25, 2011). The Vera Institute of Justice assisted the Task Force in this process. Justice Reinvestment Initiative: Delaware, Vera Institute of Justice, <http://www.vera.org/project/justice-reinvestment-initiative-delaware>. In August 2012, Governor Markell signed the Justice Reinvestment Act, which “promotes informed decision-making in the criminal justice system by institutionalizing the use of evidenced-based practices in decisions concerning bail, rehabilitation and probation supervision, and helps ensure scarce resources are focused on higher-risk offenders.” *Governor Signs Justice Reinvestment Act*, Delaware.gov (Aug. 9, 2012), <http://news.delaware.gov/2012/08/09/governor-signs-justice-reinvestment-act/>.

and involved in the discussion. We must avoid false witness of any kind, and call on our deepest reservoirs of empathy. Progress will be difficult, but by bringing to bear Christian understanding in its broadest sense, we can take important steps. Not much of durable value is easy to achieve, but Christ instructs us that the hard and true path is the only sure one.