

JOURNAL *of* CHRISTIAN LEGAL THOUGHT

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The Institute for Christian Legal Studies (ICLS),
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and Christian Legal Society.

The Mission of ICLS is to train and encourage Christian law students, law professors, pre-law advisors, and practicing lawyers to seek and study Biblical truth, including the natural law tradition, as it relates to law and legal institutions, and to encourage them in their spiritual formation and growth, their compassionate outreach to the poor and needy, and the integration of Christian faith and practice with their study, teaching, and practice of law.

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STATEMENT OF PURPOSE

The mission of the *Journal of Christian Legal Thought* is to equip and encourage legal professionals to seek and study biblical truth as it relates to law, the practice of law, and legal institutions.

Theological reflection on the law, a lawyer's work, and legal institutions is central to a lawyer's calling; therefore, all Christian lawyers and law students have an obligation to consider the nature and purpose of human law, its sources and development, and its relationship to the revealed will of God, as well as the practical implications of the Christian faith for their daily work. The *Journal* exists to help practicing lawyers, law students, judges, and legal scholars engage in this theological and practical reflection, both as a professional community and as individuals.

The *Journal* seeks, first, to provide practitioners and students a vehicle through which to engage Christian legal scholarship that will enhance this reflection as it relates to their daily work, and, second, to provide legal scholars a peer-reviewed medium through which to explore the law in light of Scripture, under the broad influence of the doctrines and creeds of the Christian faith, and on the shoulders of the communion of saints across the ages.

Given the depth and sophistication of so much of the best Christian legal scholarship today, the *Journal* recognizes that sometimes these two purposes will be at odds. While the *Journal of Christian Legal Thought* will maintain a relatively consistent point of contact with the concerns of practitioners, it will also seek to engage intra-scholarly debates, welcome inter-disciplinary scholarship, and encourage innovative scholarly theological debate. The *Journal* seeks to be a forum where complex issues may be discussed and debated.

EDITORIAL POLICY

The *Journal* seeks original scholarly articles addressing the integration of the Christian faith and legal study or practice, broadly understood, including the influence of Christianity on law, the relationship between law and Christianity, and the role of faith in the lawyer's work. Articles should reflect a Christian perspective and consider Scripture an authoritative source of revealed truth. Protestant, Roman Catholic, and Orthodox perspectives are welcome as within the broad stream of Christianity.

However, articles and essays do not necessarily reflect the views of the Institute for Christian Legal Studies, Christian Legal Society, Regent University School of Law, or other sponsoring institutions or individuals.

To submit articles or suggestions for the *Journal*, send a query or suggestion to Mike Schutt at mschutt@clsnet.org.



SERVING THE POOR, PROMOTING JUSTICE

BY KEN LIU, GUEST EDITOR

DIRECTOR OF CHRISTIAN LEGAL AID, CHRISTIAN LEGAL SOCIETY

For you always have the poor with you, but you will not always have me. —Matthew 26:11

For there will never cease to be poor in the land. Therefore I command you, ‘You shall open wide your hand to your brother, to the needy and to the poor, in your land.’ —Deuteronomy 15:11

There are some who read Matthew 26:11 and say that because there will always be poor in the land, God’s people should not be concerned about helping those in need, but should focus on praising and worshipping Him, just as the woman in Bethany did in pouring expensive ointment on Jesus. But Scripture clearly belies that notion. In fact, God tells us that because there will always be poor in the land, we are commanded to serve our brothers who are poor and needy. (Deuteronomy 15:11) And when we serve the poor, we serve Jesus himself. (Matthew 25:35)

Similarly, there are some who believe that since there will always be injustice in the world, Christians should not meddle in such worldly affairs as fighting for justice, but should focus on more heavenly, eternal pursuits. Once again, Scripture contradicts this notion and makes it clear that God cares intimately about justice. We are told that “the righteous care about justice for the poor, but the wicked have no such concern.” (Proverbs 29:7) And “is not this the kind of fasting I have chosen: to loose the chains of injustice and untie the cords of the yoke, to set the oppressed free and break every yoke?” (Isaiah 58:6)

Serving the poor is worshipping God. Promoting justice is a heavenly pursuit.

Christian lawyers can play a powerful role at the intersection of these two aims. At the micro level, we represent and serve clients on individual matters. At the macro level, we can advocate for policy and systemic changes. Both are valid and important means of serving the poor and promoting justice.

The articles in this issue provide insightful exhortations for us to consider how we as Christian lawyers can,

individually and collectively, better serve the poor and promote justice. Joy Statler and Julie Resner, both having been Christian legal aid leaders and now providing “low bono” services, analyze the various barriers to justice for the poor and offer practical solutions. Anthony Bushnell, a current Christian legal aid volunteer and leader, demonstrates how Christian legal aid blesses the poor while we look to the God who will one day bring justice and reconciliation to the earth in all spheres. Jeremiah Mosteller, a lawyer in a Christian prison ministry, and Scott Leary, a former probation officer, present slightly different perspectives on building Biblically-informed criminal justice systems.

May all of us lawyers who call on Jesus as Lord endeavor to better serve Him through blessing the poor and promoting justice in our land.

Ken Liu joined Christian Legal Society as Director of Legal Aid Ministries in September 2014. He is passionate about helping to start and grow other Christian legal aid programs around the country. Ken has served with Good Samaritan Advocates (GSA), a Christian legal aid program in suburban Washington, D.C., in multiple capacities as volunteer attorney, board member, clinic co-director, and President. Through his work with GSA, Ken is experienced in providing legal and spiritual counseling to low-income clients and in many aspects of managing a legal aid program, including starting a program, recruiting and training volunteers, board governance, and fundraising.

Ken is also an attorney at Gammon & Grange, PC, where he has practiced intellectual property and nonprofit law since 2001. He serves a broad range of nonprofits, churches, ministry organizations, and small businesses. Through his work there, Ken has extensive knowledge in the operational and legal aspects of nonprofit organizations and ministries.

Ken is a proud Wahoo from the University of Virginia and a graduate of Cornell Law School. He lives with his wife and two boys in northern Virginia and worships at St. Mary’s Orthodox Church in Falls Church, VA.



PURSUING JUSTICE FOR ALL

Considering Creative Methods To Meet The Needs Of Those Who Lack Access To Justice

BY JULIE RESNER AND JOY STATLER

CALLED TO SEEK JUSTICE

“For I, the Lord, love justice.” —Isaiah 61:8, ESV

Perhaps when we think of *justice*, the first images conjured are of an innocent man being freed from prison, or a victim being vindicated when the abuser is held accountable for the wrongs committed. But what of the abandoned mother who is unable to pursue a case for support when she is left without resources to take on a legal battle? What of the evicted family left with little money to relocate and no funds to sue a dishonest landlord? Perhaps justice is not only the end result, but also the opportunity to simply pursue it in the first place.

In Isaiah 1:17 we are exhorted, “Learn to do good; seek justice, correct oppression; bring justice to the fatherless, plead the widow’s cause.” (ESV) As Christians, we understand our calling to serve “the least of these,”¹ but those who suffer from lack of access to justice are as varied as their legal issues, and we, as Christians and legal professionals, have a moral, ethical, and God-given mandate to do all we can to bring justice to our neighbors whatever their status. That duty requires us to consider a fresh perspective on our traditional profession.

Of course, the virtue of pursuing justice is not reserved only for the theologically-minded. Government and legal regulatory agencies recognize our duty to serve the community in this way. The ABA, in the Preamble to the Model Rules, for example, urges the lawyer to “seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession.” The ABA reminds the lawyer to “be mindful of deficiencies in the administration of justice and of the fact that the poor, and *sometimes persons who are not poor*, cannot afford adequate legal assistance.” (emphasis added) The solution offered:

Therefore, *all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.* A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.²

As lawyers, we surely know that barriers exist which impede many people from accessing the legal system (of course, we typically envision these to be only the extremely poor). And from our training and experience in the legal field, we can comprehend the profound inequities and burdens that result when a person is unable to adequately seek justice in a court of law. However, like many social ills, it is difficult to appreciate the extent of the problem and recognize how we can help solve it. This article seeks to characterize the extent of the access to justice gap, identify many of the contributing factors, and offer several possible actions we can take to significantly narrow the gap.

THE GAP – THOSE AFFECTED

“Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”

—Lewis Powell, Jr., Supreme Court Justice

Access to our legal system is not a privilege that should be reserved for the wealthy. The most critical group of people in need of legal assistance is the

¹ Matthew 25:40.

² American Bar Association, Model Rule of Professional Responsibility, Preamble ¶ [x] (emphasis added).

³ “H.H.S. Poverty Guidelines For 2017.” *U.S. Department of Health & Human Services*, <https://aspe.hhs.gov/poverty-guidelines>. Accessed 24 Sept. 2017.

extremely poor. In 2017, to be eligible for free legal aid, an individual's annual income must be at or below \$12,060 (about \$230 per week). For a family of four the annual income limit is \$28,290 (about \$545 per week). This reflects the poorest among us who make 125% or less of the Federal Poverty Guidelines (FPG).³

More than 60 million Americans have family incomes at or below 125% of the FPG. Of this group, 45% identify as white, 28% as Hispanic, and 21% black with no Hispanic origin. This group includes about 6.4 million senior citizens, more than 11.1 million disabled Americans, and more than 1.7 million veterans.⁴

According to a 2016 White House interagency report, low-income Americans will seek help from federally-funded legal aid organizations with approximately 1.7 million problems in 2017. More than half of these people will receive little or no legal help due to lack of resources.⁵ This statistic does not account for those who will not even try to access free legal aid. Nor does it include people whose income is above the 125% FPG yet unable to afford professional legal assistance.

Research shows that low-income people seek professional legal assistance for only 20% of civil legal problems they face.⁶ Their reasons include: deciding to deal with it on their own; not knowing where to look for help or what resources exist; not being sure whether their problem is "legal." This issue applies to moderate-income people as well; although they will seek help more often than low-income Americans.

Not only do the poorest among us lack access to justice. Moderate-income Americans, ineligible for free legal aid, can rarely afford the average attorney rate of \$200-300 per hour.⁸ In more than 75% of civil trial cases in the United States, at least one litigant is

unrepresented.⁹ In family law, domestic violence, and housing cases, the incidence is even higher.¹⁰ According to the Judicial Council of California's 2014 report, 60-90% of family law cases have at least one unrepresented litigant.¹¹ Again, these statistics account for those who have decided to take on the challenge of self-representation. It does not include those who gave up before the legal battle began.

Our courts are filled with self-represented litigants who are attempting to access the judicial system with little or no professional assistance. With complex judicial procedures and their lack of legal education, these *pro se* litigants are not as successful as their opposing parties who are represented by counsel.¹² They must learn as they go, in fits and starts, amending, wishing for "do-overs," slowing down the resolution of cases and increasing the burden on an already over-burdened court system.

The impact of limited access to the legal system to resolve legal issues goes well beyond the specific legal problem a low- or moderate-income person faces. An unlawful eviction can lead to homelessness. Employment discrimination can cause bankruptcy. An unresolved domestic violence issue can result in further victimization. When our most vulnerable citizens cannot seek justice, our society as a whole suffers. Ensuring access to professional legal assistance can conserve public dollars by preventing problems like homelessness, chronic health issues, and other costly and harmful issues.¹³

THE GAP – CONTRIBUTING FACTORS

Identifying all possible factors contributing to the access to justice gap is beyond the scope of this article, but it is

⁴ "The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans." *The Justice Gap-Full Report*. Legal Services Corporation. June 2017. www.lsc.gov/media-center/publications/2017-justice-gap-report

⁵ "Report: White House LAIR: Expanding Access to Justice, Strengthening Federal Programs First Annual Report (DOJ 2016)." DOJ, Allie Yang-Green. www.srln.org/node/1216/report-white-house-lair-expanding-access-justice-strengthening-federal-programs-first.

⁶ *Id.*, The Justice Gap.

⁷ *Id.*

⁸ Bergmark, Martha. "We don't need fewer lawyers. We need cheaper ones." *The Washington Post*, June 2, 2015.

⁹ Rebecca Buckwalter-Poza, "Making Justice Equal." *Center for American Progress*. 8 Dec. 2016. www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/

¹⁰ *Id.*

¹¹ Judicial Council of California, *Report to the Judicial Council for business meeting on October 28, 2014, Final Report*, p. 2

¹² "Addressing the Justice Gap." 23 Aug. 2011. www.nytimes.com/2011/08/24/opinion/addressing-the-justice-gap.html.

¹³ "Report: White House LAIR: Expanding Access to Justice, Strengthening Federal Programs First Annual Report (DOJ 2016)." DOJ, Allie Yang-Green. www.srln.org/node/1216/report-white-house-lair-expanding-access-justice-strengthening-federal-programs-first.

useful to look at particular factors and discuss practical actions to address them.

Lack of Legal Aid Services

One obvious factor is the need for more free legal aid. There are 500 staff-based legal aid organizations in the US, 136 of which are funded by Legal Services Corporation, an independent nonprofit organization created and funded by the Federal government.¹⁴ Another 900 pro bono programs, most of them affiliated with state and local bar associations and more than 200 law school clinical programs, and several hundred self-help programs also supplement the staff-based delivery system.¹⁵ This includes nearly 50 Christian Legal Society-affiliated legal aid offices nationwide.¹⁶ Still, all of these various free services must turn away many people who do not meet the financial need guidelines. Lawyers and law firms also commit to thousands of pro bono hours per year, but the gap remains wide.

Funding is limited from government, churches, and other sources. IOLTA-based programs have suffered severely from low interest rates since the economic downturn in 2008, and bar associations are working to access more funding as a result. Funding will always be a challenge. The gap can be reduced in other creative ways which bring efficiency to the offices carrying this load.

High Fees

Another factor is the high fees associated with legal representation. Legal fees are consistently out of reach for the low- and moderate-income client. "Law firm billing rates only go one of two directions: Up or sideways. They never go down. This is insane from an economics perspective."¹⁷ Like other industries, it only makes sense to take a cue from the economy and adjust our rates accordingly; however, high demand for legal services and the decline in attorney employment has had little effect on the fees for these services. Perhaps this is due to the fact that the legal profession is steeped in tradition, slow to change, and preoccupied with prestige, and unfortunately all too often "money is viewed as a proxy for prestige."¹⁸

It is true that attorneys begin their practice with large school debt and the duty to zealously advocate for their clients meaning quite literally working tirelessly for that client. We propose, however, that we can meet both our financial and spiritual obligations by rethinking how we do what we do. The first place to start, of course, is to look inward and determine whether our fees are set by supply and demand, or prestige and tradition.

Limited Self-Help Options

Many individuals are capable, with the right assistance, to confront their legal issues, or even to go to court on certain matters. And many prefer to do so if it means handling their cases competently while keeping their costs down. However, finding the assistance to adequately prepare as a *pro se* litigant can be difficult.

Non-attorney assistance such as paralegals and online document preparation services can be useful and affordable, but they are limited to providing procedural assistance without legal advice and guidance. Court self-help offices are generally well-equipped to direct individuals to forms and educate individuals as to the general filing processes and appropriate expectation regarding case progression. However, a *pro se* often hears "I am not a lawyer and cannot give you legal advice" if she is uncertain as to which box to check or which form to choose based on her unique case facts.

The lack of attorney guidance is a shortcoming of these services due to the complexity of our legal system, navigation of which requires highly-trained professionals. And these highly-trained professionals charge a high rate for their service. But how is this just if it excludes a large portion of Americans from being able to adequately participate in the system?

Recognition of Legal Issues

A surprisingly high rate of legal issues are not even recognized as "legal" by low- and moderate-income Americans. According to research, low-income people are more likely to seek professional legal assistance for problems they perceive to be "legal"—problems such as child custody and wills and estates. In these cases, low-income people will seek legal help for 48% of

¹⁴ Houseman, Alan, "The Justice Gap: Civil Legal Assistance Today and Tomorrow." *Center for American Progress*. 22 June 2011. www.americanprogress.org/issues/courts/reports/2011/06/22/9824/the-justice-gap.

¹⁵ *Id.*

¹⁶ From the CLS roster of associated organizations found at <https://clsnet.org/sslpage.aspx?pid=756> (accessed September 2017)

¹⁷ Johnson, Antone, "Why Are Lawyers So Expensive Even With The Excess Supply Of Lawyers?" Quora. 6 Mar 2012. www.forbes.com/sites/quora/2012/03/06/why-are-lawyers-so-expensive-even-with-the-excess-supply-of-lawyers. Accessed 20 Sept 2017.

¹⁸ *Id.*

child-related issues and 39% of estate issues. But with problems related to consumer and finance, low-income individuals will seek legal help in only 11% of cases, and in only 18% for health issues.¹⁹ The marginalized not only cannot afford legal representation, they also do not know to seek legal assistance in the civil legal matters they face. And when legal matters such as retaliatory eviction, wrongful termination, and sexual harassment are left unresolved, further problems, such as homelessness, abuse, and chronic illness result.

OUR ROLE

“We are not to simply bandage the wounds of victims beneath the wheels of injustice, we are to drive a spoke into the wheel itself.”
—Dietrich Bonhoeffer

Attorneys are on the front lines of this pursuit of justice. For centuries, attorneys have served as an intricate part in the functioning of cases through the court system. We have dedicated our studies and talents to understanding the law, following procedure, and keeping protocol.

In his 1919 article *Justice for the Poor*, Reginald Heber Smith noted that “[t]he lawyer is indispensable to the conduct of the proceedings before the courts, and yet the fees which he must charge for his services are more than millions of persons can pay.” Smith concludes that “the machinery of justice can be operated only through attorneys . . . no reorganization . . . short of a complete overturn of the whole structure can remove the necessity for the attorney.”

The American justice system, while flawed, is the greatest on earth. Rather than feeling overwhelmed at the thought of a “complete overturn of the whole structure,” in order to serve the underserved, we should rethink our role as attorneys. In our experience serving in clinics, legal aid offices, and our own “non-traditional firm,” we have seen first-hand that there are new ways of using our gifts and our law licenses that do not fit the stereotypical “lawyer,” but which can serve our neighbors in their pursuit of justice. Make no mistake, traditional, hourly billable attorneys are going nowhere (neither should they), but rather than simply externalizing the solution to the lack of access to justice, we should embrace the prospect that things do not have to be done as they always have been. Openness to using the technologies and innovations in law practice is imperative if we

are to “drive a spoke” into the wheels of injustice and the lack of access to the courts.

In order to faithfully adhere to our directive to seek justice, we need to take a fresh look at the causes of the access to justice gap discussed above, and develop new or improved methods for narrowing that gap.

Embrace Technology

Realistically, there will never be enough funding to provide free legal assistance to all via our traditional legal aid services. We need to utilize technology in a manner that increases accessibility of legal services and simplifies procedures for self-represented litigants. For example, software applications that increase online access to legal assistance is a welcome step. Many online services can provide increased access by allowing clients and lawyers to meet and work together remotely—for example, videoconferencing, fillable forms, and screen-sharing. Videoconferencing can enable lawyers to consult with clients in remote, rural areas or serve those who cannot travel to the law office because of lack of transportation, inability to miss work, or lack of childcare. Trinity Law Clinic at the Orange County Rescue Mission in California, for example, uses video conferencing to consult with residents of the mission’s separate campus 30 miles away. Providing a service like this – for instance through a church office – requires minimal equipment, such as a computer with a camera and internet access.

We can create useful online tools modeled after fee-based online document preparation or free court self-help websites. Or we can utilize already existing tools such as court self-help websites and provide legal assistance as self-represented clients access them.²⁰ Perhaps a chat feature (like many online merchants now offer) on a legal aid website could be manned by various scheduled volunteers throughout the week to either assist the individual directly, triage the legal matter, or lead the individual to meaningful self-help resources. Another possible tool would be screen-sharing technology so that the attorney could see in real time the form that the client is completing and offer assistance remotely.

In addition to simplifying access to legal professionals, use of technology can reduce the cost of personnel, office space, and even office supplies like paper and toner. These savings can in turn can be passed to the client in the form of lower attorney fees. Case management systems and client portals also cut down significantly the time spent on individual matters. Although

¹⁹ Id.

²⁰ Several local and state court websites have excellent self-help materials online; however, in our experience, most self-represented litigants need additional help completing the forms or getting questions answered.

case management systems have been around since the early 1980's, still fewer than half of solo and small firms report utilizing them fully.²¹ Additionally, these types of systems can reduce the cost of printing, mailing, and hours spent sorting and calculating on individual cases, since much of the work is done within the software, and clients can access their documents online.²² We can take a lead from former big law attorneys who have started up low-overhead, tech-heavy law firms and cut their rates significantly.

Reduce Complexity

Reducing the complexity of judicial procedures and forms where appropriate can also enable more access to justice. In Texas, the Access to Justice Commission is developing simplified forms for *pro se* litigants to complete, such as a Protective Order Kit, which provides a way for victims of domestic violence to get legal protection from their batterer, and Divorce Set One, for uncontested divorces involving no children and no real property. In California, self-help websites on local and state court sites are increasingly providing more information that is helpful and accessible to the *pro se* litigant.

When the complexity of the system is reduced, people tend to feel empowered to take on a matter in the first place, and often feel more able to do some of the footwork themselves. It is apparent that knowledge itself (e.g., current status of a case, what a person actually owes in fines, etc.) plays a major role in the empowerment of the individual. In the clinical work we do, we have repeatedly found that a simple phone call or letter directed to the right person asking the right question can often resolve a legal issue for someone. Additionally, easy-to-use court and government agency websites can enable laypersons to easily access accurate case information online, such as upcoming court dates and outstanding fees, without the need for professional assistance. These and similar resources reduce the demand on court clerks and legal aids, allowing their time to be spent addressing more complicated matters.

Reduce fees, increase training and employment rates

As we consider the motivation behind our fee schedules, it is incumbent upon us to consider ways of keeping

costs down in order to pass along savings to those who require lower fee services. Although big law carries a lot of weight when it comes to determining the going hourly rate for associates on up, many lawyers are solo practitioners or associates in small firms. Offering more affordable services may be an efficient way to help bridge the justice gap while still earning an income.

Legal apprenticeships incorporated into the third-year law school curriculum or post-bar waiting periods can address several issues. For example, apprenticeships could provide substantial practical training so that a new lawyer enters the profession much more prepared (similar to a medical student doing a residency). An apprenticeship could also provide a means for both experienced lawyers and law students to assist low- and moderate-income clients at *pro bono* and low *bono* rates. This new attorney training period could provide much-needed manpower to serve those in need.

Limited-Scope Representation

In addition to offering reduced fees directly, or through a training program, limiting the scope of representation allows a lawyer to charge a lower rate while maintaining appropriate ethical and professional responsibilities to the client. This type of “unbundling” works well in cases where the client is capable of handling some parts of her case. For example, the lawyer can help the client prepare a declaration and coach her on how to present her case at a hearing *pro se*. In this way, the client can benefit from professional legal guidance while saving money by doing some of the work herself. This is a useful and needed extension of the paralegal assistance model where no legal advice can be offered.

This is still a new way of thinking in the industry, and as such, there is often pushback from some lawyers who consider limited scope services a “cheap” discount version of practicing law. Others worry about not fulfilling their ethical duty to their client. Yet this limited service can accommodate many people who would otherwise have no legal assistance whatsoever and potentially not even seek access to the court to protect their rights. As the need for such options has grown, bar associations have developed professional standards for unbundled services which includes clearly defining the scope of

²¹ <http://www.lawtechnologytoday.org/2015/08/how-lawyers-are-using-web-based-software-in-2015/>

²² Another example of the place for new technology in the legal industry is ROSS, the robot lawyer, being employed by Baker & Hostetler law firm and other firms. Based on IBM's Watson, ROSS can understand your legal query and respond with a hypothesis backed by up-to-date references and citations. While the price of this application would surely make its purchase out of reach of legal aid nonprofits, use of the software application could be outsourced out to legal aid providers to enable them to assist more clients.

²³ <http://www.texasatj.org/pro-se-litigants>

service in a written fee agreement. Judicial officers have cautioned that the limited scope of attorney representation must be honored by judges in order to protect the attorney's professional liability and the predetermined fee arrangement. Moreover, judges see first-hand the benefit this brings to the entire court system and, perhaps most importantly, to the litigants whose access to justice is increased by being able to have limited professional assistance.

Los Angeles County Superior Court Judge Mark A. Juhas, who chairs the California Commission on Access to Justice, recognizes that:

Limited-scope attorneys not only provide the opportunity for better outcomes, they make the court process run smoother from start to finish, resulting in more efficient hearings. This is a 'win-win' for both the court and the litigant. Whether it is due to fewer court appearances, fewer rejected pleadings or better outcomes, it is a result that we all support.²⁴

In addition to limited scope representation, attorneys can offer unbundled services such as case advising, document preparation, and client coaching. These more financially-manageable, flat-fee type services often bring resolution of a legal matter within grasp for those who would otherwise be on their own to face an overwhelming matter. By providing these types of non-traditional services, lawyers can further bridge the gap in access to justice.

BRIDGING THE GAP

If serving our neighbors is truly at the foundation of our calling as attorneys, then we must necessarily consider all options for meeting their needs. Having a new perspective on our legal system may provide the opportunity for us to affect the system while still meeting our own business and financial obligations.

In his sermon on the Good Samaritan, Martin Luther King, Jr. encouraged us to go beyond triaging those injured by injustice along the road; instead, he urged that

"there is another aspect of Christian social responsibility which is just as compelling. It seeks to tear down unjust conditions and build anew instead of patching things up. It seeks to clear the Jericho road of its robbers as well as caring for the victims of robbery."²⁵

While systemic changes to our country's legal education system and court operations may be needed (and would require a lengthy separate discussion), we can effect change for our system and for those seeking access to it simply by approaching our work anew, thus providing not only a remedy for those injured on the road to justice, but also change to the road itself. Implementing new technology to reduce the time it takes to serve our clients and providing them with tools to more adequately address their own cases can help unburden our over-saturated court system. Lessening the burden on the justice system will then allow room for other bureaucratic changes in the system, which will in turn enable greater access to the courts, and the opportunity for justice to be meaningfully pursued.

Julie Resner and Joy Statler are founding partners of Shoreline Legal Group, LLP in Los Alamitos, CA. Their firm is founded on the principle that all people deserve access to justice, and they pursue that goal by providing unbundled, flat fee services.

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Joy Statler is the Director of Clinical Programs for Trinity Law School in Santa Ana, California. She is also the supervising attorney of the Trinity Law Clinic at the Orange County Rescue Mission. She is a recipient of the President's Volunteer Service Award and the Superheroes of Tustin Volunteer Award for her work at the Orange County Rescue Mission. Joy was previously staff attorney for the Christian Legal Aid Office of Orange County, CA, and served for a number of years on their board of directors.

²⁴ California Bar Journal, July 2015 (accessed online September 2017) <http://www.calbarjournal.com/July2015/Opinion/JudgeMarkAJuhas.aspx>

²⁵ Martin Luther King, Jr., *The One Sided Approach of the Good Samaritan* (Handwritten Sermon Outline) November 20, 1955, <https://kinginstitute.stanford.edu/king-papers/documents/one-sided-approach-good-samaritan>.



THE GOSPEL FOR LEGAL AID

People Need More Than Hands and Feet

By ANTHONY BUSHNELL

Many people are familiar with William Booth, who co-founded the Salvation Army with his wife Catherine, and how he was confronted early on as a preacher by the immediate physical needs of the poor and destitute. He became convinced that to minister the gospel to London's poor and homeless, he needed to address their needs for food, clothing, and medical care at the same time.¹

Christian Legal Aid has operated with similar convictions, using the privileges of legal education and training to minister to the poor and disadvantaged by addressing relational, family, and economic problems while offering them the hope of the gospel and the support of prayer. We remember the urgency with which the apostles charged Paul to "remember the poor" and his very eagerness to do just that.² Like Paul and the other apostles, however, we are driven most of all by the urgency of the gospel: that men and women everywhere would know Christ and be saved. To preach to people without showing compassion for their needs and difficulties would fail to demonstrate the love of God.³ But meeting physical needs without caring for the soul and bringing the hope of the gospel is ultimately futile. William and Catherine Booth intended that their ministry bring sinners to Christ and convert the downtrodden in London, not simply relieve physical deprivation.⁴

The need for *pro bono* legal services is overwhelming. This article examines how the gospel and the hope of God's love for sinners enable us to meet these needs in unexpected ways, and enable us to endure the mental and emotional burdens of entering into those needs. It

summarizes how the difficulties of poverty multiply to undermine stability for the poor, how legal expertise can often make a surprisingly large difference, and finally how the gospel and our application of its promises are critical because the law alone cannot make people whole. Using the experiences of Christians serving in several different legal aid clinics and other services, it demonstrates how we are uniquely equipped to bring hope and comfort into brokenness and disorder.

THE CASCADING EFFECTS OF THE POVERTY SPIRAL

The legal needs of poor and disadvantaged members of the populace are incredibly diverse. In 2011 a study commissioned by the Minnesota State Bar Association, the Bremer Foundation, the Minnesota Legal Services Coalition, and the Legal Services Advisory Committee reported on the needs of low-income individuals surveyed across a number of Minnesota counties. The Minnesota Client Access, Barriers and Solutions Study ("MN-CABS Study") was a first of its kind in the United States, following the methodology of direct interviews and focus groups with hundreds of persons eligible for legal aid, often conducted by people experienced in providing legal aid services.⁵ The report identified such diverse legal needs as: affordable housing, finding and keeping employment, qualifying for renting, ensuring landlords comply with maintenance and health obligations, obtaining government benefits, overcoming criminal records, transportation impeded by driver's license and insurance issues related to criminal or traffic

¹ "Booth provided meals, clothing and other assistance to his early converts. He was famous for saying, 'Nobody ever got saved while they had a toothache.'" Pickert, Kate. "A Brief History of the Salvation Army." *TIME*, Dec. 2, 2008. Available at: <http://content.time.com/time/nation/article/0,8599,1863162,00.html>; see also <http://salvationarmyusa.org/usn/history-of-the-salvation-army>.

² Galatians 2:9-10.

³ James 2:14-17; 1 John 3:17.

⁴ See <http://salvationarmyusa.org/usn/history-of-the-salvation-army>.

⁵ See <http://www.mncourts.gov/SupremeCourt/Legal-Services-Advisory-Committee.aspx> > MN-CABS Study. The full text of the report, released September 13, 2011, is available at: http://www.mncourts.gov/Documents/0/Public/administration/Final_MN-CABS_Study_September_2011.pdf.

violations, mental health issues, juvenile delinquency, lack of immigration documentation and cultural differences as a barrier to receiving services, access to health care, domestic violence, and many more.⁶

However, some basic needs form the most common issues for which people seek legal aid. In 2006, Sandhya Boyd founded Brooklyn Jubilee, “a Christian nonprofit offering free legal advice and advocacy.” She was able to do this with “support from her church, Brooklyn Presbyterian (now Resurrection Brooklyn)” after finding that working in a public legal services agency restricted her ability to minister to people spiritually. Boyd states: “We found that our clients’ three basic needs are affordable housing, access to food, and health care. Our primary focus is helping people with these three areas.”⁷ The first and most urgent need for many near the poverty line is simply keeping the basics of life in place so that they can maintain a job and build on that.

A single unmet legal need in a critical area can become the crumbling rock that starts an entire avalanche of legal difficulties. As the MN-CABS Study found, people in poverty:

struggle to get or retain shelter, income, education, health care, protection from violence or abuse and other basic necessities. An obstacle in even one of these areas can shatter the tenuous stability of their lives. Access to legal assistance often is the key to resolving the problem and clearing a path out of poverty.⁸

What may seem a minor problem to someone with a sustainable income can create a chain reaction of setbacks and losses for a person near the poverty line. Linda Tirado tells an all-too-common story of how being unable to afford a few hundred dollars to get a vehicle out of impound for a parking violation led to her and her husband losing their jobs and housing.⁹ No transportation often means no job, and when the impound lot continues to stack up fees every day a vehicle remains, a person on a limited income can never catch up.

Volunteers at the Twin Cities Christian Legal Aid clinics (“TCCLA”) in Minneapolis and Saint Paul, Minnesota have seen it firsthand. One client had an eviction action initiated against him years ago by a landlord, who claimed he owed \$1,500 in back rent. Even though he had been working, he had become ill for a few weeks and lost his job. He was unable to pay at the time, and the landlord turned the judgment over to a collection agency. The agency added interest, late fees, and collection charges over the years that ballooned to an amount he could not hope to pay. Yet the unpaid eviction judgment kept him from being able to rent anywhere else. He was effectively homeless. Volunteers at the clinic were able to work together to settle the debt and even received an anonymous donation to place the deposit on a new place for him to live.¹⁰

OUR HELP IS MUCH MORE VALUABLE AND EFFECTIVE THAN WE THINK

Being available to address a critical legal need at the outset can help prevent this cycle of setbacks. TCCLA was started in 2000 at Metro Hope Recovery Center in Minneapolis with the help of Christian Legal Society of Minnesota. It has since expanded to serve clients at four Twin Cities’ locations.¹¹ In 2010, TCCLA was featured in *The Christian Lawyer*, detailing some of the experiences of volunteers at the clinics.¹² In some cases the legal needs of clients turn out to be an excellent match for the legal expertise of volunteers. Paul Baertschi described meeting with a man who had come from Kansas for treatment without getting permission from his probation officer. He was anxious about the impact on his probation. “It just ‘happened’ that criminal law is my primary area of practice,” said Baertschi. He was able to make calls to the probation officer, ensure no violations would be issued, and reassure the client that he could complete his treatment without complications. “We have found that often the most appreciated advice is very simple. The clients appreciate just having someone who

⁶ See generally MN-CABS Study, *id.*, pp. i-iii *et seq.*

⁷ Krispin, Christy Tennant; Wieman, Roxanne. “The Boroughs’ Believers.” *Christianity Today*. Sep. 2013, Vol. 57, Issue 7, pp. 44-45.

⁸ MN-CABS Study, *Id.*, p. vi.

⁹ Tirado, Linda, “Why Poor People Stay Poor.” *Slate*, Dec. 5, 2014. Available at: http://www.slate.com/articles/life/family/2014/12/linda_tirado_on_the_realities_of_living_in_bootstrap_america_daily_annoyances.html

¹⁰ TCCLA Weekly Update e-mail, July 22, 2016, in author’s possession.

¹¹ <https://www.tccla.org/> > About. Disclosure: The author’s wife serves on the board of directors of TCCLA, and the author has been a volunteer at the clinic.

¹² Baertschi, Paul, “A Ministry of Mercy a Decade in the Making.” *The Christian Lawyer*, Summer 2010, Vol. 6, No. 3, pp. 14-15.

will listen to their situation and guide them,” Baertschi concluded.¹³

Fear is one of the largest challenges for many facing legal trouble without resources. David Best, who was on staff with TCCLA, observed: “Fear can trap any of us, and it is an especially powerful emotion for our clients. At TCCLA, we seek to reflect the values of Christ, by giving our clients a pathway out of fear toward hope, by giving them the information they need to make informed decisions.”¹⁴ As a clinic volunteer at TCCLA, the author’s own experience has often been that clients need help organizing details and identifying priorities as much as they need legal advice. Sometimes they just need someone to help them make a decision and act on it. When a person is frightened or overwhelmed, avoidance is a common response. Lawyers have the benefit of knowing that avoiding a problem often makes it worse and more costly or complicated to solve, and faith gives us the courage to act. A Christian can minister to people by helping them get out of the downward spiral of letting things pile up.

Helping a client build up the courage to look for a solution is a vital part of this ministry. In spite of how overwhelming the interconnected legal problems can become for those in need, one extraordinary aspect of serving in legal aid is discovering how surprisingly easy a solution may be. As James Vaughn illustrates, often people in need simply aren’t aware of the benefits and services that are available to them.¹⁵ They need encouragement to start reaching out, and they also need the knowledge and ability to locate resources that lawyers can provide. One lawyer rarely has all the parts of the solution, but it is much less intimidating for a lawyer to make calls to get answers. Clinic volunteer David Kempston says, “It took me out of my comfort zone—I know my area of the law well—but had to rely on others more ... calling other lawyers for advice, etc.”¹⁶ That ability to work together with a network of volunteers

and to reach out to other colleagues is an immeasurable resource legal aid clients simply don’t have on their own.

For Kempston, that opportunity to be a bridge to assistance keeps him coming back to serve. “I always felt that we were serving the poorest of the poor, the disenfranchised. And what a privilege that was. It provided a number of great opportunities to share the gospel while providing practical help. And many good opportunities to pray with people in need.”¹⁷

THE SOURCE OF HOPE AND COMFORT WHERE THE LEGAL SYSTEM FAILS

In spite of the success stories and the situations where a little kindness and attention from an attorney made a large difference in someone’s situation, there are also many cases where our time and expertise don’t seem to change the client’s situation at all. This is where having the gospel as a central part of our work makes all the difference.

When a client’s situation doesn’t seem to be changing, all a secular organization can say is: “I’m sorry.” Christians can say: “The Lord is near to the brokenhearted and saves the crushed in spirit.”¹⁸

Every single client needs the gospel, but the clients that suffer the greatest discouragement in the face of impassable difficulties need to be reassured that God’s love for them is unchanging. The most convincing reassurance of this is when our love for them and our commitment to help them remain unchanged.

Shame hangs heavily over the heads of those in need, especially if they are bearing the weight of mistakes and failures. “Some of our clients come to us because they have been wronged, and we strive to help them find justice. Others come to us with problems they’ve made for themselves. Our response is compassion as we strive to set them on the right track,” writes TCCLA volunteer Josiah Young.¹⁹ By accepting and helping them without being critical or condemning, we demonstrate that the Lord does the same.

*The clients that suffer
the greatest discouragement
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them is unchanging.*

¹³ Id.

¹⁴ TCCLA Weekly Update e-mail, May 20, 2016, in author’s possession.

¹⁵ James, Vaughn E., *Strategies for Reaching the Welfare-to-Work Population* (March 1, 2002). THE COMMUNITY TAX LAW REPORT, Vol. 6, No. 1, 2002. Available at SSRN: <https://ssrn.com/abstract=1154772>

¹⁶ E-mail dated Aug. 30, 2017, in author’s possession.

¹⁷ Id.

¹⁸ Psalm 34:18 (ESV).

¹⁹ TCCLA Weekly Update e-mail, June 18, 2016, in author’s possession.

This contrast shines especially brightly when compared with how society treats those with criminal records. One of the biggest obstacles for those convicted of a crime – any type of crime – is finding a job. The majority of employers (almost two-thirds) in one study of four major cities said they would not accept a job applicant with a criminal record.²⁰ This is typical across the United States. The discouragement of applying over and over to any possible job, only to consistently get no response or get rejected, certainly crushes the spirit.²¹ Abby Perry writes of a room of job-seekers at a Workforce Commission program:

In rooms where keyboard clicks and discouraged sighs express hopeless laments, our willingness to reject bootstrap ideology and offer abundant grace to our neighbors may change a few notes in that tune. Dignity is not ours to give or to take. It is, however, ours to acknowledge, even when acknowledgment is risky.²²

How we treat people, especially our willingness to continue to invest our time and support in their lives in spite of setback after setback, shows them the difference between how the world sees them and how God sees them. Perry adds: “If we believe that every person is an image bearer, that work and humanity are inherently dignified yet fallen, and that God shows grace to the underserving, then it seems we should be invested in recognizing dignity both in others and in their work—not merely in ourselves and our own work.”²³

Another unique ministry Christian legal aid can provide to address this is to help integrate clients into church communities and other Christian services that can shepherd them and provide continuing care and discipleship. The Mission Statement of Twin Cities Christian Legal Aid is: “Serving the poor, disabled and homeless by offering legal advice, limited assistance and spiritual counsel as well as referrals to Christian and other agencies in order to help individuals and their families become free of

legal entanglements and become reconciled with God.”²⁴ There are significant advantages to being able to refer someone to a Christian church or other Christian ministry for services, since both are likely to be able to meet spiritual needs alongside physical needs. Solving a legal problem is only a step forward, and poverty is still a long road. Connecting a person with a Christian community that can begin to share life with him or her is the ideal way to keep them encouraged in their identity in Christ.

Another way of involving that community is meeting at churches. TCCLA’s most-visited location is a church in downtown Minneapolis. It becomes very easy and natural to encourage people already familiar with the clinic location to think about coming back on Sunday for comfort and spiritual counsel.

THE GOSPEL KEEPS US FROM DESPAIRING TOO

The gospel is the essential source of comfort and hope for those struggling with poverty and legal roadblocks, but it is also a critical source of encouragement and endurance for those of us who serve them. It is all too easy to be weighed down with the enormity of the problems of so many people, and to lose heart when we can’t get results through the law. C.J. Masimore, the 2013 recipient of Christian Legal Society’s John D. Robb Christian Legal Aid Award, writes candidly about the discouragement of uphill battles against an unsympathetic legal system:

I don’t know that I could practice this type of law if I were not cognizant of a just and righteous God who one day will bring justice and reconciliation to the earth in all spheres—the justice sphere, the family sphere, and the economic sphere, to start. Because on this earth, in this court, in this job market, in this client’s family—injustice and brokenness in all spheres are converging and reigning supreme, and we may or may not see justice in court today.²⁵

²⁰ Reported by Harvard economist Richard Freeman. Freeman, R. “Can We Close the Revolving Door?: Recidivism vs Employment of Ex-Offenders in the U.S.,” in Urban Institute Roundtable: Employment Dimensions of Prisoner Reentry and Work: Understanding the Nexus Between Prisoner Reentry and Work. New York University Law School, May 19, 2003, *cited* in Perry, Abby. “Ex-Convicts Need Second Chances Too.” Nov. 19, 2016. Available at: <https://www.thegospelcoalition.org/article/ex-convicts-need-second-chances-too>

²¹ See, e.g., Perry, *id.*; Jenkins, Bethany. “Man with a Past—And Now, a Future.” Mar. 21, 2017. Available at: <https://www.thegospelcoalition.org/article/man-with-past-now-future>

²² Perry, *Id.*

²³ *Id.*

²⁴ <https://www.tccla.org/>

²⁵ Masimore, C.J. “Uphold the Cause of the Poor and the Oppressed.” Sept. 30, 2014. Available at: <https://www.thegospelcoalition.org/article/uphold-the-cause-of-the-poor-and-the-oppressed>

Both clients and the lawyers who bear their burdens with them need to keep our hope set on the Lord who will set all things right, and who has promised to faithfully keep us through all adversity.²⁶

Without this knowledge, advocating for justice among the brokenness of the world would be almost too much to bear. It is the knowledge of Jesus and his advocacy for us—and the fact that he has given me the tools and the opportunity to do on earth what he does in heaven—that provides both enduring hope and the strength to continue advocating for justice in a broken world.

If we keep the gospel and the promises of God as our motivation, the work of serving in legal aid can actually strengthen our hands and refresh us as lawyers. David Kempston says: “I often came away with a different perspective on my own circumstances afterward. And by that I mean it was hard to get away from my own job demands, but once I did that and focused on others in a non-work setting, it usually refreshed me.”²⁸ In Minnesota, it was actually the formation of Twin Cities Christian Legal Aid that revived and fueled the Christian Legal Society chapter in 2000. Paul Baertschi, who was instrumental in both, recalls:

The formation of TCCLA gave the Christian Legal Society in Minnesota a huge breath of new life. It gave a focus and a purpose for coming together as Christian lawyers. It spurred

the reformation of the CLS chapter, ushered in new Board members and led to the creation of TCCLA, with attorneys using their gifts in different ways including outreach, board service and some community education through one of our volunteers.²⁹

May we never forget that when we accept the work of ministering the gospel, God shows up to supply the power.

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Mr. Bushnell is actively involved in the legal community, serving as the secretary to the council of the Solo and Small Firm section of the Minnesota State Bar Association and spending time speaking with and mentoring law students. He volunteers at the Twin Cities Christian Legal Aid clinic and served as the vice president and a board member for the Christian Legal Society of Minnesota. He is adjunct faculty for the law enforcement training program at The University of Northwestern - Saint Paul, and he served as an adjunct Lawyering Program Instructor at the University of Minnesota Law School for the 2009-2010 class year. He currently serves on the board of Christian Legal Society.

²⁶ Psalm 34:17; 1 Peter 5:10-11; James 5:7-8; Hebrews 10:32-39; 1 Thess. 5:23-24; Jude 24-25.

²⁷ Masimore, Id.

²⁸ E-mail dated Aug. 30, 2017, in author's possession.

²⁹ Baertschi, *The Christian Lawyer*, Summer 2010, Vol. 6, No. 3, p. 15.



BUILDING SKILLS BEHIND BARS: *The Biblical Case for a Constructive Prison Culture*

BY JEREMIAH MOSTELLER

American prisons and jails house more than two million people, an increase of more than 600 percent from 1960.¹ This growth has occurred despite the fact that America's population increased by only 80 percent during the same period, and crime rates have fallen significantly since the 1990s.² Though crime rates have shown an overarching decline since the 1990's, those sentenced to prison are now receiving longer terms of incarceration than we have seen in the decades since accurate data started being collected. Released at a rate of nearly 650,000 per year, these men and women grapple with practical and social challenges while remaining handicapped by poor education and life skills training.³ As Christians, neighbors, and attorneys, we are called

to come alongside those who are returning to our communities, and help ensure that they are enabled to lead healthy and productive lives.

Research has made clear that our correctional systems do not achieve the desired outcomes of safety while behind bars, better reentry, and lower recidivism. The lengthening of sentences and the rise in prison populations appears to have had only a minimal deterrent effect on future crime. Of those individuals who are convicted of a federal crime, almost half will be rearrested within eight years of their release.⁵ State correctional systems report graver results, with more than three-quarters of those released from state prisons being rearrested within just five years.^{6,7} In an effort to prioritize safety, provide

- 1 Danielle Keable & Lauren Glaze, *Correctional Populations in the United States. 2015*, Bureau of Justice Statistics (December 2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.
- 2 The prison population in America has grown from 212,953 in 1960 to 1,526,800 in 2015 compared to a population increase from 179,323,175 in April 1960 to 320,335,611 in April 2015. See Carson, *supra* note 2 at 1; United States Census Bureau, *Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2017*, United States Census Bureau (December 2016), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>; The Pew Charitable Trusts, *National Imprisonment and Crime Rates Continue to Fall*, The Pew Charitable Trusts (December 2016), http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf; Jennifer L. Truman & Rachel E. Morgan, *Criminal Victimization, 2015*, Bureau of Justice Statistics (October 2016), <https://www.bjs.gov/content/pub/pdf/cv15.pdf>; United States Census Bureau, *Table 2: Population, Housing Units, Area Measurements, and Density: 1790-1990*, United States Census Bureau (August 27, 1993), <https://www.census.gov/population/www/censusdata/files/table-2.pdf>; Bureau of Justice Statistics, *supra* note 2 at 2.
- 3 Federal drug, immigration, and public-order offenses alone have seen sentence lengths extended by 150 percent, 290 percent, and 320 percent respectively. See The Pew Charitable Trusts, *Prison Time Surges for Federal Inmates*, The Pew Charitable Trusts (November 2015), http://www.pewtrusts.org/~media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf.
- 4 E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, Bureau of Justice Statistics (December 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.
- 5 Kim Steven Hunt & Robert Dumville, *Recidivism Among Federal Offenders: A Comprehensive Overview*, United States Sentencing Commission (March 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.
- 6 Matthew R. Durose, et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, Bureau of Justice Statistics (April 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.
- 7 Some scholars believe that the significant difference in recidivism at the state and federal level is a result of the significantly longer sentences imposed upon individuals charged with drug crimes at the federal level (almost half of those imprisoned at the federal level). The most recent state data reveals that individuals charged with drug crimes are subject to a median sentence length of 36 months whereas those charged with federal drug crimes are subject to a median sentence length of 60 months, 67 percent longer than that seen at the state level. See Louis Reedt, et al., *Recidivism Among Federal Drug Trafficking Offenders*, United States Sentencing Commission (February 21, 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170221_Recidivism-Drugs.pdf; Carson, *supra* note 4 at 15; Tom Bonczar, *State Prison Admissions, 2009: Sentence length, by offense and admission type*, Bureau of Justice Statistics (May 2011), available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2056>.

opportunities for character transformation, and create better outcomes for those serving time in jails and prisons throughout our nation, we must equip men and women to return to their communities as better neighbors and citizens.

A JUSTICE SYSTEM THAT RESTORES

Scripture outlines God's heart for justice and provides a framework within which justice should be carried out on earth.⁸ A biblical model of justice requires those doling out punishment to remain mindful of the inherent dignity that both those who commit crime and victims of crime share as a result of being created by God.⁹ In so doing, we must promote accountability for the responsible party through proportional punishment,¹⁰ prioritize and respect the victim by validating their experience,¹¹ and cultivate community engagement in the administration of justice.¹² Once sentenced to incarceration, it is vital to ensure that the punishment experienced is more than simple warehousing of people. The culture within prisons and jails should be constructive, providing avenues to earn back the trust of the community through character development and addressing criminogenic risks and needs. Educational and workforce development programs provide opportunities for individuals who are incarcerated to build their practical skills and practice strong character.

SKILLS BEHIND BARS: WHERE ARE WE NOW?

Newly available data paints a picture of literacy and educational attainment in America's prisons: one comprehensive study released in 2016 found that people in

prison score almost eight percent lower on literacy tests and almost 14 percent lower on numeracy skills tests when compared to the general population.¹³ An earlier study by the Bureau of Justice Statistics found that more than 40 percent of the incarcerated population had not previously attained a high school diploma or high school equivalency before they were incarcerated. An even more startling revelation within that study: nearly 15 percent had not completed any amount of high school education at all.¹⁴ While the advent and advancement of basic educational programs within prisons, such as GED classes, have decreased these rates slightly over time, high school education and equivalency numbers within prisons still more than double those seen in the general population.¹⁵

Without widespread access to educational programming, particularly for higher education, an incarcerated person's level of educational attainment generally does not improve while incarcerated. Though 70 percent of individuals in prison wish to enroll in some form of educational programming while incarcerated, only 42 percent have completed such a program.¹⁶ This inability for those who are incarcerated to apply for access to such educational programs is directly tied to how society views incarceration as punishment. In order to have an effective correctional system that recognizes the potential for even the worst among us to be transformed, advances public safety, and prioritizes successful reentry, correctional environments must provide avenues for personal improvement. In one study of educational programming provided in the American correctional system, more than 90 percent of states reported offering some form of adult basic education, GED test preparation, and

⁸ Exodus 23:1-9 (English Standard Version); Psalm 33:5 (New International Version); Proverbs 29:4 (NIV); Isaiah 42:4 (ESV); *See also* Prison Fellowship has created a framework for justice that restores which contains 18 different elements. *See* Prison Fellowship, *Justice That Restores*, Prison Fellowship (2015) available at <https://www.prisonfellowship.org/about/justicereform/justice-that-restores/>.

⁹ Matthew 25:36-40 (NIV); Hebrews 13:3 (ESV)

¹⁰ Exodus 21:18-19; 23-27 (ESV); Exodus 22: 1, 4, 9 (NIV); Leviticus 6:1-7 (NIV); Leviticus 24:19-22 (NIV); Numbers 5:6-7 (NIV); Deuteronomy 19:18-21 (NIV); Proverbs 17:15 (NIV); Proverbs 31:9 (ESV); Luke 19:8 (NIV).

¹¹ Numbers 5:6-7 (NIV); Luke 10:25-37 (NIV); Romans 12:15 (NIV).

¹² Isaiah 32:18 (NIV); James 1:25 (NIV).

¹³ Bobby D. Rampey, et al., *Highlights from the U.S. PIAAC Survey of Incarcerated Adults: Their Skills, Work Experience, Education, and Training*, U.S. Department of Education (November 2016), <https://nces.ed.gov/pubs2016/2016040.pdf>.

¹⁴ Caroline Wolf Harlow, *Education and Correctional Populations*, Bureau of Justice Statistics (April 15th 2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf>.

¹⁵ Harlow, *supra* note 14 at 1-2.

¹⁶ Rampey, *supra* note 13 at 27 & 35.

vocational skills training, and approximately 70 percent offer secondary or postsecondary courses in at least one of their correctional facilities.¹⁷ While these percentages may seem encouraging, 36 states decreased spending on correctional education between 2009 and 2012 and correctional spending has only continued to decrease in recent years, leading to reduced capacity for such programs.^{18, 19}

Prisoners' skill deficits and opportunities for development are not limited to their educational attainment. They also have significantly lower levels of traditional work experience than the general population. Only 65 percent of individuals who are incarcerated in state and federal correctional facilities were employed at the time of their incarceration.²⁰ This figure is slightly lower than the labor-force participation rate of the general population, even though a significantly higher percentage of incarcerated people are of prime working age.²¹ This decreased employment only continues during incarceration, with only 61 percent of individuals who are imprisoned reporting that they currently hold a job within their correctional institution.²² Even among those who are employed during their incarceration, most hold jobs that do not require them to utilize their numeracy or literacy skills.²³

THE MORAL CASE FOR EDUCATION AND WORKFORCE DEVELOPMENT PROGRAMS IN PRISON

A justice system that reflects biblical values is one that holds those responsible for crime accountable, validates and cares for victims, and restores those who have paid their debt to society to a position where they can fulfill their God-given potential and live crime-free.²⁴ These considerations compel Christians to support education and workforce development programming in prison.²⁵

To promote a constructive culture in prison, we must ensure that our correctional environments model and encourage attitudes, behaviors, and lifestyles that are conducive to a law-abiding and productive reentry to an individual's family and community. The biblical model for justice requires that punishment be intended to not only provide accountability for harmful actions and validate the victim, but also provide opportunities for the responsible party to be transformed.²⁶ Proper accountability for crime should impart wisdom and understanding of the correct way in which an individual should live. Many people end up in prison not because they are simply incorrigible, but because of factors, including poverty, trauma, lack of opportunity, and criminal "role models" in their social network, that contribute

¹⁷ Lois M. Davis, et al., *How Effective is Correctional Education, and Where Do We Go From Here?*, RAND Corp. & Bureau of Justice Assistance (2014), available at http://www.rand.org/pubs/research_reports/RR564.html

¹⁸ Chris Mai & Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010-2015*, Vera Institute of Justice (May 2017), available at <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends>; Davis, *supra* note 17 at 61-66.

¹⁹ Through there are various drivers to the decreases that occur in correctional budgets, including positive criminal justice reforms, we must prioritize the provision of programming in our correctional facilities because of the long-term savings and dividends it will pay through increased public safety.

²⁰ Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities, 2004*, Bureau of Justice Statistics (February 28th, 2007), available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/4572?dataFormat=Online+analysis&archive=NACJD&searchSource=revise&q=Survey+of+Inmates+of+State+and+Federal+Correctional+Facilities%2C+1997>; See also Rampey, *supra* note 13 at 9.

²¹ Bureau of Labor Statistics, *Labor Force Participation Rate*, United States Department of Labor (March 2017), available at <https://data.bls.gov/timeseries/LNS11300000>; Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, Bureau of Justice Statistics (October 2005), <https://www.bjs.gov/content/pub/pdf/p04.pdf>; United States Census Bureau, *Table 1.1: Population by Age, Sex, Race, and Hispanic Origin: 2004*, U.S. Department of Commerce (February 1, 2017), available at <https://www.census.gov/data/tables/2004/demo/age-and-sex/2004-age-sex-composition.html>.

²² Rampey, *supra* note 13 at 15.

²³ Rampey, *supra* note 13 at 21.

²⁴ Prison Fellowship, *supra* note 8.

²⁵ Prison Fellowship, *supra* note 8.

²⁶ Proverbs 6:23 (NIV); Proverbs 15:32 (NIV); Proverbs 29:15 (NIV); Hebrews 12:11 (ESV).

to behaviors that harm the self and others.²⁷ While these circumstances do not excuse the harm these individuals have caused, it is prudent for our correctional systems to address these underlying problems within the prescribed punishment. Education and workforce development programs can equip prisoners with the skills and knowledge to be both financially and socially successful upon return to the community. Teaching new skills and values such as hard work and dedication through programming will represent a major step toward constructive correctional environments.

To truly be restored to a safe, contributing role in their community, our justice system must extend to one convicted of crime the opportunity to take responsibility for the harm caused, make appropriate amends, and demonstrate a sincere intent to live transformed. We see this idea of opportunity for redemption and restoration clearly displayed in Acts, where Paul must earn the trust of the Christian community in Jerusalem because of his previous life as their enemy and chief persecutor.²⁸ This opportunity to earn trust is essential to a successful reentry for every individual who will be released from prison in the future. Providing those who are imprisoned with access to GED test preparation, college courses, and vocational programs present an excellent opportunity for them to demonstrate commitment to personal improvement while fulfilling their term of punishment. Typically optional, but time-consuming, these efforts to secure additional education and work skills while in prison reveal an individual's desire to lead a more productive and law-abiding life.

Every person deserves closure after they have satisfied all formal requirements of the justice system, including any forms of punishment or victim restitution, so that they can successfully rejoin society. Closure is an idea that derives from the writing of Paul, specifically

Galatians where he exhorts those in the Christian communities of Galatia to restore those who have been caught in sin "gently" because each person may also be tempted with sin themselves in the near future.²⁹ An individual who has paid their debt to society and committed to living a transformed life should be able to gain closure from the punishment imposed and return to their community as a fully restored individual with the rights, duties, and capabilities necessary to be a productive and contributing member of society. By equipping individuals with the skills and work experience necessary for their success, we can help them close the book on their harmful past and begin a new chapter.

One of our most important correctional goals is derived from a biblical concept of safety. As we see in Isaiah, God longs for us to live "in peaceful dwelling places" and promises us through these scriptures that he will provide us a "secure home" and "undisturbed places of rest" in the coming Kingdom of Christ.³⁰ For our correctional system to be one that values public safety, it must promote and develop crime reduction practices that have proven outcomes. Providing individuals who are incarcerated with educational and workforce development programming is a proven strategy to ensure that they spend their time constructively while serving their sentence and after they are released.

We all long to be accepted and respected in our communities. However, people with a criminal record often remain on the fringes, in part because society is unable or unwilling to envision returning citizens as productive members of the community. We see this idea of acceptance clearly displayed in Romans 3. Paul reminds the church in Rome that "all have sinned and fallen short of the glory of God" but that every person can be "justified freely by his grace through the redemption that came by Christ Jesus."³¹ This verse shows us that God's

²⁷ See Lorraine E. Cuadra, et al., *Child maltreatment and adult criminal behavior: Does criminal thinking explain the association?*, 38 Child Abuse Neglect 1399 (2014), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1652&context=psychfacpub>; Nancy Wolff & Jing Shi, *Childhood and Adult Trauma Experiences of Incarcerated Persons and Their Relationship to Adult Behavioral Health Problems and Treatment*, 9 Int. J. Environ. Res. Public Health 1908 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3386595/pdf/ijerph-09-01908.pdf>; Donald M. Black, et al., *Antisocial Personality Disorder in Incarcerated Offenders: Psychiatric Comorbidity and Quality of Life*, 22 Annals Clinical Psychiatry 113 (2010); Jane A. Siegel & Linda M. Williams, *The Relationship Between Child Sexual Abuse and Female Delinquency and Crime: A Prospective Study*, 40 J. Res. Crime Delinq. 71 (February 2003), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.521.9034&rep=rep1&type=pdf>; Janet Currie & Erdal Tekin, *Does Child Abuse Cause Crime?* (National Bureau of Economic Research, Working Paper No. 12171, April 2006), <http://www.nber.org/papers/w12171.pdf>; Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities*, 2004, United States Department of Justice (2004), available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/4572/>.

²⁸ 2 Corinthians 5:11-21 (NIV); See also 1 Corinthians 4:2 (NIV).

²⁹ Galatians 6:1-3 (NIV).

³⁰ Isaiah 32:18 (NIV); See also Psalm 34:14 (ESV); Isaiah 33:20 (NIV); Matthew 5:9 (ESV); Hebrews 12:14 (ESV).

³¹ Romans 3:21-24 (NIV).

acceptance of those who receive His free gift of salvation does not vary based on the person or their past sinful actions. In addition to demonstrating God's gift of salvation through Christ to the redeemed, we can find truth in this passage to instruct our treatment of those who are incarcerated. If we are meant to be like Christ, the Church must emulate this character of God by helping restore men and women who have completed their criminal punishment by assisting with their full integration into society.³² We can help returning neighbors by advocating for programs that will equip them with the knowledge, work ethic, and character they need to succeed in our communities. By ensuring that they have skills necessary to provide for themselves practically, we can begin to construct a framework by which they can flourish.

THE PRACTICAL CASE FOR EDUCATION AND WORKFORCE DEVELOPMENT PROGRAMS IN PRISON

The biblical case for appropriate criminal justice reform and advancement of restorative programming in prison is strongly supported by research. Studies clearly show that, while people with a criminal history face significant barriers to securing employment, providing educational and vocational classes is an effective way to assist them in overcoming these barriers. The evidence also shows that these types of programming are both cost-effective and beneficial to public safety.

According to the best estimates available, there are more than 65 million Americans who have a criminal record.³³ In 2015, almost 650,000 people returned to society from state and federal prisons.³⁴ Across the country, they today face more than 48,000 legal barriers that bar them from securing employment, occupational licenses, housing, and many other things they need to become productive members of society.³⁵ Pervasive social stigma also impedes attainment of meaningful employment, with only 40 percent of employers reporting that they would be willing to hire an individual with a criminal record.³⁶ Largely due to these barriers, 90 percent of people who have been incarcerated struggle to find employment in the first year after release. Upon finding employment, a father who has been incarcerated earns 15 percent less per year, creating a generational impact of on economic mobility.³⁷

Arguably the single greatest aim of imprisonment is to advance public safety. The biggest predictor of whether someone will recidivate is not the crime he or she was convicted of, but the skills, values, and character with which he or she leaves prison.³⁸ Barriers to employment also contribute to high levels of recidivism. Fifty percent of individuals released from federal prison and more than 75 percent of those released from state prisons will be re-arrested.³⁹ Prison programming is a pivotal component of providing the crucial skills, education, and character changes that will equip them to succeed. Educational and vocational classes have proven to be particularly effective. Prisons that provide these

³² See Ephesians 4:32-35 (ESV).

³³ Michelle Natividad Rodriguez & Maurice Emsellem, 65 Million "Need Not Apply:" *The Case for Reforming Criminal Background Checks for Employment*, The National Employment Law Project (March 2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf; United States Census Bureau, *Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016*, United State Census Bureau (December 2016), available at <http://www.census.gov/data/tables/2016/demo/popest/state-total.html>.

³⁴ E Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, U.S. Department of Justice (December 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

³⁵ Justice Center, *The National Inventory of Collateral Consequences of Conviction*, The Council of State Governments (2017), <https://niccc.csjusticecenter.org/map/>.

³⁶ Harry J. Holzer, *Collateral Costs: The Effects of Incarceration on the Employment and Earnings of Young Workers* 12 (Institute for the Study of Labor, Discussion Paper No. 3118, October 2007).

³⁷ Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, in *DO PRISONS MAKE US SAFER? THE BENEFITS AND COST OF THE PRISON BOOM* 177-206 (Steven Raphael & Michael Stoll eds., 2009); See generally Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration during Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, 50 *J. Offender Rehabilitation* 18 (January 2011).

³⁸ John M. Nally, et al., *Post-Release Recidivism and Employment among Different Types of Released Offenders: A 5-Year Follow-up Study in the United States*, 9 *Int'l J. of Crim. Just. Sci.* 1, 16, 23 (2014); Matthew Makarios, et al., *Examining the Predictors of Recidivism Among Men and Women Released from Prison in Ohio*, 37 *Crim. Just. Behav.* 1377 (December 2010); Le'Ann Duran, et al., *Integrated Reentry and Employment Strategies: Reducing Recidivism and Promoting Job Readiness*, The Council of State Governments Justice Center (2013), https://csjusticecenter.org/wp-content/uploads/2013/09/Final.Reentry-and-Employment.pp_.pdf.

programs see reduced recidivism by up to 13 percent and reduced incident reports for prisoner misconduct by four percent.⁴⁰ Such programs have also been found to increase post-release employment by between 13 and 21 percent, depending on the type and form of the specific program.⁴¹ These programs also reflect good stewardship: every taxpayer dollar spent on educational and vocational training programs for prisoners saves five dollars on law enforcement and corrections expenditures.⁴²

We should not be surprised that research aligns with the biblical principles that compel us to support educational and workforce development programs in prison. By facilitating a more constructive culture in prisons, we can help ensure that people with a criminal history have the opportunity to equip themselves for productive, law-abiding futures. By helping to ensure that returning citizens can secure meaningful employment, we can provide them with the opportunity to acquire true closure after punishment is fulfilled and the ability and incentives to avoid criminal behavior in the future. When applying biblical principles, we receive societal benefits, including economic growth, increased public safety, and strengthened families.

CURRENT LAWS ENCOURAGING PROGRAMMING

Many states have recognized the prudence of providing educational and workforce development programming

in their correctional institutions and have implemented requirements for such programming in their laws. Some jurisdictions have adopted laws requiring correctional officials to ensure that every individual who is incarcerated leaves correctional supervision with some minimal level of education, whereas others have adopted requirements that officials expand partnerships with religious and secular organizations to provide such programming.⁴³ California enacted legislation that authorized a particularly robust correctional education system in 2013.⁴⁴ This program attempts to ensure that at least 70 percent of individuals in the state's correctional system with criminogenic needs related to education have their educational needs met before their release.⁴⁵ The first of three components of this program requires that every individual held in the state's correctional system achieve a ninth-grade reading level before release.⁴⁶ The second requires the provision of services to those who already have attained the ninth-grade reading level that would equip them to receive their high school diploma or GED.⁴⁷ Lastly, the program requires the provision of voluntary college programs for all individuals who do not fall within the first two categories, allowing them to acquire college credits and degrees during their time of incarceration.⁴⁸

The federal government has also taken strides to encourage implementation of education and workforce development programs across the country by passing

³⁹ Federal numbers are based on an eight-year time frame and state recidivism is based on a five-year time frame. Kim Steven Hunt & Robert Dumville, *Recidivism Among Federal Offenders: A Comprehensive Review*, United States Sentencing Commission (March 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf; Matthew R. Durose, et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, Bureau of Justice Statistics (April 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

⁴⁰ David B. Wilson, et al., A Meta-Analysis of Corrections-Based Education, Vocation, and Work Programs for Adult Offenders, 37 *J. of Res. in Crime and Delinq.* 4, 347, 355-357 (2000); Christopher Uggen, Work as a Turning Point in the Life Course of Criminals: A Durational Model of Age, Employment, and Recidivism, 67 *Am. Soc. Rev.* 4, 529, 535-542 (2000); William G. Saylor & Gerald G. Gaes, *Training Inmates through Industrial Work Participation and Vocational Apprenticeship Instruction*, 1 *Corrections Mgmt. Q.* 32 (1997); Lois M. Davis, et al., *How Effective is Correctional Education, and Where Do We Go From Here?*, RAND Corp. & Bureau of Justice Assistance (2014), available at http://www.rand.org/pubs/research_reports/RR564.html; Christy Visher, et al., *Employment after Prison: A Longitudinal Study of Releasees in Three States*, Urban Institute (October 2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF>.

⁴¹ William G. Saylor & Gerald G. Gaes, *Training Inmates through Industrial Work Participation and Vocational Apprenticeship Instruction*, 1 *Corrections Mgmt. Q.* 32 (1997); Davis, *supra* note 39 at 14; Visher, *supra* note 39 at 6.

⁴² Davis, *supra* note 40 at 18.

⁴³ See e.g. Cal. Penal Code § 2053.1; Fla. Stat. § 944.803; Ind. Code § 11-10-16; N.Y. Correction Law § 136; Tex. Gov. Code § 501.009.

⁴⁴ A.B. 494, 2013-2014 Ca. State Legis. (Cal. 2013).

⁴⁵ A.B. 494 § 1 (Cal. 2013).

⁴⁶ A.B. 494 § 2 (Cal. 2013).

⁴⁷ *Id.*

⁴⁸ *Id.*

the Second Chance Act of 2007.⁴⁹ This Act provided funding for programs that would increase effective reentry for returning neighbors, such as education and other evidence-based programs that have been proven to reduce recidivism.⁵⁰ Evidence released after implementation of such programs has found that states have realized reductions in recidivism ranging from six to more than 19 percent.⁵¹ Even though the results of these programs have been positive, Congress has failed in recent years to reauthorize this legislation through 2020.⁵² We should place our support behind this reauthorization because the evidence reveals that this Act has resulted in programs across the country that have successfully ensured closure for returning citizens and increased public safety.

CONCLUSION

Though America's correctional system has grown at an alarming rate and fails to effectively deter future crime, we can help repair this broken system by implementing a biblically-based understanding of crime and incarceration. One critical and practical step is to support educational and workforce development programming in our correctional facilities.

As Christians, we should support educational and workforce development programs because they help create a more constructive prison culture, offer people

who have committed crime opportunities to regain the public's trust and provide avenues for closure from the punishment received by helping them in overcoming the thousands of collateral consequences they face upon release. Often the case when we apply scripture to public policy, these types of programs have also been found to provide tangible benefits in the form of increased public safety and reduced government spending on corrections. Both our moral foundation as Christians and practical evidence compel us to encourage adoption of additional educational and workforce development programming across the country. As skilled attorneys and faithful constituents, we must continue to encourage our elected and governmental officials to adopt additional programs providing education and work skills to those who are incarcerated.

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⁴⁹ Second Chance Act of 2007, H.R. 1593, 110th Cong. (2007).

⁵⁰ The Bureau of Justice Assistance created the Comprehensive Statewide Adult Recidivism Reduction (SRR) Program as part of the Second Chance act funding which allows funding for educational programs that train individuals for reentry. See Justice Center, *Statewide Recidivism Reduction*, The Council of State Governments (2017), <https://csgjusticecenter.org/nrrc/second-chance-act-recidivism-reduction-grant-program/>.

⁵¹ The National Reentry Resource Center, *Reducing Recidivism: States Deliver Results*, The Council of State Governments Justice Center (June 2014), https://csgjusticecenter.org/wp-content/uploads/2014/06/ReducingRecidivism_StatesDeliverResults.pdf.

⁵² See Second Chance Reauthorization Act of 2015, S. 1513, 114th Cong., 1st Sess. (2015); Second Chance Reauthorization Act of 2013, S. 1690, 113th Cong., 2nd Sess. (2014); Second Chance Reauthorization Act of 2013, H.R. 3465, 113th Cong., 1st Sess. (2013); Second Chance Reauthorization Act of 2011, S. 1231, 112th Cong., 1st Sess. (2011).



A BIBLICAL CRITIQUE OF THE U.S. PRISON SYSTEM

BY J. SCOTT LEARY

I. INTRODUCTION

In 1971, half of the inmate population inside Attica State Prison took control of an entire cell block in New York State.¹ Ten corrections officers and thirty-three inmates died. What fueled the violence? The prisoners demanded better prison conditions. It captured the minds and attention of the public for months.

Last September marked the forty-fifth anniversary of that tragedy. How have we progressed in forty-five years? By any assessment, the situation of American prisons has only become worse. The criminal justice system in the U.S. incarcerates more than any other country. Today, the United States is home to five percent of the world population but twenty-five percent of the world's prisoner population. The most recent statistics show that in the 2015, there were 1.4 million persons incarcerated in state and federal prisons and twelve million in county jails.²

Clearly, prisons cast an ominous shadow over our cities and towns—over society as a whole. Many nonprofits and non-governmental organizations are searching for the root causes of the rise of incarceration rates in America. However, most of this research is based on assumptions contrary to the reality that we live in a world in which God exists and has revealed His will for mankind. While one might expect this from secular criminal justice studies and sociologists, it is surprising that very few Christians are examining the problem of our prisons and “mass incarceration” from a biblical point of view. If Christians were to stop and examine the current United

States prison system, we would observe that the philosophies and practices of that system are in many ways unbiblical and unjust. Our current uses of prison fail to honor God's image in humankind and promote restoration and restitution.

II. THE MODERN PRISON SYSTEM IS BUILT ON A HUMANISTIC FOUNDATION

Why is America's prison system unbiblical? The foremost reason is its faulty emphasis. Today, the emphasis of criminal justice and the prison system is on rehabilitating the criminal. On the surface, one might think this is a worthy cause. However, rehabilitation is not true biblical justice.

In the eighteenth century, a humanistic worldview exercised a dominant influence on criminal justice policy. The Quakers are attributed with inventing the modern form of the prison. Perhaps to “soften” the terminology and its use, they called it a “penitentiary.”³ The Quakers were of the belief that a time of confinement would allow the criminal to reflect on his sins and criminal acts. This was often for a long period of time. It cannot be disputed that the era of the modern unbiblical prison was indeed founded by Christians. According to Dr. Rex Skidmore, “The whole system of penal treatment, instigated by the Quakers and practiced in the Walnut Street jail in the 1790's, was an attempt to rehabilitate the prisoners—a forerunner of advanced penological thought today.”⁴ When it was operational, the historic Eastern State in Philadelphia was called a “penitentiary,” as it functioned as a tool to produce “penance”

1 Juleyka Lantigua-Williams; *Is Another Attica on the Horizon*: The Atlantic Monthly, September 9, 2016, <https://www.theatlantic.com/politics/archive/2016/09/is-another-attica-on-the-horizon/499397/> accessed July 18, 2017.

2 The Sentencing Project, *Facts Sheet Trends in U.S. Corrections*. June 2016, in Conjunction with Bureau of Justice Statistics: *Prisoners Series*.

3 Christopher D. Marshall. *Prison, Prisoners and the Bible*, Paper Delivered to “Breaking Down the Walls Conference.” (June 2002), at 4.

4 Rex A. Skidmore, *Penological Pioneering in the Walnut Street Jail, 1789-1799*, 39 J. CRIM. L. & CRIMINOLOGY 167, 180 (1948-1949).

from its imprisoned residents. What did they mean by “penance”? Being “penitent,” or reaching “penance” simply meant expressing their guilt and crime before God and achieving the goal of rehabilitation.⁵

No one knew at that time, but that one small prison, founded with good intentions, would grow into the institution characterized by mass incarceration as it is today.

In the 19th century, punishment was placed aside for a more rehabilitative approach to prison work. In fact, prisons were renamed “correctional facilities” to align with this humanistic philosophy, which represented a kinder marketing strategy. This new influence, with a central focus on correction, was shown to have a dual purpose to both deter crime and protect the public while attempting to reform the individual.⁶

These “correctional” institutions are categorized according to their level of security. They range from the typical prison, labeled “minimum,” to “medium” security, and finally to “maximum” security levels.⁷ Minimum-security facilities house offenders with clean disciplinary records who are finishing their prison sentences. Medium-security facilities have the look of a regular prison, with high walls and razor wire for security. Ironically, it is at these facilities where there is more attention given to education and rehabilitation, as inmates inside these walls are viewed as “redeemable” in the eyes of the correction administrators.⁸ It is here that one can clearly see the intersection of correctional policy and its humanistic foundation. Francis Schaeffer states that humanism “places man at the center of all things.”⁹ When one takes an honest look at our modern prison system, it is deeply disturbing—its humanistic framework does not know what the true concept of “man” truly is. Schaeffer asserts, “Since their concept of Man is mistaken, their concept of society and of law is mistaken, and they have no sufficient base for either society or law.”¹⁰

This makes the correctional facility perspective even more relevant. The correctional facility perspective holds to the theory which believes there is a possibility

of “reforming” individuals while they are confined in prison. Yet humanistic theorists cannot answer the question of why attempting to reform an offender is a just punishment. Furthermore, if one is not found to be “redeemable” through the assessment of correctional administrators, he or she is then assigned to a maximum or supermax facility.

III. THE MODERN PRISON SYSTEM IS UNJUST

Early in our country’s history, governments did not shy away from expressing biblical justifications for law and justice policy. For example, the colony of New Jersey held itself to a Christian standard of morality during its founding.¹¹ In fact, their intentions were made so explicit that they inscribed on their seal, “Righteousness exalteth a nation” from Proverbs 14:34. Their Governor exhorted citizens to obedience to the laws of God. This Governor, before the creation of the Constitution of the United States, clearly visualized that it was the responsibility of the government to promote justice and liberty for all who are within the boundaries of their state.

The courts are exhorted from Scripture to do the same: “You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.”¹²

Scripture set forth a vision for justice which informs the principles of government and judiciary. Romans 13 is often cited for the duty to obey governing authorities. This passage explicitly states that governmental authority is a delegated responsibility from God and instituted by Him. The civil ruler is functioning as a servant of God, who serves as an avenger against wrongdoing. Therefore, what is before us is a vitally important question of justice.

If justice is truly from God and if governors function as servants of God, there should be no systematic oppression based on race. The Apostle Paul affirms that in Christ, there is no favoritism of one race over another. Those in prison are human beings with a story to tell. Those within the church at large must be cautioned against assuming that those who are behind bars are all

5 GARY DEMAR, GOD AND GOVERNMENT: A BIBLICAL HISTORICAL AND CONSTITUTIONAL PERSPECTIVE 621 (2011).

6 ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 515 (1973).

7 ALISSA ACKERMAN AND MEGHAN SACKS, INTRODUCTION TO CRIMINAL JUSTICE: A PERSONAL NARRATIVE APPROACH 179 (2016).

8 ACKERMAN AND SACKS, 179.

9 FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 23 (2005).

10 SCHAEFFER, AT 26.

11 DEMAR, GOD AND GOVERNMENT 124.

12 Leviticus 19:15.

“violent offenders” deserving of the most severe and harshest punishments. More importantly, these men and women are neighbors, the very people Christians are commanded to love: “You shall love your neighbor as yourself. There is no other commandment greater than these.”¹³

This goal is frustrated by the prison system, because prisons cannot be a part of the community at large.¹⁴ This is largely the result of a *confinement without purpose* approach to justice. Prisons are simply warehouses filled to capacity with inmates without goals and having no direction. Our primary emphasis, rehabilitation, has failed. It is a flawed foundation, so we are left with warehousing: simple confinement.

A theory that focuses on simply confining or isolating an offender from society at large, and nothing more, is unjust. If confinement is society’s solution, it does not demonstrate concern for the prisoner’s well-being beyond simply keeping them guarded and in a cage. Prison caretakers are not concerned for the prisoners well-being and do not demonstrate any desire of improving their lives. And incarceration rates ensure that authorities cannot possibly do any more than the status quo. Guards are severely outnumbered, so conditions are dangerous. Prisons are dehumanizing because prisoners are exposed to inhuman or subhuman experiences and conditions. It is commonplace for guards and inmates to be exposed to assaults, rapes, drug trades, strip searches, nudity, gang violence, sodomy, and corruption. “Confinement” is masquerading as “justice,” and the mask is now off, revealing the system for with it is: an exercise in futility and a system with no real aim. Shouldn’t we consider the possibility that confinement without a purpose is itself inhumane?

In addition, the prison system is dehumanizing because it can be discriminatory. Discrimination is “the

unfair or prejudicial treatment of people and groups based on characteristics such as race, gender, age or sexual orientation”¹⁵ As Christians, we believe that every person is made in the image of God, regardless of his or her racial, ethnic, social, or financial status. Yet, our prison system seems to be inherently discriminatory. Statistically, the picture is disturbing. One out of every three black men are subjected to confinement or imprisonment at some point in their life, compared to only one out of every seventeen white men.¹⁶ This is inherent injustice. In fact, people of color make up sixty-seven percent of the prison population.¹⁷ Prison sentences

within the black community are no longer a surprise. Time in prison is often viewed as a “badge of honor” within that same community.¹⁸

The rate of incarceration within the U.S. increased exponentially after 1972,¹⁹ and accompanying that increase was an increased share in the prison population by the black

community. The share of the prison population of white males is 500 per 100,000 while the rate among black males is a staggering 3,000.²⁰

The question must be asked whether it is merely a coincidence that our prison population is composed primarily of members of a single minority. If it is not merely a coincidence, we must examine the myriad criminal justice policies and practices which contribute to these disproportionate rates of incarceration and ask whether our system is just.

Furthermore, incarceration places an undue financial burden on the community. When an offender is placed in the custody of the state, the state is now responsible for their care. They require guarding, bed, meals, uniform, and schooling or a trade. These costs are now the responsibility of the state, and those costs have been calculated to be \$20,000 per year per inmate.²¹ Yet the cost to the family may be immeasurable. One cannot measure the

*These men and women
are neighbors, the very
people Christians are
commanded to love.*

¹³ Mark 12:31 (ESV).

¹⁴ DUNCAN B. FORRESTER, CHRISTIAN JUSTICE AND PUBLIC POLICY 69 (1997).

¹⁵ The American Psychological Association, *Discrimination: What it is, and how to cope*. <http://www.apa.org/help-center/discrimination.aspx>. Accessed September, 18, 2017.

¹⁶ The Sentencing Project, *Criminal Justice Facts*. <http://www.sentencingproject.org/criminal-justice-facts/>. Accessed July 19, 2017.

¹⁷ Id.

¹⁸ WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 34 (2011).

¹⁹ Id., at 34.

²⁰ Id., at 34.

²¹ William Spelman, *Crime Cash and limited options: Explaining the prison boom*, CRIMINOLOGY AND PUBLIC POLICY, Vol. 8, Issue 1 (2009), 30.

loss a son or daughter incurs from their father or mother serving time behind bars. What can be measured is the increase in welfare assistance that will be given to these families to compensate for the income loss associated with incarceration.²² Incarcerating individuals for long periods of time impairs their ability to find long-term employment, and more importantly, free their family from the chains of poverty. Scripture asserts that justice is also given to the poor and it must not be severely punitive and controlling: “You shall not pervert the justice due to your poor in his lawsuit. Keep far from a false charge and do not kill the innocent and righteous for I will not acquit the wicked.”²³

This passage is a two sided in its exhortation. The poor shall not be given any favor due to their status of poverty. Equally, their justice must not be perverted because of their limited means. The writer is directly addressing magistrates and judges which is evident in the phrase, “Your poor,” or *the poor in your midst*. The system of justice operating in our courts and prisons are filled with accused defendants who are financially below the poverty line. Securing private attorneys for representation is well beyond the reach of most people charged with felony crimes. In fact, 80 percent of those charged with felonies are classified as indigent and cannot hire their own lawyer.²⁴ All criminal defendants deserve representation in court proceedings. Yet court rules and laws are severely complex and often are not explained to defendants. They are then pressured to plead guilty to compensate for the backlogged court dockets and cases filling the system. The end result is a perversion of justice: innocent people filling our prisons and countless others being wrapped into the courts who would otherwise be left alone. One tragic example is Kalief Browder.²⁵ Kalief was a New York City teenager who was incarcerated in Riker’s Island. This prison remains one of the most notoriously violent complexes on the east coast. He spent three years in prison only to have his charges of theft of a backpack dismissed. Sadly, he took his own life shortly after his release. His time in prison and solitary confinement contributed to his mental state. His case highlights a perversion of justice through over punishing. With the lack of legal representation for defendants and the prevalence of so many

indigents in the system, mass incarceration is bound to continue.

Not only are prisons contrary to God’s designed justice, but what is prescribed by that justice—His Law—is the exact opposite of what happens in the modern criminal justice system. The overriding and most prevalent sanction for a violation of any of God’s Law is restitution. Biblical law does not call for imprisonment as a consistent punishment for any violation, as it fails to repair the relationship between the victim and the lawbreaker. Restitution was prescribed in cases of theft: “If the stolen beast is found alive in his possession, whether it is an ox or a donkey or a sheep, he shall pay double.”²⁶

God Himself imposed these laws. They set forth clear and abounding principles which upheld the importance of property rights and wealth. The principles of restitution and the penal sanctions are also found to be *in kind*.²⁷ The property and the penal sanctions must be of equal value. Restitution impresses upon a thief the clear picture that the loss to the victim is only on himself and no one else. In Leviticus, the process of restitution is further outlined and adds the “twenty percent” provision:

[I]f he has sinned and has realized his guilt and will restore what he took by robbery or what he got by oppression or the deposit that was committed to him or the lost thing that he found or anything about which he has sworn falsely, he shall restore it in full and shall add a fifth to it, and give it to him to whom it belongs on the day he realizes his guilt.²⁸

Leviticus outlines a principle of direct restitution, which restores the victim, double of what he lost.

The restitution process in today’s justice system does not make the victim whole in any way. The imposed punishment of incarceration, in fact, severely restricts the offender from making any restitution or restoring the relationship between the two. The offender cannot make the victim whole through restitution if he is serving months or years in a cage that restricts his ability to gain any financial footing.

²² Spelman, at 30.

²³ Exodus 23:6. ESV.

²⁴ Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 85 (2012).

²⁵ Jennfer Goonerman, *Before the Law*, *THE NEW YORKER*, October 6, 2014. <https://www.newyorker.com/magazine/2014/10/06/before-the-law> Accessed September 19, 2017.

²⁶ Exodus 22:4. ESV.

²⁷ JOEL MCDURMON, *THE BOUNDS OF LOVE: AN INTRODUCTION TO GOD’S LAW OF LIBERTY* (2016).

²⁸ Leviticus 6:4-5 ESV

IV. A BIBLICAL MODEL OF CRIMINAL JUSTICE

The biblical model of criminal justice starts at the ground level: “In the beginning, God created the heavens and the Earth.”²⁹ The Triune God, Father, Son, and Holy Spirit is the beginning. When considering the importance of Creation within the large scale of criminal justice, one must start with God, not man. Man must not start with himself when imposing justice for God and His standard. One theologian speaks of the importance of God and creation. Specifically, he states, the Trinity held “counsel” before man was created.³⁰ This was rather different from the creation of Earth itself and the creatures which inhabit it. When man is created, he was not created after the likeness of any other living thing before it. The phrase, “after their kind,” is distinctly absent.³¹ Man is made “in God’s image and after His Likeness.”³²

The importance of Creation as it relates to the prison system does not end there. The implications extend to the whole person as God also imparts to man a soul.³³ This makes humans unique and set apart from the rest of creation. There is a body and spirit which is able to conceive what is right and wrong.

Some readers may ask, “What does creation have to do with the prison system or mass incarceration?” One must ask the crucial question: *Who or what is being placed in a cage?* Only the Christian worldview can definitively answer that question. If one holds to a biblical framework of Creation, one must view the image of God as the grid through which they view justice. Justice is not treating millions of image bearers like the very animals they are to have dominion over.

Then God said, “Let us make man in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth.”³⁴

The Creation mandate shows that ownership begins with God. He made man and has delegated stewardship

of earth to mankind.³⁵ Along with that delegated stewardship are rules and laws to abide by. Man can succeed or severely complicate and fail his stewardship of earth by how he holds to those laws. God has passed those civil and moral laws to man in history. However, a rival covenant has ruled this era of history. It has seized control of the justice system with the belief that man owns the earth and can therefore establish his rules and serve as an autonomous judge.³⁶

Additionally, the Bible does not see race in justice: There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, of you are all in Christ Jesus. And if you are Christ’s then you are Abraham’s offspring, heirs according to the promise.³⁷

The word “prison” is used forty-three times in Scripture.³⁸ The Old Testament does not prescribe the use of imprisonment as punishment in the Law. In fact, the only form of punishment mentioned for crimes in all of Scripture are restitution and retribution. While Scripture is silent on the use of prisons for the people of Israel, one must consider the possibility that its silence is a caution against its use.

The first mention of prison in the Pentateuch is found in the book of Genesis:

And Joseph’s master took him and put him into the prison, the place where the king’s prisoners were confined, and he was there in prison. But the Lord was with Joseph and showed him steadfast love and gave him favor in the sight of the keeper of the prison.³⁹

Joseph, son of Jacob was sold into slavery by his brothers and eventually worked his way into leadership of Pharaoh’s house. In this instance, prison was used as an unjust punishment forced upon Joseph for being obedient to God. Egypt was holding the nation of Israel in captivity and did not hold to any forms of biblical law. Therefore, this form of punishment would likely fall outside the scope of God’s justice.

²⁹ Genesis 1:1 ESV.

³⁰ MARTIN LLOYD-JONES, *GOD THE FATHER, GOD THE SON*, VOL. 1 154 (1996).

³¹ Id.

³² Id.

³³ Id.

³⁴ Genesis 1:28. ESV.

³⁵ GARY NORTH, *WHEN JUSTICE IS ABORTED* 10 (1989).

³⁶ Id.

³⁷ Ephesians 4:28-29. ESV.

³⁸ Logos search for the term “prison” revealed 43 mentions in the Lexham English Bible.

³⁹ Genesis 39:20-21 ESV

We see another instance where there is distinct evidence of a foreign influence of the prison culture. One example of this can be found in the book of Ezra: “Whoever will not obey the law of your God and the law of the king, let judgment be strictly executed on him, whether for death or for banishment or for confiscation of his goods or for imprisonment.”⁴⁰

This is the only mention of imprisonment as a sanction for punishment. However, it does not fall under the jurisdiction of the nation of Israel. Rather, it is sanction given by the Persian King Artaxerxes.⁴¹ Notice here that God, after ordering Ezra to appoint magistrates and judges, instructs him to place judgement on those “who do not obey the law of the king.” One theologian explains that this passage is a legal sanction which occurs after the exile.⁴² As a result, this sanction was enacted under Persian law, not biblical law, and would not support an argument for the use of prisons by the people of God.

The Bible also recognizes that prisons are often used as a tool of oppression: “To crush underfoot, all the prisoners of the earth, to deny a man justice in the presence of the Most High, to subvert a man in his lawsuit, the Lord does not approve.”⁴³

This is another instance in Scripture where a negative connotation of prison use is depicted. The writer of Lamentations outlines God’s disapproval and utilizes the imagery of a crushing blow being delivered to all prisoners on earth. If the biblical justice process was followed more closely, direct restitution would be made without an extra cost to the taxpayer who must pay for the prisoner’s cot and meals year after year. The offender would have the possibility of paying or working off his debt to the victim. Additionally, if a more biblically-informed approach was followed, the Government would be prevented from punishing more than required. It would be prevented from “stealing” from its own citizens to warehouse and cage its felons and criminals like animals.

Government and state authorities are not above biblical law. It may not engage in theft, murder, false witness, or violence. It must hold to the same commandment which its citizens are subject to. This is the “rule of law.” The State is not entitled to excessive fines, while punishing someone for the crime of theft. This author witnessed evidence of over punishment on numerous occasions. It was commonplace to see judges sentence an offender to 3 years flat of state prison time and \$1,000 in fines paid directly to the State for a violation of probation. This punishment of warehousing the offender does not fit the crime. Why is the judge ordering the additional fines to the state while the victim is still waiting to be made whole? Additionally, how does prison time allow for the offender to make his restitution payments?

This is a symptom of the total abandonment of biblical restitution within the U.S. prison system.⁴⁴ Crimes are now perceived to be committed against the State as a whole, rather than against the victim. Therefore, the emphasis is taken off of the victim. Restitution is stressed in Scripture to emphasize that the offenders’ actions are committed against God, and that they are ultimately responsible to Him and His Law. If a biblical approach to restitution were followed, society would see the thief and victim restored.

It is increasingly difficult for felons to overcome the shame of their long exile of imprisonment. With the humanistic justice process of selective enforcement and the complex legal hurdles, getting one's life back after incarceration is nearly impossible.

It is increasingly difficult for felons to overcome the shame of their long exile of imprisonment. With the humanistic justice process of selective enforcement and the complex legal hurdles, getting one’s life back after incarceration is nearly impossible. Michelle Alexander states, “When someone is convicted of a crime today, their ‘debt to society’ is never paid.”⁴⁵ This is a negative result of the current state of our justice system. Sadly, it is a sense of abandonment. “Even in church, a place where many people seek solace in times of grief and sorrow, families of prisoners keep secret the imprisonment of their child or relatives.”⁴⁶ Church can be a source of pain for families suffering through a period of incarceration.

⁴⁰ Ezra 7:26. ESV

⁴¹ MARSHALL, at 7.

⁴² RUSHDOONY, at 515.

⁴³ Lamentations 3:34-36. ESV

⁴⁴ DEMAR, at 624.

⁴⁵ ALEXANDER, at 163.

⁴⁶ Id., at 166

The church can be a place of restoration for those who have been incarcerated. One does not have to be a Christian to observe the need for restoration. Being restored is essential to humanity. Christians can heed to this call to restore both the offender and the victim. This is the essence of justice that the “system” leaves out and poorly enacts. How should the church respond to these families? Is there a new direction in which they may go?

While there is no direct prescription for the use of prison, it remains of pivotal importance. The writer of Hebrews clearly states that the prison system is of clear importance for the church: “Remember those who are in prison, as though in prison with them, and those who are mistreated, since you also are in the body.”⁴⁷

With this passage, we have a clear reminder to remember those who are in prison. This verse in no way discontinues the practice of imprisonment, merely the exhortation to “remember” all humans who are incarcerated. Compassion is a necessary mark of the Christian life.⁴⁸ This theological exhortation to remember, to be mindful of those image bearers, and to demonstrate compassion, must lead to action. The church needs more men and women to serve those in the justice system with their talents. The church can love their neighbors as though they are in prison by working in the justice system and by serving as advocates for the voiceless.

As Dr. Chris Marshall has stated, “an ‘out of sight out of mind’ attitude is not an option for Christians.”⁴⁹ When someone becomes an inmate in a jail or a prison, they are stripped of their true identity and become a number.⁵⁰ We must begin the process of restoring the human dignity of those suffering in the criminal justice system. “Punishment becomes less attractive to the state when

those relationships humanize the people the state targets.”⁵¹ Christianity brings a message of humanity. That message is clearly needed in a system which searching for reform and an end to the vicious cycles of mass incarceration and over punishment. No one can change the origins of the prison now.

But there is hope for the future use of prisons and the future of doing justice. Our use of prisons can be reformed. The vicious cycles that the justice system finds itself in can be changed. Human justice is an imperfect system. Human justice and punishment imposed by rulers within the system are operating in a world in the grips of evil and fallen judgment. Therefore, the system must strive for a more biblically informed worldview in line with God’s justice and restorative principles. This will provide a fuller picture of what Jesus outlines in the Gospels.

V. CONCLUSION

Jesus has come to set prisoners free.

The Spirit of the Lord is upon me, because he has anointed me to proclaim good news to the poor. He has sent me to proclaim liberty to the captives and recovering of sight to the blind, to set at liberty those who are oppressed, to proclaim the year of the Lord's favor.”⁵²

Jesus proclaimed a message of liberty and freedom to those who are oppressed. Jesus’s message rings true today. There are many who are held captive, in steel cells, subject to excessive punishment. There are also victims, awaiting their chance to be made whole through biblical restitution. The gospel is a message of freedom and love, for the offender and the victim. Christians ought to also

⁴⁷ Hebrews 13:3, ESV

⁴⁸ MARSHALL, at 7.

⁴⁹ RUSHDOONY, at 515.

⁵⁰ Lamentations 3:34-36. ESV

⁵¹ DEMAR, at 624.

⁵² ALEXANDER, at 163.

⁵³ Id., at 166

⁵⁴ Hebrews 13:3, ESV

⁵⁵ KENNETH L. BARKER & JOHN R KOHLENBERGER, ZONDERVAN NIV BIBLE COMMENTARY 1008 (1994).

⁵⁶ MARSHALL, at 2

⁵⁷ “Jail” and “prison” are used differently in the United States. Jails are typically run by county or local governments. Prisons fall under the jurisdiction of State and Federal governments and used for longer sentences of 365 days to several years.

⁵⁸ STUNTZ, at 310.

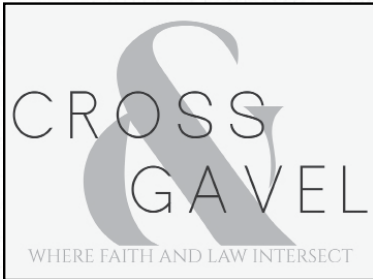
⁵⁹ Luke 4:18 ESV.

⁶⁰ John 14:15 ESV.

desire external freedom of the prisoner and true justice for the victim. Therefore, Christians must be resistant to the injustice of the prison system. Those behind the walls of America's prisons and jails must hear and see the message of hope and grace. When they do, the walls of separation, which hold them back, will come down and they can then be welcomed with forgiveness and grace in the community of Christ and experience true justice. Yet the Christian serving in the justice system is called to treat those they serve with dignity and respect as they are image bearers of God. It is time to reaffirm are commitment

to love our neighbors and more importantly love Jesus and His Commandments.⁵³ This is truly the goal of a biblically-informed worldview.

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SPEAKING OF RELIGIOUS FREEDOM

A Conversation with Kim Colby about the Masterpiece Cakeshop Oral Argument

BY KIMBERLEE WOOD COLBY

On December 5, 2017, the Supreme Court of the United States heard oral arguments in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Kim Colby, Director of CLS' Center for Law and Religious Freedom, attended the oral argument. On December 6, she sat down with *Journal* editor-in-chief Mike Schutt to discuss her impressions.

MIKE SCHUTT: Kim Colby is the director of Christian Legal Society's Center for Law and Religious Freedom. She attended the oral argument yesterday, and she has given a few post-argument interviews, and I thought before things got too far along, we should talk to her about what she saw and heard.

Kim, this case started when two men walked into a cake shop in Colorado. Let's call them David and Charlie (since those are their names).

David and Charlie walked into a cake shop, and they sat down with the owner and asked him to design a custom cake for their wedding. He says, "Before we get down the road on this, I've got to tell you that I don't design cakes for same-sex weddings." They felt like this was illegal discrimination, so they filed a claim with the Colorado Human Rights Commission.

Let's start with how this case is framed in the press. For example, I read in *The Wall Street Journal* that Jack Phillips (the owner of Masterpiece Cakeshop, who had this conversation with David and Charlie), "refused to serve a gay couple." That seems a little misleading to me. Am I right about that?

KIM COLBY: It is quite misleading. And yet it is how the case is being discussed in the media.

The reason it's not accurate is that Jack would sell anything that is pre-made to anyone in his shop, but he won't do custom work or events that he cannot do in good conscience, his religious conscience. He doesn't do Halloween cakes. He doesn't bake any cakes with alcohol. I think at one point, he had been asked to do a divorce celebration cake. Yet he could not and would not celebrate divorce because he believes marriage is sacred, instituted by God, and that is between a man and

a woman. It symbolizes the relationship between Jesus and the church. It wasn't the fact that they were LGBT people walking into this bakery. They could have bought anything—and he told them that—but they were asking him to use his creative talent to create something to celebrate the wedding and that was what the case was really about.

Had they wanted to buy cake and use it as a wedding cake off his shelf, he would not have any problem using it to celebrate this wedding. Anyone could buy a cake off the shelf and use it for a divorce party or a Halloween celebration or whatever. He doesn't feel like he is complicit in selling cakes, but using his gifts to create a custom piece for the celebration.

This actually came up early in the oral argument through questions from Justices Ginsburg and Kagan. Kristen Waggoner, who represents Jack Phillips, made a great point in her oral argument before the Court. She explained that for him to have to create the cake to celebrate events that violate his religious beliefs and convictions would be compelled speech that would violate the First Amendment. He would be compelled by the government to create expression that he objected to. When he has already made something, it's a cake sitting there for anyone to buy, and he's already expressed himself; so he is not then expressing a celebratory message. They can just go ahead and buy it and they can put anything they want to on the cake. That's the line he draws.

MS: There are some listeners who may be saying, "Wait a minute. I thought this was a religious freedom case, not a free speech case." It is both, isn't it?

KC: Right, it is. So many religious freedom cases involved both speech and free exercise. This one is an example of that. Phillips is basically making two main arguments: First, that he is being compelled to create a message that he doesn't agree with. There are a number of very important cases in our Supreme Court jurisprudence that say the government cannot force you to speak a message that you disagree with. A really nice way that the Solicitor General of the United States put it

during argument was that Jack is basically being forced to take part in a parade that has a message that he doesn't agree with. That is a nice mental image.

Second, Jack Phillips makes an argument based upon his right to free exercise of religion. There are two separate free exercise problems. Christian Legal Society filed an amicus brief, written by Professors Doug Laycock and Tom Berg—that actually got some visibility in the argument—that focuses on the free exercise claims. There's a two-part claim here. First, a wedding is a religious ceremony in the eyes of many, though not everyone (maybe not even the couple here, I don't know), but it is a religious ceremony in the eyes of Jack Phillips. It has a very strong religious significance. Basic First Amendment principles tell us that the government cannot compel people to take part in ceremonies that have religious significance for them.

The second main argument, which got some airtime at oral argument, is that here the Colorado Non-Discrimination Law was not being applied in a neutral and generally applicable way for two reasons. First, there had been a man who had gone to three bakeries near Jack's shop, and he had asked each of the bakeries to make a cake in the shape of a Bible with a message that was against same-sex marriage, with a Bible verse about homosexual conduct. Each of the bakeries turned him down because they found the message offensive and, therefore, they would not create it.

This man then filed a complaint like the gay couple had done against Jack. He filed a complaint against the three bakeries and whereas the Colorado Civil Rights Commission had proceeded against Jack, had brought charges against Jack for discrimination, the same commission did not bring charges against the three bakeries when they refused to bake this anti-same-sex marriage cake. That fact played a huge role in the discussions yesterday.

Kristen Waggoner brought up the case of the other bakers and argued that the Colorado Civil Rights Commission treated those bakers as if they were exercising free speech. They didn't have to bake those cakes because they didn't agree with the message.

On the other hand, they treated Jack Phillips as if he wasn't the one carrying the message. Therefore, he had to bake the cake. They treated them in exactly opposite ways.

This is the argument that the state is not applying the law generally applicably.

The second factor was raised by Justice Kennedy on his own at oral argument. It seemed to really trouble him that when Jack's case was heard by the Colorado Civil Rights Commission, at least one of the commissioners, possibly two, demonstrated hostility to religion

generally or in particular to Jack's religious beliefs. One of the commissioners basically expressed the view that we hear so often today that religion is responsible for all sorts of terrible things and that religious freedom "should not be a cover for" this kind of discrimination. Interestingly, Justice Kennedy was very concerned that this demonstrated hostility to Jack and that it may have created bias in the hearing—which would be a violation of Jack's free exercise.

What I think is really going on here is that we've had a couple of pretty intense years now of fact-free dialogue about religious freedom and LGBT rights in the wake of *Obergefell*. There are huge chunks of the American population that don't understand what religious freedom looks like or why it's an extremely important public good. There are those who really believe that non-discrimination laws always should trump not only religious freedom, but also free speech claims. That of course is a very extreme view, but it is part of the argument in this case.

This argument that respondents make and that we've heard so much over the last couple of years is that when a non-discrimination law and religious freedom rub up against each other, the non-discrimination law should always prevail over the religious freedom or free speech interest. This is simply not what has been the American legal tradition. It's actually counter to what the laws themselves usually are trying to do. When you have a case like this where a non-discrimination law is being used to prohibit a religious person from living according to his deepest religious values, that's a red flag that something maybe going on here that shouldn't be going on—maybe there's a misuse or an abuse of non-discrimination law.

I think this is an important opportunity for saying, "We can have both." The ACLU and the Colorado government are basically arguing, "No. You only can have one—and that's non-discrimination law." That's just not right.

MS: Talk about the question by the Chief Justice regarding Catholic Legal Services.

KC: The Chief asked a question to both the State of Colorado's attorney and the ACLU attorney. It was the first question to the respondent during the oral argument. Basically, it was, "So if Catholic Legal Services provides pro bono services to everyone, and this couple that have sued Jack had gone to Catholic Legal Services and said, 'We want you to represent us in suing Masterpiece Cakeshop and Jack Phillips for not making our wedding cake,' would Catholic Legal Services be able to say, 'We won't represent you because we believe that same-sex

marriage is a violation of our religious conscience"? Basically, the Chief Justice implied that will be compelled by the Colorado "civil rights" law. Initially, the Colorado SG tried to push back against it, but the bottom line answer from the SG was that Catholic Legal Services would have to represent this couple in suing a baker for basically living according to Catholic beliefs. That didn't really go well.

It is absurd, but it is exactly where this is going. The other thing that's important about that interchange I think is it wasn't explicit, but the briefing by the ACLU and the Colorado government kept saying, "This is just about commercial transactions and commercial businesses. It's not about nonprofit organizations." That's just not true. Nonprofit organizations like CLS had been attacked through non-discrimination policies and other nonprofit organizations have been as well.

If it were true that Colorado is only arguing that this applies to commercial organizations or businesses, then that should have been their response to the Chief Justice: "Oh, Colorado law doesn't apply to the Catholic Legal Services because they're a religious nonprofit." But Colorado's law does actually apply to religious nonprofits.

As the argument unfolded, there were four separate speakers: Kristen Waggoner for Phillips, the Solicitor General of the United States, Noel Francisco, for Phillips, the solicitor general of Colorado, and then the ACLU's attorney. The ACLU's attorney is a good lawyer. This isn't his first time before the court.

During Kristen Waggoner's argument, so early in the oral argument, Justice Ginsburg had been trying to draw the line between "just a cake" and a cake with words written on it because the conversation had been reasonably short between Jack Phillips and the gay couple, because he said very early on, "I just don't do cakes for same-sex wedding." They had not really gotten into exactly what the design of the cake was that the couple wanted or if they would want words on the cake. Justice Ginsburg was trying to draw this line with Kristen early in the argument, trying to imply "there aren't words on this cake. Maybe if there had been a request for words on the cake, that is maybe compelled speech because then you have words, but how can a cake by itself be compelled speech?"

You could see Justice Ginsburg's thinking. Much later in the argument, she asked the ACLU's attorney a hypothetical. She asked whether Phillips would have to write, "God bless this union of Craig and Mullins"—the two men in the case. Could the baker be compelled to put these words on a cake? Could the state compel the words on a same-sex couple's wedding cake if he had at some other time written the words, "God bless this

union of John and Mary" on a heterosexual couple's wedding cake? The ACLU attorney said, "Yes. He would have to write 'God bless this union of David and Craig' because the only difference would be the identity of the customer." I think that was not the answer that Justice Ginsburg was looking for.

Justice Ginsburg surely thought the answer there would have been. "Well, no, of course, not." They state cannot compel someone to say, "God bless this union." That's crazy.

I think she was a little surprised. It shows the extreme nature of the argument they're making. Justice Kagan jumped in, saying, "We don't have to decide that in this case, do we?" She tried to minimize the mistake he had made. But it makes you wonder if they even understand how extreme the argument is that they're making.

MS: Can you talk a little bit about that and how a cake with no words can still be speech?

KC: At first, you think, "Of course, there has to be words to be speech", but that's not true in the sense that if you burn a flag, you are definitely expressing a message even if there are no words written on that flag. The flag itself is a symbol, so we call it "symbolic expression" or symbolic speech. The most famous case for this is the flag burning cases, *Texas v. Johnson*. Also, the *Des Moines School District* case back during the Vietnam War where the students wore a black armband in protest of the war. No words, but the black armband itself is protected speech.

Here we're not talking about a product that's a widget or a product that doesn't express a message, but we are talking about something that is a symbol—like a T-shirt with a picture or an armband.

Here, you have a wedding cake, which is very symbolic in itself of celebrating that particular wedding. The couple feeds each other. It says something to the guests. It is a feature of the wedding itself.

It came up several times during oral argument that people spend hundreds and hundreds of dollars on a wedding cake and they often don't taste that good. You're not feeding your guest something that is the best dessert you can come up with. It's actually a symbol that's very strongly related to wedding.

MS: Jack Phillips named his bakery "Masterpiece Cakeshop" based on Ephesians 2:10, "We are his workmanship"—we are his *poema*, his masterpiece—"created in Christ Jesus to do good works." This is clearly artistic expression in the sense that it is an expression of my created-ness in God's image, and I want to use these gifts for His glory. If I don't think that doing it in this way is

bringing glory to Him, that should be my decision, and not the state's certainly.

KC: Also, there's some of the hypocrisy involved. You don't have to think back more than the beginning of this year when a number of creative talents were not willing to take a part in the inauguration because they disagreed with President Trump's message. There was a cake involved in that one too where someone who had created a particular cake for President Obama's inauguration had been approached about doing one, essentially the same, for President Trump. He would not do it because of his disagreement with Trump's views—and more power to him. Yet that actually would violate the DC Human Rights Law because the human rights law in DC covers political affiliation.

It's interesting that so many people understood why creative people wouldn't want to participate in the inauguration, but they don't understand why Jack Phillips doesn't want to participate in the same-sex wedding.

We need to keep trying to shine a light on the inconsistency by saying, "Hey, we want a pluralistic society in which everyone gets to live according to their deepest convictions."

This year is the 500th anniversary of the Protestant Reformation. It is really the place where the idea of individual conscience took root in our modern Western civilization. Maybe that's overstating it, but I think it's interesting that Jack Phillips is standing before the Supreme Court 500 years after Martin Luther stood before another court and said, "I'm going to stand on the word of God and I can't recant." The left and center should be standing against coercion of the prevailing orthodoxy, and yet they're persecuting Jack Phillips because he engages in religious dissent. That's really troubling.

In our brief, we really are making a pitch for a pluralism in which every one, religious people, non-religious people, LGBT people, live according to their deepest convictions because that's what we understand the First Amendment to be about. The government may not impose an orthodoxy, and we want to ensure that religious dissenters in particular have a right to express their belief particularly when they don't go along with the orthodoxy. The First Amendment is really about protecting everyone's right to dissent because often the ideas that are seen as most wrong-headed 20 or 30 years later are recognized as being correct.

MS: On that point, I've heard people say, "That's just not loving. Jack Phillips should have designed that cake as a

Christian, even though he disagreed in order to show his love for people or whatever."

There is actually room for that kind of position. The question is, "*Who gets to help* Jack Phillips make that decision? His family and his community and his pastor and his church mediating the Word, talking about the Scripture and his duties and what he does with his hands? Or the state? Who gets to tell him what to do?" As Christians, we are guided by a different community. My pastor can coerce me in a particular kind of way that the state cannot.

KC: I've heard this one, too: "He should have made the cake. He should have made two cakes like walking the extra mile." It will always come down to whether the individual gets to make the decision or the government. As Christians, I think we just have to respect that even if we ourselves would have made the cake, the government should not compel us to do so.

Justice Gorsuch did a really fantastic job during the argument, and towards the end of the argument, he pointed out that there were three things the Colorado ordered Jack Phillips to do. One was that he either stop making wedding cakes or he make them for same-sex couples. That's what most of all the discussions have been about.

Another requirement is that Colorado required him to make compliance reports for two years. The third thing they ordered him to do was "retraining sessions" for his employees, several of whom are his family members! Talk about compelled speech. Justice Kennedy got this as well as Gorsuch, who asked the question. There you have your words. You're having retraining of your employees. You're going to have to speak. There's compelled speech, and you have to basically teach your employees something that your religious teachings are exactly contrary to. You're are compelled to say, "My religious beliefs are wrong in the eyes of the State of Colorado."

One of those employees is his daughter. You're requiring a father to tell his daughter that their family's religious beliefs are wrong because the state says so.

MS: You talked about discrimination and you are very careful and I think rightly so to say, "Look, there's a lot of good anti-discrimination laws and a lot of discrimination that's bad." Whatever happened to using words like *invidious* discrimination? We don't do that anymore. I didn't hear it or see it once I don't think in all of the public jurisprudence that's going on in talking about this case – because we all discriminate, and not all of it is bad.

We all make choices. We all choose one person over another. We like one food over another. All the restaurants say, "We reserve the right to refuse service to anyone." Everybody discriminates. The question is what kind of discrimination is bad and of the bad kinds of discrimination, what kinds can the state say something about? We don't have a vocabulary anymore for that, right?

KC: Exactly. Now, discrimination is just bad and it makes it easy then to smear religious people because you just say, "It's discrimination" and everyone looks horrified and doesn't think about what you've just said. Rick Garnett, Professor at Notre Dame, has at least one, maybe two really good articles trying to resurrect the idea of "invidious" to help determine when discrimination is just normal and also good and when it should be punished or prohibited. Of course, religious organizations generally discriminate in who we hire because our personnel is our mission and our message. It is important to have people who are of the same religion in the church or the synagogue they're leading or in the organization they're working for. This is just common sense.

MS: Can you talk about whether there's a cause for optimism and why or why not? You are also welcome to give a forecast of the exact vote and how it will come out and what day it will be announced.

KC: There has been quite a bit of speculation based on the oral argument. Those on the side of Jack Phillips have expressed some cautious optimism that maybe there will be enough votes for him to win this case on the speech or free-exercise grounds. Some of the cautious optimism is based on Justice Kennedy's questions and some of the caution is based on Justice Kennedy himself.

Justice Kennedy asked some very pointed questions of Kristen Waggoner and the US government Solicitor

General. Had the argument stopped after those two arguments, I think we'd all be very concerned. But his questions and statements to the Solicitor General of Colorado began with something like, "Tolerance is very important for a free society. Tolerance should be mutual, and I don't think that the State of Colorado has been either tolerant or respectful of Jack Phillips." Now, that's a paraphrase, but that's generally what he said.

It wasn't a question. It was a statement. That is very much I think how Justice Kennedy sees these issues. He really does want people to be living tolerantly of each other. That's why I think our brief could be very influential because we lay out a way of deciding this case that respects non-discrimination laws and doesn't weaken them and yet has a robust vision of religious freedom.

I think that's the reason for hope, but the problem of course is that Justice Kennedy will be subject to pressure, quite honestly, from the media, from the *New York Times* and *The Washington Post* probably, to line up on the right side basically. Get in line. The ACLU attorney basically claimed that if Phillips won, the LGBT citizens would be relegated to second class status.

That's just not true, but this will be the pressure on Justice Kennedy, who has been quite solicitous of LGBT interests over the past two decades. If he somehow starts thinking that what the ACLU attorney says is true, then he could retract or re-transform the questions he was asking during the oral argument.

For all of this, we just should be praying just generally for the court always and for this decision in particular.

Kim Colby has worked for the Center for Law and Religious Freedom since graduating from Harvard Law School in 1981. She has represented religious groups in numerous appellate cases, including two cases heard by the United States Supreme Court, as well as on dozens of amicus briefs in federal and state courts. She was involved in congressional passage of the Equal Access Act in 1984.

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