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## Jurists for Jesus

Barbara L. Atwell

*Elisabeth Haub School of Law at Pace University*

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## Jurists for Jesus

Barbara L. Atwell\*

*Dominique Green . . . [is] . . . an inmate who lives in the solitary confinement of a six-by-nine foot cell for twenty-three out of every twenty-four hours. . . . [V]isit[s] must take place in one of a row of tiny visitors' booths . . . through which prisoner and visitor may observe each other but never touch . . . . Dominique is where he is for two reasons only: because he is poor and because he is black. Raised in an alcoholic household by a mother whose idea of discipline was to burn the palms of her children's hands, living on the streets . . . [by] the time he was fifteen, Dominique was no angel—nor should the society that failed him utterly expect him to have been. At eighteen he was involved, it would seem, in an armed robbery with three other boys. The victim pulled a knife. There was a struggle and one shot was fired, killing the victim. The only independent eyewitness did not identify Dominique as the killer. The police did a deal with one of the boys—the only white one . . . . The white boy, never charged with anything, went free, and the district attorney interfered with investigators attempting to interview him; the three blacks went to prison. Dominique alone was sentenced to death after testimony from a psychologist known to believe that African Americans and Latinos are more prone to violence than others . . . . This psychologist was chosen by Dominique's court-appointed attorneys, who appeared—even to the victim's wife—to work hand in glove with the prosecutors. These attorneys failed to introduce evidence that there had been a struggle (which would have led to a conviction for manslaughter, rather than murder), nor did they request DNA tests of any kind.<sup>1</sup>*

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\*Professor of Law & Director of Diversity Initiatives, Pace University School of Law. Many thanks to my friend, colleague, and prisoners' rights expert, Professor Michael Mushlin, and to my research assistant, Gloribelle Perez.

<sup>1</sup>THOMAS CAHILL, A SAINT ON DEATH ROW: THE STORY OF DOMINIQUE GREEN 2-3 (The Doubleday Publishing Group 2009). Dominique Green became a source of strength for other inmates and a source of inspiration to virtually all who met him, including Archbishop Desmond Tutu. *Id.* at 108-09. Green was executed by lethal injection in Huntsville, Texas on October 26, 2004. *Id.* at 109. He was only thirty years old. *Id.* at 131. Dominique Green's case is not unique. See, e.g., MUMIA ABU-JAMAL, LIVE FROM DEATH ROW (Perennial 2002) (1995) (Mumia Abu-Jamal remains on death row despite evidence of his innocence and fails to receive a fair trial); Bob Barr, Op-Ed., *Death Penalty Disgrace*, N.Y. TIMES, June 1, 2009, at A21 (discussing the impending execution of Troy Davis, a man on death row, in which seven of nine witnesses against the accused recanted their testimony and in which "[n]o court has ever heard the evidence of [his] innocence"). On March 26, 2009, United States Senator Jim Webb introduced the National Criminal Justice Commission Act of 2009 into the Senate, calling our current system a "national disgrace" and seeking the formation of a Commission that would overhaul it. Jim Webb U.S. Sen. for Va., *The National Criminal Justice Commission Act of 2009*, <http://webb.senate.gov/issuesandlegislation/criminaljusticeandlawenforcement/National-Criminal-Justice-Commission-Act-of-2009.cfm> (last visited Apr. 1, 2010); but cf. *The Brian Lehrer Show: Hip Hop Justice* (WNYC radio broadcast May 27, 2009), available at <http://www.wnyc.org/shows/bl/episodes/2009/05/27/segments/132872> (last visited Apr. 1, 2010) (In an interview on WNYC public radio, George Washington Law Professor Paul Butler discussed the moral and economic failure of the criminal justice system, arguing for jury nullification in some cases that involve no violence and no victim).

### Introduction

At first glance, Dominique Green's case may seem to have nothing to do with the teachings of Jesus. At virtually every turn, however, his case violated Jesus' fundamental mandate to love our neighbors as ourselves. Dominique was treated with almost utter disregard: from his abusive mother, to the failure of his initial court appointed attorneys to properly defend him, to his later efforts to try to access court records,<sup>2</sup> and ultimately to his death sentence. His case is not unique. There are over 2.3 million people incarcerated in the United States, far more than any other developed nation.<sup>3</sup> An estimated 3,220 of those inmates are on death row.<sup>4</sup> These numbers reflect failed criminal justice policies that need to be explored.

One place to begin that exploration is with the life of Jesus. Regardless of religious beliefs, Jesus' life and the values he embodied continue to provide the moral compass for millions of people throughout the world.<sup>5</sup>

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<sup>2</sup> CAHILL, *supra* note 1, at 116-20 (In a letter, Dominique pleads for a response to his repeated requests for trial transcripts and other records).

<sup>3</sup> HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008 – STATISTICAL TABLE (2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf> (placing the total number of inmates in custody as of June 2008 at more than 2,300,000); *see infra* p. 17 and note 70 and accompanying text.

<sup>4</sup> BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2007 - STATISTICAL TABLES (2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/html/cp/2007/tables/cp07st04.cfm>.

<sup>5</sup> Among those influenced by Jesus' teachings are Christians who believed that he was God, Jews who believed that Jesus was a prophet, and others who believed that Jesus was simply another mortal human being, but believed in his moral teachings. While Jesus' lasting influence is beyond dispute, there are divergent viewpoints about the substance of some of his teachings. *See, e.g.*, BART D. EHRMAN, JESUS, INTERRUPTED: REVEALING THE HIDDEN CONTRADICTIONS IN THE BIBLE (AND WHY WE DON'T KNOW ABOUT THEM) (HarperCollins 2009) (examining the New Testament from an historical perspective and focusing on its discrepancies and contradictions); BART D. EHRMAN, MISQUOTING JESUS: THE STORY BEHIND

In fact, Jesus is arguably the most influential person ever to have lived.<sup>6</sup> Aspiring to the laws and policies that reflect his teachings is fitting for they are the laws and policies that will likely lead to true justice.

This article focuses on Jesus' fundamental mandate to "love your neighbor as yourself."<sup>7</sup> These five words encompass two prongs: honoring every individual ("yourself"), and caring for the human community as a whole ("your neighbor"). This article refers to these two fundamental prongs as the Jesus Principles.<sup>8</sup> An individual does not need to be a Christian or otherwise religious to embrace the Jesus Principles; in fact, they are universal.<sup>9</sup>

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WHO CHANGED THE BIBLE AND WHY (HarperCollins 2005) (highlighting that the New Testament was written by fallible individuals years after Jesus' death and includes mistakes and changes made over time). Cf. MARCUS J. BORG, JESUS: UNCOVERING THE LIFE, TEACHINGS, AND RELEVANCE OF A RELIGIOUS REVOLUTIONARY (HarperOne 2006); TIMOTHY PAUL JONES, MISQUOTING TRUTH: A GUIDE TO THE FALLACIES OF BART EHRMAN'S "MISQUOTING JESUS" (InterVarsity Press 2007) (the text of the New Testament can be trusted); GARY R. RENARD, THE DISAPPEARANCE OF THE UNIVERSE (Hay House 2004) (2003) (forgiveness is paramount to followers of Jesus); KLYNE R. SNODGRASS, STORIES WITH INTENT: A COMPREHENSIVE GUIDE TO THE PARABLES OF JESUS (Wm. B. Eerdmans Publishing 2008) (focusing on discerning Jesus' intent in the parables rather than human distortions that have been inserted over time); DAVID WENHAM, THE PARABLES OF JESUS (InterVarsity Press 1989) (the parables reflect the fundamental theme of God's love); JERRY WILDE, JESUS WAS A LIBERAL: HOW THE CONSERVATIVE AGENDA IS A REJECTION OF CHRIST'S TEACHINGS (LGR Publishing 2006) (liberal rather than conservative beliefs are more inline with Jesus' teaching of love and care for everyone).<sup>6</sup>

<sup>6</sup> See, e.g., EMMET FOX, THE SERMON ON THE MOUNT: THE KEY TO SUCCESS IN LIFE 1 (HarperCollins 1989) (1934) ("Jesus . . . is easily the most important figure that has ever appeared in the history of mankind. . . . More people's lives are influenced by his doctrines" than anyone else); MICHAEL H. HART, THE 100: A RANKING OF THE MOST INFLUENTIAL PERSONS IN HISTORY (Citadel Press 1992) (1978) (ranking Jesus as the third most influential person in history).

<sup>7</sup> *Luke* 10:27 (New Int'l Version); *Mark* 12:31 (New Int'l Version).

<sup>8</sup> Loving our neighbors as ourselves gave rise to Jesus' direction to "do to others what you would have them do to you," *Matthew* 7:12 (New Int'l Version), which we generally refer to as the Golden Rule. The phrase continues, "for this [the Golden Rule] sums up the Law and the Prophets." *Id.*

<sup>9</sup> Many religions have similar mandates. See, e.g., *Udana-Varga* 5:18 (Buddhism: "Hurt not others in ways that you yourself would find hurtful."); *Analec* 15:23 (Confucianism: "Surely it is the maxim of loving-kindness: Do not do to others what you would not have them do to you"); *Mahabharata* 5:1517 (Hinduism: "Do not do to others what would cause pain if done to you."). See also Community of Sant'Egidio, <http://www.santegidiosa.org/> (last visited Apr. 1,

Developing laws and policies consistent with the basic concept of love reflected in the Jesus Principles can guide us toward a more just society.<sup>10</sup>

We have lost sight of the fundamental objective of serving justice. The system would be very different if we formulated laws with the primary end of serving justice, and only secondarily assess the means of achieving that end. More than 2 million people are languishing in prison, approximately 1 in every 100 adults.<sup>11</sup>

Dominique Green was executed because of the apparent failure of the criminal justice system to protect critical rights to which he was entitled.<sup>12</sup> He was executed despite the fact that some of those involved in this miscarriage of justice undoubtedly identify at some level with Jesus' teachings. Dominique's case failed to reflect the teachings of Jesus which much of the world claims as a guide.

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2010) (a non-denominational community formed around the mandate to love thy neighbor as thyself).

<sup>10</sup> Mary C. Szto, *Lanyers as Hired Doves: Lessons from the Sermon on the Mount*, 31 CUMB. L. REV. 27, 40 (2000) (for Jesus, "[j]ustice finds its perfection in love").

<sup>11</sup> Press Release, *Pew Report Finds More than One in 100 Adults are Behind Bars*, *The Pew Center on the States*, Feb. 28, 2008,

[http://www.pewcenteronthestates.org/news\\_room\\_detail.aspx?id=35912](http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912);

*See infra* p. 17 and note 70 and accompanying text.

<sup>12</sup> In addition to the Sixth Amendment right to assistance of counsel, there are a host of other rights for those accused of crimes. *See, e.g.*, MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS, VOL. I CH. 1 (Thompson West 3d ed. 2002) (1984). *Cf.* Bidish J. Sarma, Robert J. Smith & G. Ben Cohen, *Interrogations and the Guiding Hand of Counsel: Montejo, Ventris, and the Sixth Amendment's Continued Vitality*, 103 Nw. U. L. REV. 456 (2009) (comparing the Fifth Amendment right against self incrimination with the Sixth Amendment right to assistance of counsel); Karen Patton Seymour, Steven R. Peikin & Allison Caffarone, *Prosecution of Process Crimes: Thoughts and Trends*, 37 GEO. L.J. ANN. REV. CRIM. PROC. iii – ix (2008) (reviewing a variety of rights of prisoners, including the Eighth Amendment right to be free from cruel and unusual treatment).

The United States has a wealth of laws designed to protect both individual rights<sup>13</sup> and communities.<sup>14</sup> Yet, other laws and policies reflect neither the equal worth of every individual nor equal regard for the community.<sup>15</sup> Although the United States maintains a separation between church and state,<sup>16</sup> the ethical and moral underpinnings of Jesus' teachings can be reflected in our laws without violating the First Amendment.

In exploring the Jesus Principles and their relationship to the law, Part I of this article takes a closer look at three of Jesus' parables that highlight his values and beliefs. Part II explores, from a legal policy perspective, why the law would shift if the Jesus Principles were used as a foundational building block. This is done through the prism of the criminal justice system. This article concludes that the criminal justice system must be re-evaluated if it is to be brought in line with the Jesus Principles. Our imprisonment of

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<sup>13</sup> See, e.g., U.S. CONST. amend. I: Freedoms of Religion, Speech, and Assembly; U.S. CONST. amend. IV: Right against unreasonable searches and seizures; U.S. CONST. amend. VI: Right to counsel; U.S. CONST. amend. VIII: Prohibition against cruel and unusual punishment; U.S. CONST. amend. XIV: Equal Protection of the laws and Due Process protections. Despite these articulated individual rights, laws and policies sometimes undermine their purposes.

<sup>14</sup> Civil rights laws like Title VII and the Voting Rights Act, for example, were enacted to ensure a fair system for all. Other laws like Medicare, social security, and Medicaid are designed to provide a safety net for the elderly and the poor. Child abuse and neglect laws are also designed to ensure the safety of children. See, e.g., Child Abuse Prevention and Treatment and Adoption Reform, 42 U.S.C. § 5105.

<sup>15</sup> While we hope the Obama administration will bring change in this area, we still have a non-system of health care that fails to provide health insurance to about 47 million Americans and those who do have coverage are underinsured. This historic lack of commitment to the health and welfare of the community is not consistent with the Jesus Principles. Another example is the current recession, which arguably reflects the greed of some at the expense of many, and a legal system that allowed the de-regulation of financial institutions. Neither factor reflects the Jesus Principles. Cf. Edmund L. Andrews & Peter Baker, *A. I. G., Huge Bonuses After \$170 Billion Bailout*, N. Y. TIMES, Mar. 15, 2009; Editorial, *Payback Time*, N.Y. TIMES, June 10, 2009, available at [http://www.nytimes.com/2009/06/11/opinion/11thu1.html?\\_r=1&scp=1&sq=payback%20time%20june%202011,%202009%20editorial&st=cse](http://www.nytimes.com/2009/06/11/opinion/11thu1.html?_r=1&scp=1&sq=payback%20time%20june%202011,%202009%20editorial&st=cse) (noting the risk of returning to a status quo that favored bankers and did a disservice to the public).

<sup>16</sup> U.S. CONST. amend. I.

approximately 1 in every 100 adults along with harsh prison conditions cannot be reconciled with the Jesus Principles.<sup>17</sup>

### The Jesus Principles

*“Love your neighbor as yourself. There is no commandment greater than these.”*<sup>18</sup>

There are many forms of biblical interpretation. Some believe that every written word is to be interpreted literally.<sup>19</sup> Others believe that the gospels in the New Testament must be critically analyzed as the work of fallible people.<sup>20</sup> While there are differing views about Jesus’ life, there is a general consensus that Jesus instructed us to love our neighbors as ourselves.<sup>21</sup> In recognizing both the individual and the worldwide community of neighbors, Jesus taught that the love of all humanity is paramount.

Some of the most famous parables told by Jesus highlight the centrality of the Jesus Principles. They demonstrate the importance of each person and of the community, while focusing on treating everyone equally and with love, regardless of their circumstances. Forgiveness and compassion are also of

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<sup>17</sup> See *Pew Report Finds More than One in 100 Adults are Behind Bars*, *supra* note 11. See *infra* pp. 15-32 and notes 69-142 and accompanying text.

<sup>18</sup> *Mark* 12:31 (New Int’l Version); *Luke* 10:27 (New Int’l Version). The plural “these” refers to the other great commandment mentioned at the same time, “Love the Lord your God with all your heart and with all your mind and with all your soul and with all your strength.”

<sup>19</sup> See BORG, *supra* note 5, at 24; MICHAEL O. EMERSON & CHRISTIAN SMITH, *DIVIDED BY FAITH, EVANGELICAL RELIGION AND THE PROBLEM OF RACE IN AMERICA* 3 (Oxford University Press 2000) (One author defines an evangelical Christian as one for whom the “ultimate authority is the Bible.”).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., EHRMAN, *supra* note 5, at 169. (“[Jesus] taught the crowds that entering this kingdom meant . . . loving one’s neighbor as oneself.”).

critical importance. A brief overview of three well-known parables illustrates these points.

### A. Individual Equality

#### *The Lost Sheep*<sup>22</sup>

In the story of the lost sheep, Jesus tells of a shepherd who had 100 sheep. Each night, the shepherd would do an inventory to ensure that all the sheep were accounted for. One night, he counted only ninety-nine sheep. One was lost. While the shepherd could have forgotten about the lost sheep and focused on the ninety-nine that were safely at hand, he instead searched high and low to find the missing sheep. Eventually he found the lost sheep trapped in a tangle of thorns and celebrated.<sup>23</sup>

The shepherd was not celebrating because he now maintained the wealth of 100 sheep instead of ninety-nine. It was not about material possession. Instead, Jesus explained that the celebration was because there was genuine concern about the welfare of the lost sheep. Once found, the shepherd celebrated the sheep's well-being. The meaning behind this parable is that just as the shepherd never forgot about his lost sheep, God<sup>24</sup> never forgets about any person. Regardless of our individual identity characteristics<sup>25</sup> or good or bad deeds, we are all loved and cared for. No one is forgotten, and God especially celebrates when a lost soul returns to the fold.

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<sup>22</sup> *Matthew* 18:12-14 (New Int'l Version); *Luke* 15:3-7 (New Int'l Version).

<sup>23</sup> There is a similar story involving a lost coin. *Luke* 15: 8 (New Int'l Version).

<sup>24</sup> This article uses the term "God" but the reader is free to substitute whatever term he or she prefers.

<sup>25</sup> Identity characteristics include race, religion, ethnicity, and sexual orientation.

*The Prodigal Son*<sup>26</sup>

The parable of the lost son continues this theme. A well-to-do man had two sons, one of whom was restless and wanted to leave home to explore the world. He immediately asked his father for his share of his inheritance so that he could venture off and “find himself.” His father agreed and the son left. During his travels, the son quickly and irresponsibly went through his inheritance. He was embarrassed by the fact that he had spent his entire inheritance and thought his father would be angry with him for his foolish behavior. Nonetheless, having no money, he returned home. Instead of being angry, his father was delighted when he returned and gave him a welcome home party. The father showed nothing but love and compassion for his son. He was not focused on any irresponsible behavior on the son’s part. Like most parents, the father was happy that his son had returned safely and in good health.

The man’s other son, who had remained loyal to his father, stayed home and worked hard, was upset about all the attention given to his wandering, irresponsible brother. But Jesus explained that the father’s love was not conditional upon whether his traveling son had acted responsibly or irresponsibly. The father still loved both of his sons equally, regardless of who displayed the best behavior. Thus, the father celebrated because his family was together again.

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<sup>26</sup> *Luke* 15:11-32 (New Int’l Version).

One interpretation of this story is that the lost son in the parable was not just traveling, but was spiritually lost. Perhaps the son was lost because he was too focused on things and places instead of people. He could have committed crimes or simply been indifferent toward those with whom he came into contact, still, there was joy upon his return. The story of the lost son, like that of the lost sheep, is Jesus' way of explaining that God loves each of us and forgives us when we stray from the mandate to love our neighbor as ourselves. He celebrates when we return home no matter how long that takes or what conduct we have engaged in the interim. Each of us is loved and God is with us always.<sup>27</sup>

The stories of the lost sheep and the prodigal son recognize the equal value of each individual within the larger community. Each sheep was of equal worth as was each son, although that value may have expressed itself in uniquely individual ways. Likewise, each of us is equally valued. This notion of individual equality means that no one is better or worse than anyone else and we should treat one another accordingly. Treating one another as we wish to be treated – the Golden Rule – is an outgrowth of the Jesus Principles.<sup>28</sup> By following this rule, judgmentalism or condescension toward those we may perceive to be different is avoided. Jesus teaches that we are each equally loved<sup>29</sup> without concern for race, religion, ethnicity, gender, sexual orientation

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<sup>27</sup> *Matthew* 28:20 (New Int'l Version) ("... I am with you always ....").

<sup>28</sup> See *supra* note 15 and accompanying text.

<sup>29</sup> The United States places a great deal of value on individuality and our individual rights. Our individual traits may lead us to identify ourselves as belonging

or circumstance or behavior, like socioeconomic status, or misdeeds. As a result, God will not give up on any of us if we go astray; and celebrates when we find our way back home.

### B. Compassion and Community

#### *The Good Samaritan*<sup>30</sup>

By instructing us to love our neighbor as ourselves, Jesus answers the question of who constitutes a neighbor in the parable of the Good Samaritan. According to the story, a man had been beaten, robbed, and left on the side of the road. He was badly hurt and in need of help. A priest walked by the wounded man, but did not offer assistance. Instead, he crossed to the other side of the road, so as not to pass too closely to the man. Likewise, a helper at the Temple came along and failed to assist the wounded man. He too crossed to the other side of the road. Finally, a Samaritan passed by and rendered assistance to the injured man. The Samaritan bandaged his wounds, placed him on his donkey, and transported him to an inn. He then paid for the man to stay at the inn until he recovered.

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to different groups based on race, religion, sexual orientation, disability or the like. Some may identify as Christians, while others as Jews, Muslims, Buddhists, or a multitude of other religions. In addition, there are agnostics and atheists. In racial terms we may identify as Black, White, biracial, Asian, Latino, African or some other race. We can delight in each person's unique set of characteristics and traits, and recognize our fundamental rights as human beings that we all share regardless of any differences. Cf. EMERSON & SMITH, *supra* note 19 (discussing the role of Christianity in race relations); CURTISS PAUL DEYOUNG, MICHAEL O. EMERSON & GEORGE YANCEY, UNITED BY FAITH, (Oxford University Press 2003).

<sup>30</sup> *Luke* 10: 25-37 (New Int'l Version).

The story of the Good Samaritan has two underlying lessons. First, everyone is our neighbor. In the story, the priest's neighbors were not limited to other priests or like-minded individuals, but all human beings. At that time Jews had a history of hostility toward the Samaritans.<sup>31</sup> Thus Jesus was also teaching about nondiscrimination by highlighting the good deed of the Samaritan and suggesting that they too were of equal worth. There is a theme of inclusion rather than separation,<sup>32</sup> of unity rather than duality. The story rejects an "us versus them" mentality in which we care only for those we perceive to be similar to us. Focusing on one's own well-being, without regard to the well-being of other members of the human community, is not consistent with the lesson that everyone is our neighbor.

The second principle, is that we must treat one another with a loving, open, compassionate heart. We must show compassion not only for people we perceive to be like us, but for others in need, regardless of their circumstance.<sup>33</sup> In fact, the story of the Good Samaritan highlights the

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<sup>31</sup> See Encyclopedia Britannica, Parable of the Good Samaritan, <http://www.britannica.com/EBchecked/topic/238742/parable-of-the-Good-Samaritan> ("The low esteem that Jews had for the Samaritans was the background of Christ's famous parable of the Good Samaritan.").

<sup>32</sup> Circle of Atonement, [http://www.circleofa.org/course\\_miracles/ACourseInMiracles.php](http://www.circleofa.org/course_miracles/ACourseInMiracles.php) (last visited April 9, 2010) ("Christ . . . reflects. . . unity rather than separation . . .").

<sup>33</sup> *Matthew* 25:40 (New Int'l Version) (Jesus applauds feeding the hungry, giving drink to those who are thirsty, clothing the naked and the like. As he explains, "I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me."). Slavery, or human trafficking, for example, would be the antithesis of the Jesus Principles. It treats other human beings, often children, as chattel. Modern slavery is alive and well). See E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY 1-2 (Free Press 2008) ("[We] are living at a time when there are more slaves than at any point in history."). Skinner describes how a human slave can be purchased for approximately 100 dollars. *Id.* at 9 - 12. Moreover, "[y]our slave will come in any color you like, as Henry Ford said, as long as it's black. Maximum age: fifteen. He or she can be used for anything. Sex or domestic labor are

importance of helping those less fortunate than we are, and even those we would prefer to avoid.<sup>34</sup> Since Samaritans were “religious and social outcasts” of their day,<sup>35</sup> the fact that it was the Samaritan who is the hero of the story was Jesus way of explaining that we are all worthy and our obligation is to love everyone, simply by virtue of our common humanity.

### C. Forgiveness and Love

In the story of the Prodigal Son,<sup>36</sup> the father welcomed his son back with open arms. There is an underlying theme in this story of total acceptance and forgiveness. Perhaps the son’s actions while he was away left much to be desired. Yet the father’s focus was on the joy of reuniting with him. Forgiveness is not directed only to those we know and love:

Love your enemies, do good to those who hate you, bless those who curse you, pray for those who abuse you. If anyone strikes you on the cheek, offer the other also, and from anyone who takes away your coat do not withhold even your shirt. . . . Do to others as you would have them do to you.<sup>37</sup>

Forgiveness is far reaching. It encompasses not only passive forgiveness of those who hurt us, but also going the extra mile in some circumstances to give

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the most frequent uses, but it’s up to you.” *Id.* at 1. See also, John R. Miller, Op-Ed., *The Justice Department, Blind to Slavery*, N.Y. TIMES, July 11, 2008, at A17, available at <http://www.nytimes.com/2008/07/11/opinion/11miller.html?scp=1&sq=John%20R.%20Miller,%20The%20Justice%20Department,%20Blind%20to%20Slavery&st=cse> (commenting on the Justice Department’s campaign against new regulations that would “strengthen the government’s anti-human trafficking efforts.”).

<sup>34</sup> See *infra* p. 10 and note 37 and accompanying text.

<sup>35</sup> WENHAM, *supra* note 5, at 14.

<sup>36</sup> See *supra* notes 26 and accompanying text.

<sup>37</sup> *Luke* 6: 27-31 (New Int’l Version); see also *Matthew* 5: 38-42 (New Int’l Version). Cf. RENARD, *supra* note 5, at 27 (“Fear blinds the world. Forgiveness sets it free”).

the wrongdoer what he or she needs. It suggests that we actively serve others, even those who harm us. Jesus teaches that everyone, no matter how terrible their actions or thoughts, have “always direct access to an all-loving . . . God, who will forgive [them] and supply His own strength to [them] to enable [them] to find [themselves] again.”<sup>38</sup>

All of the stories and principles outlined above essentially boil down to loving one another and behaving accordingly. If we recognize our shared humanity and equal worth, we will likely have greater compassion for one another, be more forgiving and respond with love. Thus the Jesus Principles can be summed up by focusing on two fundamentals: Every individual is of equal worth; and each of us has an obligation to the human community.<sup>39</sup> The next section explores how the Jesus Principles can be applied to the criminal justice system.

## II. Law, Rationality, and the Jesus Principles -- The Criminal Justice System

*“Whatever you did for the least of these brothers of mine, you do for me.”*<sup>40</sup>

The law tends to focus on whether it is intellectually logical and rational, without necessarily examining its underlying humanity. One can rationalize almost anything. Therefore, love, forgiveness, and concern for one another, principles reflected in the Jesus Principles, are the foundational

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<sup>38</sup> FOX, *supra* note 6, at 5.

<sup>39</sup> Cf. CAROLINE MYSS, ENTERING THE CASTLE: AN INNER PATH TO GOD AND YOUR SOUL 325 (Free Press 2007) (“The archetypal teachings of Jesus . . . [include] his call to love one another as we love ourselves, to forgive one another as often as necessary, to be of service to one another, and to alleviate suffering”).

<sup>40</sup> *Matthew* 25:35-46 (New Int'l Version).

pillars upon which the law should be built. Looking at the criminal justice system through the lens of the Jesus Principles, the question is: Does the system reflect the equal worth of every individual and honor the community?<sup>41</sup> Laws and policies surrounding the criminal justice system fall short on both counts. While the criminal justice system is too multi-faceted to explore all of its components, this article examines a few aspects that illustrate some important shortcomings.

Like the wounded man in the case of the Good Samaritan, people who are brought into the criminal justice system are especially vulnerable. If they have been convicted of crimes and incarcerated, then they have lost virtually every freedom that the rest of society takes for granted. This includes such basic things as the right to travel, assemble with others of their choosing, decide what to eat, when to bathe, the freedom to drive a car, and other simple pleasures are all lost to prisoners. In fact, prisoners are more vulnerable than the wounded man in the story of the Good Samaritan because they are literally out of sight of much of the population. While the wounded man in the story of the Good Samaritan may have been metaphorically invisible, prisoners are literally out of sight and largely out of mind. We must do everything we can to be sure that those who are incarcerated are done so properly. Pursuant to the Jesus Principles, everyone

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<sup>41</sup> There is certainly an overlap between love for the individual and love of the community. If every individual is treated with love, this de facto becomes a community wide protection.

is our neighbor, including those convicted of crimes, and we must treat them humanely.

### A. Legal Rights of the Accused and Imprisoned

There are numerous legal provisions designed to protect those who have entered the criminal justice system. The Fourth Amendment's prohibition on unreasonable searches and seizures, for example, theoretically should exclude evidence against an accused that was gathered unreasonably.<sup>42</sup> The Fifth Amendment's right against self-incrimination provides further protection,<sup>43</sup> as does the Sixth Amendment's right to assistance of counsel<sup>44</sup> and a trial by jury.<sup>45</sup> Those accused of crimes are presumed innocent and have the right to a fair trial in which the state must prove guilt beyond a reasonable doubt.<sup>46</sup>

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<sup>42</sup> U.S. CONST. amend. IV (stating probable cause or a warrant is required in order for a search or seizure to be deemed reasonable). *See also* *Herring v. United States*, No. 07-513 (U.S. Jan. 14, 2009); *Katz v. United States*, 389 U.S. 347 (1967). There are exceptions based on consent or exigent circumstances, for example, a search incident to a lawful arrest where the arrestee poses a danger or may destroy evidence. *See Arizona v. Gant*, No. 07-542, slip op. at (U.S. April 21, 2009); *Chimel v. California*, 395 U.S. 752, 763 (1965); *Safford Unified Sch. Dist. v. Redding*, 2009 U.S. Lexis 4735 (Jun. 25, 2009).

<sup>43</sup> U.S. CONST. amend. V. *See also* *Miranda v. Arizona*, 384 U.S. 436, 495-96 (1966) (holding that arrestees are entitled to have a list of rights identified).

<sup>44</sup> U.S. CONST. amend. VI. *See also* *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (holding a defendant is entitled to counsel at all "critical" stages of criminal proceedings); *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

<sup>45</sup> U.S. CONST. amend VI.

<sup>46</sup> *Dist. Attorney's Office for the Third Judicial Dist., v. Osborne*, 129 U.S. 2308, 2315 (2009). The Confrontation Clause of the Sixth Amendment also gives an accused the right to confront witnesses against him. This includes the right to confront analysts who certify the scientific contents of evidence used against the defendant. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2008).

If convicted and incarcerated, the US Supreme Court has recognized that prisoners do not lose their constitutional rights.<sup>47</sup> The Eighth Amendment's prohibition of cruel and unusual punishment<sup>48</sup>, therefore, applies not only to sentencing, but also to how we treat the incarcerated. Prisoners retain other constitutional rights like the right to free speech, freedom of religion, to habeas corpus,<sup>49</sup> and the right to adequate food and health care. Theoretically protections exist for those entering the criminal justice system.

On the other hand, these *de jure* rights too often fail in practice. For example, while the state must prove guilt beyond a reasonable doubt, prosecutorial misconduct<sup>50</sup> or ineffective assistance of counsel can undermine this right. The Court has arguably diluted several of these rights in numerous cases. In *Osborne* the Court held that prisoners have no substantive due process right to DNA evidence that can establish their innocence.<sup>51</sup> The Court acknowledged the power of DNA evidence while upholding a denial of

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<sup>47</sup> Wolff v. McDonnell, 418 U. S. 539, 555-56 (1974) (“[T]here is no iron curtain drawn between the Constitution and the prisons of this country.”). DeAnna Pratt Swearingen, Comment, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees’ Due Process Rights*, 62 ARK. L. REV. 101 (2009). See generally MUSHLIN, *supra* note 12.

<sup>48</sup> U.S. CONST. amend. VIII. See also Seymour, Peikin & Caffarone, *supra* note 12, at 958-61.

<sup>49</sup> 28 U.S.C. § 2254.

<sup>50</sup> Prosecutors are required to disclose to the defendant all exculpatory evidence prior to trial. See generally Brady vs. Maryland, 373 U.S. 83 (1963). Yet cases of prosecutorial misconduct are legion. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (Thomson West 2d ed. 2007).

<sup>51</sup> See *Osborne*, 129 U.S. at 2315 (distinguishing between pre-conviction versus post-conviction relief, the Court noted that the defendant no longer has the benefit of the presumption of innocence if convicted after a fair trial. Therefore post-conviction relief must “comport with fundamental fairness.”). The majority in *Osborne* found that Alaska’s procedures for post-conviction relief were adequate, although it was one of only four states lacking legislation regarding post-conviction access to DNA evidence. Moreover, earlier attempts by Osborne to access the DNA evidence through the state court system had been unsuccessful.

access to it: “[m]odern DNA testing can provide powerful new evidence unlike anything known before . . . DNA testing has exonerated wrongly convicted people.”<sup>52</sup> The Court, nonetheless, refused to find a constitutional right of access to that evidence.<sup>53</sup>

This elevation of form over substance is unjustifiable. Since we know that individuals are sometimes wrongfully convicted, DNA evidence that could prove innocence should always be accessible.

The Supreme Court has diluted the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination.<sup>54</sup> In *Jackson* the Court held that a prisoner could only waive his right to counsel in the presence of his attorney, or by initiating the waiver by contacting the police.<sup>55</sup> The Court recognized that a prisoner might otherwise waive these protections without sufficient understanding of what he or she was doing.<sup>56</sup> In *Montejo*, by contrast, the Court upheld the death penalty for a man who waived his right to counsel and made incriminating statements to the police before he had a chance to meet his court-appointed attorney.<sup>57</sup> In overruling *Jackson*, the Court in *Montejo* noted that the benefits of making sure that individuals understand their rights before waiving them is “marginal” when compared to

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<sup>52</sup> *Id.* at 2316.

<sup>53</sup> *Id.* at 2316, 2320, 2323.

<sup>54</sup> *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

<sup>55</sup> *Jackson*, *infra* p. 14 note 57, at 636 (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

<sup>56</sup> *Id.* (citing *Edwards v. Arizona*, 451 U.S. 477, 483 (1981)).

<sup>57</sup> *Montejo*, 129 S. Ct. at 2091-92.

the possibility that a guilty person will go free.<sup>58</sup> If police convince a defendant to provide incriminating evidence before he/she has even met his/her attorney, it undermines both the Sixth Amendment right to assistance of counsel and the Fifth Amendment right against self-incrimination.

The Court has likewise, through a variety of decisions, eroded the Fourth Amendment's prohibition of unreasonable searches and seizures.<sup>59</sup> In *Herring v. United States*,<sup>60</sup> the Court held that evidence obtained in violation of the Fourth Amendment need not be suppressed.<sup>61</sup> If a Fourth Amendment violation has no consequences, then it becomes a right in name only.

The Eighth Amendment bar on cruel and unusual treatment has also been construed in a manner incompatible with its apparent intent. In sentencing, the death penalty is still legally available.<sup>62</sup> If killing another human being is not cruel and unusual, it is hard to imagine what is. And the way we mistreat prisoners seems to know no bounds, despite Eighth

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<sup>58</sup> *Id.* at 2090-91.

<sup>59</sup> See, e.g., *Michigan v. Jackson*, 475 U.S. 625 (2006); *United States v. Leon*, 468 U.S. 897 (1984). See also Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court*, 59 CASE W. RES. L. REV. 1 (2008) (noting unreasonableness of the Supreme Court's Fourth Amendment Jurisprudence); Sameer Bajaj, *Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors*, 109 COLUM. L. REV. 309, 310 (2009) (argues that warrantless police stops to investigate completed misdemeanors are constitutional only when employed to defuse an ongoing danger).

<sup>60</sup> *Herring v. United States*, 129 S. Ct. 695 (2009).

<sup>61</sup> *Id.* at 701.

<sup>62</sup> Formally imposed punishment is only **cruel** and unusual if it involves the "unnecessary and wanton inflictions of pain," such as punishment "totally without penological justification" or "grossly disproportionate to the severity of the crime." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

Amendment protection.<sup>63</sup> While the Court still claims to require humane prison conditions,<sup>64</sup> it has made it extremely difficult to prove an Eighth Amendment violation for prisoner mistreatment. In *Farmer v. Brennan*, the Court created a heavier burden for prisoners to meet in order to show an Eighth Amendment violation:

It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety. Our cases have held that a prison official violates the *Eighth Amendment* only when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious." [A] prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities[.]" . . . [S]econd... [t]o violate the *Cruel and Unusual Punishments Clause*, a prison official must have a "sufficiently culpable state of mind." In prison-conditions cases that state of mind is one of "deliberate indifference" to inmate health or safety.<sup>65</sup>

By setting such a high bar for proving Eighth Amendment violations – particularly requiring a showing of improper state of mind – cruel and unusual treatment will inevitably continue.

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<sup>63</sup> See *infra* pp. 26-34 notes 117-146 and accompanying text.

<sup>64</sup> *Farmer v. Brennan*, 511 U.S. 825, 832-34 (1994) (discusses unconstitutionality in inhumane prison conditions and examples thereof); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984) ("prison administrators...are under an obligation to take reasonable measures to guarantee the safety of the inmates"); *Helling v. McKinney*, 509 U.S. 25, 31 (1993) ("[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the *Eighth Amendment*") (emphasis in original).

<sup>65</sup> *Farmer*, 511 U.S. at 834. See also *id.* at 847 (holding the "deliberate indifference" standard to require a showing that the official was subjectively aware of the risk); *Rhodes*, 452 U.S. at 352 (discussing the responsibility of the federal courts to "scrutinize claims of cruel and unusual confinement" in order to stop prisons from violating prisoners' Eighth Amendment right); *Hudson v. McMillian*, 503 U.S. 1, 10 (1992) (rejecting argument that a prisoner must suffer serious injuries for his beatings to constitute cruel and unusual punishment); *Helling v. McKinney*, 509 U.S. 25 (1993) (holding that the Eighth Amendment prohibits inhumane prison conditions); *Prosecution of Process Crimes: Thoughts and Trends*, 37 GEO. L.J. ANN. REV. CRIM. PROC., 943, 944 (2008) (discussing standards and tests used by the Supreme Court in the past to evaluate the prison conditions in each case).

Moreover, the United States criminalizes many behaviors, some of which seem racially based, that would arguably be better dealt with in other venues. One of the most notorious examples is New York's Rockefeller Drug Laws that imposed harsh mandatory sentences for relatively minor drug offenses.<sup>66</sup> As discussed below, we have thousands of individuals – largely people of color – imprisoned both in New York and throughout the country for non-violent drug offenses. The next sections focus on the multifaceted question of why we incarcerate more individuals than any other developed country and how we treat the imprisoned. The law will only be a tool for equal access to justice if it is interpreted in a manner that requires it.

### **B. The Criminal Justice System Violates the Jesus Principles**

The United States prison population is the largest in the world, having experienced a 500% increase since 1970.<sup>67</sup> In fact, more than one out of every 100 American adults is in prison.<sup>68</sup>

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<sup>66</sup> See generally *infra* notes pp. 21-24 and notes 93-105 and accompanying text.

<sup>67</sup> See WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2006 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf>. This number continues to climb. There are now 2,310,984 individuals in state and federal prisons and jails. See also Justice Policy Institute, *Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety*, [http://www.justicepolicy.org/images/upload/09\\_05\\_REP\\_PruningPrisons\\_AC\\_PS.pdf](http://www.justicepolicy.org/images/upload/09_05_REP_PruningPrisons_AC_PS.pdf). This represents a 2.8 percent increase in the prison populations from 2005 to 2006 according to the Department of Justice. This is the largest increase in absolute and percentage terms in the last six years. RYAN S. KING, MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, BIG PRISONS, SMALL TOWNS: PRISON ECONOMICS IN RURAL AMERICA (2003) (between 1980 and 2000 there was a three-fold increase in the United States prison population); But see BUREAU OF JUSTICE STATISTICS, GROWTH IN PRISON AND JAIL POPULATION SLOWING (2009), available at

The United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners. . . . Americans are locked up for crimes -- from writing bad checks to using drugs -- that would rarely produce prison sentences in other countries. And in particular they are kept incarcerated far longer than prisoners in other nations.<sup>69</sup>

The sheer number of prisoners – approximately 2.3 million<sup>70</sup> – is a human tragedy and reflects policies that need to be reconsidered. There is no justification for this exponential growth in incarceration.

In examining why there has been such a tremendous increase in the prison population over the past few decades, several possible explanations come to light. First, the failure of the public educational system to properly educate our children, combined with the creation of zero-tolerance policies in schools, has created a “schools to prison pipeline.”<sup>71</sup> Society has failed many of the imprisoned at a young age by failing to educate them and provide opportunities for upward mobility and success. Second, the war on drugs has increased sentences of non-violent drug offenders, imprisoned

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<http://bjs.ojp.usdoj.gov/content/pub/press/pimjim08stpr.cfm> (noting that the rate of increase in the prison population finally seems to be slowing in some areas).

<sup>68</sup> The Pew Center on the States, *supra* note 11. The report does not include juveniles held in secure facilities nor does it include persons held in immigration detention centers. See also *Prison and Jail Inmates at Midyear 2006*, *infra* note 72.

<sup>69</sup> Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1. Cf. Bob Herbert, Op-Ed, *No Cause for Arrest*, N.Y. TIMES, Apr. 18, 2009, at A23 (describing an impending settlement between New York City and a group of teenagers and young adults of color who were arrested in Brooklyn without justification).

<sup>70</sup> WEST & SABOL, *supra* note 3; see also MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (2007), available at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf).

<sup>71</sup> See *infra* notes 81-89 and accompanying text.

many who could have benefited from drug treatment programs or community service rather than being subjected to harsh prison conditions. Mandatory drug sentencing laws and racially-based distinctions between crack cocaine and powder cocaine also contributed to increased rates of incarceration.<sup>72</sup> Third, the prison industrial complex that privatized many prisons, making them profit-making businesses, arguably contributed to the exponential growth in the prison population.<sup>73</sup> Fourth, we treat the incarcerated in inhumane ways that leave psychological wounds that are likely to result in more rather than less crime.<sup>74</sup> Finally, blatant racism cannot be ignored as one of the reasons for the increase in the prison population.<sup>75</sup>

### Education

There is a clear connection between our broken urban public educational system and the increased prison population. A large proportion

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<sup>72</sup> Far greater penalties have been associated with the use and possession of crack cocaine than with its powdered counterpart. Cf. 18 U.S.C. § 3582(c)(2) (2002); UNITED STATES SENTENCING COMMISSION, 2008 Year in Review, <http://www.ussc.gov/ANNRPT/2008/AR2008YIR.pdf> (2008); UNITED STATES SENTENCING COMMISSION, REPORT ON COCAINE AND FEDERAL SENTENCING POLICY, <http://www.ussc.gov/crack/CHAP5.htm>; Editorial, *Fairness in Drug Sentencing*, N.Y. TIMES, April 30, 2009, at A22, available at <http://www.nytimes.com/2009/05/01/opinion/01fri3.html>.

<sup>73</sup> See *infra* pp. 24-25 and notes 106-112 and accompanying text.

<sup>74</sup> *The Brian Lehrer Show*, *supra* note 1.

<sup>75</sup> This list is not all inclusive. There are undoubtedly other factors that have contributed to the growth in the prison population. For example, the failure to implement strict gun control laws has also played a role. Mary Becker, *Symposium: The Constitution Outside the Courts and the Pursuit of a Good Society: Towards a Progressive Politics and a Progressive Constitution*, 69 FORDHAM L. REV. 2007, 2023-25 (2001). In most of what we call the 'civilized world...violence is much lower and gun ownership tightly regulated.' Webb, *supra*, note 1 ("Four times as many mentally ill people are in prisons than in mental health hospitals"). In addition, we incarcerate many people in need of mental health services rather than providing them treatment that could help them.

of prisoners are high school dropouts.<sup>76</sup> By the time they are in their mid-30s, “6 in 10 black men who had dropped out of school had spent time in prison.”<sup>77</sup> According to one survey, approximately 52% of high school students in the fifty largest cities graduate from high school.<sup>78</sup> In some cities – Baltimore, Cleveland, Detroit, and Indianapolis—the graduation rate is less than 35%.<sup>79</sup> New York City, Los Angeles, Dallas, and Minneapolis also have graduation rates below 50%.<sup>80</sup> This study shows an urban/suburban divide with urban graduation rates generally 17% below suburban rates.<sup>81</sup>

Not only are graduation rates unacceptably low in many urban areas, but some students are effectively moved from schools to prisons via zero-

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<sup>76</sup> GEORGIA FAMILY CONNECTION PARTNERSHIP, UNDERLYING CAUSE OF HIGH SCHOOL DROPOUT, [HTTP://GAFCP.ORG/INDEX.PHP/COMMUNICATE/TMP\\_PUBLICATIONS/CAT/BEST\\_PRACTICES\\_FACTSHEET](http://GAFCP.ORG/INDEX.PHP/COMMUNICATE/TMP_PUBLICATIONS/CAT/BEST_PRACTICES_FACTSHEET) (2001) (ONE RESEARCH STUDY POINTED OUT THAT 82% OF AMERICA’S PRISONERS ARE HIGH SCHOOL DROPOUTS); NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DROPOUT RATES IN THE UNITED STATES – 2005, [HTTP://NCES.ED.GOV/PUBS2007/DROPOUT05/#F2](http://NCES.ED.GOV/PUBS2007/DROPOUT05/#F2) (2005) (“ESTIMATES...THAT APPROXIMATELY 30 PERCENT OF FEDERAL INMATES, 40 PERCENT OF STATE PRISON INMATES, AND 50 PERCENT OF PERSONS ON DEATH ROW ARE HIGH SCHOOL DROPOUTS. . . . ALTHOUGH NOT STRICTLY COMPARABLE, ESTIMATES FOR THE GENERAL POPULATION DURING THE SAME YEARS INDICATE THAT ABOUT 18 PERCENT WERE DROPOUTS.”).

<sup>77</sup> Erik Eckholm, *Plight Deepens for Black Men*, *Studies Warn*, N. Y. TIMES, Mar. 20, 2006, A1, *available at* <http://www.nytimes.com/2006/03/20/national/20blackmen.html>.

<sup>78</sup> CHRISTOPHER B. SWANSON, EPE RESEARCH CENTER, CITIES IN CRISIS, A SPECIAL ANALYTIC REPORT ON HIGH SCHOOL GRADUATION (2008), [http://www.americaspromise.org/Our-Work/Dropout-prevention/~media/Files/Our%20Work/Dropout%20Prevention/Cities%20in%20Crisis/Cities\\_In\\_Crisis\\_Report\\_2008.ashx](http://www.americaspromise.org/Our-Work/Dropout-prevention/~media/Files/Our%20Work/Dropout%20Prevention/Cities%20in%20Crisis/Cities_In_Crisis_Report_2008.ashx). This 2008 report is an analysis of the 2003-2004 school year.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* See Jennifer Medina, *Most in City Now Graduate in Four Years*, N.Y. TIMES, Aug. 12, 2008, at B1. A recent report shows more than 50% of New York City high school students graduating in four years for the first time in many years.

<sup>81</sup> *Id.* See Sam Dillon, *Large Urban-Suburban Gap Seen in Graduation Rates*, N.Y. TIMES, Apr. 22, 2009, at A14. In some cities the urban/suburban divide is more than 40%.

tolerance policies that punish students for minor rules violations.<sup>82</sup> A shift in inner city public school policies and rules could significantly reduce the prison population. As the ACLU explains:

The ACLU's Racial Justice Program is committed to challenging the 'school to prison pipeline,' a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems. Many of these children have learning disabilities or histories of poverty, abuse or neglect, and would benefit from additional educational and counseling services. Instead, they are isolated, punished and pushed out. 'Zero-tolerance' policies criminalize minor infractions of school rules, while high-stakes testing programs encourage educators to push out low-performing students to improve their schools' overall test scores. Students of color are especially vulnerable to push-out trends and the discriminatory application of discipline. . . . [C]hildren should be educated, not incarcerated.<sup>83</sup>

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<sup>82</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 4 (2006), [http://www.naacpldf.org/content/pdf/pipeline/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline.pdf](http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf).

<sup>83</sup> ACLU, SCHOOL TO PRISON, <http://www.aclu.org/racial-justice/school-prison-pipeline>. The NAACP Legal Defense Fund confirms the existence of, and is also seeking to address the school to prison pipeline. See DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, *supra* note 82.

In some states, the number of suspensions exceeded 10% of the number of students enrolled in school in those states. . . . [T]aking children out of school for even a few days disrupts their education and often escalates poor behavior by removing them from a structured environment and giving them increased time and opportunity to get into trouble.

. . .

[I]n 2003, African-American youths made up 16% of the nation's overall juvenile population but accounted for 45% of juvenile arrests. Moreover, studies show that African-American students are far more likely than their white peers to be suspended, expelled, or arrested for the *same kind* of conduct at school.

The school to prison pipeline increases both adult and juvenile prison populations.<sup>84</sup> A disturbing trend in the juvenile justice system has been treating juvenile offenders as adults. Currently, the prison population includes individuals who have been sentenced to life in prison for crimes they committed at ages fourteen and under.

While the United States Supreme Court recently declared that death by execution is unconstitutional for juveniles, young children continue to be sentenced to die in prison with very little scrutiny or review. [Equal Justice Initiative] has documented 73 cases where children 14 years of age or younger have been condemned to death in prison. Almost all of these kids currently lack legal representation and in most of these cases the propriety and constitutionality of their extreme sentences has never been reviewed.<sup>85</sup>

Instead of imposing unduly harsh sentences for juvenile offenders, we must address and improve the educational system. Early and effective education will help to reduce the prison population.<sup>86</sup> It would instill knowledge and provide skills that children could carry with them into adulthood. Additionally, it would be more cost effective to educate than it

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<sup>84</sup> See DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, *supra* note 82 (“Experts say that in some states such as Florida and Maine, as many as 60% of all juvenile offenders have disabilities that affect their ability to learn”).

<sup>85</sup> EQUAL JUSTICE INITIATIVE, DEATH IN PRISON SENTENCES FOR 13- AND 14-YEAR OLDS, <http://eji.org/eji/childrenprison/deathinprison> (2010); See Also *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that children who were under the age of 18 when they committed their crimes could not have the death penalty imposed on them). Nonetheless, these individuals can be given life sentences. Editorial, *Delinquency and Prevention*, N.Y. TIMES, Apr. 10, 2009, at A22. “Treating young people as adults increases the “... risk of being raped, battered or pushed to suicide.”

<sup>86</sup> *Writing Off Disabled Children*, N.Y. TIMES, Aug. 9, 2008 at A18 (recognizing that students who are suspended from school or who drop out are more likely to end up in the criminal justice system).

would be to incarcerate.<sup>87</sup> Failure to educate children, and instead incarcerating juvenile offenders, signals that we have lost hope in their ability to become whole. It ignores the Jesus Principle of forgiveness. To think of children like we think of the Prodigal Son, the law's focus should be how to maximize the chance of each child growing up and reaching his or her full potential. While there may be lapses along the way the law can be a vehicle to help these children become productive members of society.

### *War on Drugs*

Through the war on drugs, the legal system has directly contributed to the exponential growth in the prison population.<sup>88</sup> Moreover, it has devastated communities of color. According to a report by The Sentencing Project, there has been a 1100% increase in drug-related incarcerations since 1980.<sup>89</sup> "To place some perspective on that change, the number of people incarcerated for a drug offense is now greater than the number incarcerated for *all* offenses in 1980."<sup>90</sup> Approximately two-thirds of those incarcerated for drug related offenses are African American or Latino.<sup>91</sup> In describing his

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<sup>87</sup> MUSHLIN, *supra* note 12, at 4 n. 7 (citing MARC MAUER, RACE TO INCARCERATE (2009)) ("In some states, more tax money goes to the operation of prisons and jails than is spent on educating a comparable age group.").

<sup>88</sup> Nicholas D. Kristof, Op-Ed., *Drugs Won the War*, N.Y. TIMES, Jun. 14, 2009, at WK10 ("[T]he number of people in prison for drug offenses [has risen] from [about] 41,000 in 1980 to [about] 500,000 today.").

<sup>89</sup> MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS (2009), [http://www.sentencingproject.org/doc/dp\\_raceanddrugs.pdf](http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf).

<sup>90</sup> *Id.*  
<sup>91</sup> *Id.*

experience as a prosecutor, George Washington Law Professor Paul Butler confirmed the racial component of the war on drugs: “I spent my days locking up low-income African-American and Latino people for mainly non-violent drug offenses. Like a lot of prosecutors, that’s pretty much all I did and so I started to wonder, did I go to Harvard Law School to put poor people in prison?”<sup>92</sup> Professor Butler went on to note that New York still arrests “40,000 people a year for marijuana possession offenses ... I don’t even know if you can afford that these days. . . Is that really the best use of the government’s resources?”<sup>93</sup> The cost of this war on drugs has been in the trillion dollar range.<sup>94</sup>

Mandatory sentencing through laws like New York’s Rockefeller Drug Laws, have contributed to the increase in drug-related incarceration. Mandatory drug sentences can be found at both the state and federal levels.<sup>95</sup> Not only are mandatory sentencing laws unduly harsh, they also have a disproportionate impact on communities of color. Despite the fact that both

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<sup>92</sup> *The Brian Lehrer Show*, *supra* note 1.

<sup>93</sup> *Id.*

<sup>94</sup> Kristof, *supra* note 88 (“We’ve spent a trillion dollars prosecuting the war on drugs. . . Drugs are more readily available, at lower prices and higher levels of potency. It’s a dismal failure.” (quoting Norm Stamper police chief of Seattle who advocates drug legalization)).

<sup>95</sup> See, e.g., Mauer, *supra* note 89, at overview. The 1973 New York Rockefeller Drug Laws imposed a mandatory fifteen year sentence for possession of four ounces of narcotics or sale of two ounces. *Id.* \Fortunately, some of the more draconian provisions of the Rockefeller Drug Laws are being dismantled. See DRUG POLICY ALLIANCE, NEW YORK’S ROCKEFELLER DRUG LAWS: EXPLAINING THE REFORMS OF 2009, [http://www.drugpolicy.org/docUploads/Explaining\\_the\\_RDL\\_reforms\\_of\\_2009\\_FINAL.pdf](http://www.drugpolicy.org/docUploads/Explaining_the_RDL_reforms_of_2009_FINAL.pdf).

crack and powder cocaine are “pharmacologically identical,”<sup>96</sup> much harsher sentences are generally imposed for crack cocaine violations, which usually involve people of color.<sup>97</sup> Its powdered counterpart, often associated with a whiter, more upscale clientele, has lesser penalties associated with it.<sup>98</sup> “Despite changes in federal sentencing guidelines, the mandatory provisions still in place require that anyone convicted of possessing as little as five grams of crack cocaine (the weight of two sugar packets) receive a five-year prison term for a first-time offense.”<sup>99</sup>

The inordinate number of people incarcerated for drug related offenses, especially non-violent drug-offenses, must be examined and the criminal justice policies modified. Some of these offenders need treatment programs, not incarceration. For example, they may need drug treatment, mental health treatment, social services, or simply jobs. Perhaps some drugs, like marijuana, should be legalized.<sup>100</sup> Whatever the solution, it is not

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<sup>96</sup> Mauer, *supra* note 89.

<sup>97</sup> See Editorial, *Fairness in Drug Sentencing*, N.Y. TIMES, May 1, 2009, at A22 (“[I]n 2006, 82 percent of the people convicted under the federal crack statute were black and only 9 percent were white.”).

<sup>98</sup> *Id.*

<sup>99</sup> Mauer, *supra* note 89. See also, *supra* note 101 (While “Congress has repeatedly ignored calls to equalize sentencing . . . the Justice Department . . . told lawmakers that it was time to revisit the crack/cocaine disparity.”). A related problem are laws like California’s three-strikes rule that requires a 25-year-to- life sentence for anyone convicted of a third felony. See Solomon Moore, Study Finds Record Number of Inmates Serving Life, N.Y. TIMES, Jul. 23, 2009, at A24 (highlighting the case of a woman sentenced to life in prison whose third felony was the theft of three track suits to support her cocaine habit).

<sup>100</sup> When President Obama held a virtual town hall shortly after taking office, the most popular question, “which received more than three million votes, was: ‘With over 1 out of 30 Americans controlled by the penal system, why not legalize, control, and tax marijuana to change the failed war on drugs into a money making, money

consistent with the Jesus Principles to incarcerate non-violent drug offenders who are arrested simply for their own use of proscribed substances. Some more humane approach is needed, since prisons are often unsafe.<sup>101</sup> If we view drug abusers as individuals in need of help, just as the Good Samaritan viewed the injured man on the side of the road, we would be more open to explore ways to help them. In some cases, this would mean treating the issue as a public health concern rather than as a criminal problem. In any event, it would be an approach derived from love according to the Jesus Principles.

#### *Prison Industrial Complex*

Drug-related incarcerations must be considered in tandem with the third factor, prison privatization, because drug laws feed the prison industrial complex. The extraordinary rise in the prison population coincided with a move toward privatization of correctional facilities. "In 1987, the number of inmates incarcerated in privately operated correctional facilities worldwide was 3,100; by 1998 the number had risen to 132,000. In the United States today there [are] a total of 158 private correctional facilities."<sup>102</sup> The initial

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saving boost to the economy? Do we really need that many victimless criminals?" Sam Stein, *Obama Takes Pot Legalization Question During Townhall*, THE HUFFINGTON POST, March 26, 2009, [http://www.huffingtonpost.com/2009/03/26/obama-takes-pot-legalizat\\_n\\_179563.html](http://www.huffingtonpost.com/2009/03/26/obama-takes-pot-legalizat_n_179563.html).

<sup>101</sup> See *infra* pp. 28-32 and notes 113-140 and accompanying text.

<sup>102</sup> JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, *EMERGING ISSUES ON PRIVATIZED PRISONS*, iii (2001), <http://www.ncjrs.gov/pdffiles1/bja/181249.pdf>. See also Press Release, Department of Justice, Office of Justice Programs, Growth in Prison and Jail Populations Slowing: 16 States Report Declines in the Number of Prisoners (March 31, 2009), available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/BJS090331.htm> (reporting 126,249 inmates in privately-run facilities in 2008, representing a 6.8 percent increase over the prior year.); AMY CHEUNG, THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION, (2004),

rationale for privatization was that it would save money. It was believed that privatization would cost 20% less to run than public facilities. A 2001 study by the Bureau of Justice Assistance, however, concedes that these cost savings have not materialized.<sup>103</sup> There are more instances of abuse occurring in the privatized prisons than at the government-run facilities. Accordingly, states have begun to move away from privatization. The federal government, on the other hand, continues to increase the number of privatized prisoners.<sup>104</sup>

Prison privatization has created financial incentives to construct and operate prisons. It has created job opportunities for those in the construction business as well as long-term positions for those employed to staff the prisons. For the prison owners, it provides the potential for profit. This prison industrial complex and the jobs it provides help sustain rural economies in which many prisons are located. While urban people of color have been imprisoned in disproportionate numbers, prison employment opportunities for the largely white rural populations in which they are located has gone

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[http://www.sentencingproject.org/Admin/Documents/publications/inc\\_prisonprivatization.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_prisonprivatization.pdf).

<sup>103</sup> Cheung, *supra* note 102, at 2 (The BJA indicates a savings of 1%).

<sup>104</sup> *Id.* Much of this increase is at the expense of immigrants and is attributed to the 1996 Immigration Reform Act, which makes felonies of behavior that would be misdemeanors for citizens. See also Meredith Kolodner, *Private Prisons Expect a Boom, Immigration Enforcement to Benefit Detention Companies*, N.Y. TIMES, July 19, 2006, at C1, available at <http://www.nytimes.com/2006/07/19/business/19detain.html?sq=private+prisons+expect+a+boom&st=nyt>. This double standard based on one's immigration status cannot be squared with the Jesus Principle that each of us is equal.

up.<sup>105</sup> A reflection of the risks this financial scheme creates was illustrated when two judges pled guilty to participating in a scheme to jail juvenile offenders in exchange for money.<sup>106</sup> The judges, who received 2.6 million in kickbacks, pled guilty to wire and income tax fraud.<sup>107</sup>

We need to question whose interests are being served by this prison industrial complex, a system that has been described as a form of modern day slavery.<sup>108</sup> Are we really concerned with making society safe from violent offenders, or is the prison industrial complex all about money? Historically prisoners have been viewed as sinners, deviants, or members of an oppressed class.<sup>109</sup> In the twenty-first century prisoners have become mere commodities in the eyes of entrepreneurs.<sup>110</sup> Injecting profit motive into the running of prisons is fraught with peril, and it should be removed from the equation. While there are individuals who need to be imprisoned, we need not risk imprisoning them for someone else's financial gain. To imprison some for the financial gain of others is completely antithetical with the notion of loving thy neighbor as thyself. Instead, it shows a disregard for the welfare of those vulnerable to such abuse. As such, it cannot be reconciled with the Jesus Principles.

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<sup>105</sup> See generally AUSTIN, *supra* note 103, at 45-46.

<sup>106</sup> Ian Urbina & Sean D. Hamill, *Judges Pleas Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22, available at, <http://www.nytimes.com/2009/02/13/us/13judge.html>.

<sup>107</sup> *Id.*

<sup>108</sup> Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, CENTRE FOR RESEARCH ON GLOBALIZATION, March 10, 2008, <http://www.globalresearch.ca/index.php?context=va&aid=8289>.

<sup>109</sup> See e.g. MAUER, *supra* note 89.

<sup>110</sup> *Id.*

*Prisoner Mistreatment*

The fourth factor that increases the prison population is the mistreatment of prisoners. Mistreatment decreases the likelihood of rehabilitation and increases the likelihood that the inmate will engage in additional criminal conduct upon release, thereby sustaining the huge population of inmates.

One form of prisoner mistreatment is the practice known as supermax. Supermax involves the solitary confinement of prisoners for 23 hours per day.<sup>111</sup> A prisoner may end up in supermax based on the crime for which he has been convicted or because of prison behavior.<sup>112</sup> It can last for months or years on end and essentially constitutes human kennels.<sup>113</sup> There are at least 100,000 prisoners in supermax facilities.<sup>114</sup> Living in solitary confinement for any length of time is difficult, but to make it a way of life is

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<sup>111</sup> John Parry, *Torture Nation, Torture Law*, 97 GEO. L. J. 1001, 1026 (2009) (“[I]nmates must remain in small single-inmate cells (for example seven feet by fourteen feet) for twenty-three hours every day; a light is on inside the cell at all times; inmates take all of their meals alone; the cell door is designed to prevent them from communicating with each other; and they receive one hour per day in an ‘indoor recreation cell.’”). There seems to be wide consensus that supermax confinement is not necessary for anyone’s safety.

<sup>112</sup> David Ball, *Heinous, Atrocious, and Cruel: Appendi, Indeterminate Sentencing and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 946 n.275 (2009).

<sup>113</sup> Human kennels are exactly what the name suggests: larger cages than we would use to contain dogs since humans are larger, but they are cages, nonetheless for individual prisoners. See Norman L. Greene, et al., *Dying Twice: Incarceration on Death Row: A Symposium Held at the Association of the Bar of the City of New York: June 17, 2002*, 31 CAP. U. L. REV. 853, 880 (2003) (“[T]he recreation facility, resembles a dog **kennel** with row after row of barred open ‘recreation’ cages, each of which hold one inmate. The average sentence of people in these facilities is not days. It is measured in years. There are some people held in these facilities who are not scheduled to be released from them until 2014.”).

<sup>114</sup> See Green, *supra* note 113, at 881.

inhumane.<sup>115</sup> In describing the sense of isolation created by this policy, one inmate noted: “[S]ocial interaction is strictly prohibited. I have not watched a television . . . in five years. We are isolated to one-man cages twenty-four hours each day. . . . The isolation experienced . . . is of grave consequence to the human psyche. I have witnessed men literally lose their minds here.”<sup>116</sup> There is nothing about supermax that reflects the Jesus Principles. This kind of confinement is inhumane and clearly contradictory to the command that we love our neighbors. Yet it would be surprising if those who create and enforce the supermax policies do not, in large part, identify with Jesus. It is simply difficult to imagine how prison officials reconcile Jesus as their moral compass with the way they treat other human beings, such as using the death penalty.

The death penalty should be a *per se* violation of the Eighth Amendment. The idea that the intentional taking of another life is constitutionally sanctioned, rather than cruel and unusual punishment is troubling to say the least. Nonetheless, we continue to allow convicted felons to be executed. At a practical level, the death penalty fails to recognize that there are many innocent individuals languishing in prison.<sup>117</sup> Whether because of prosecutorial misconduct, ineffective assistance of counsel, mistake, or other reasons, DNA evidence has shown that some inmates are falsely convicted.<sup>118</sup>

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<sup>115</sup> Cf. Parry, *supra* note 111.

<sup>116</sup> CAHILL, *supra* note 1, at 68.

<sup>117</sup> See generally THE INNOCENCE PROJECT, [www.innocenceproject.org](http://www.innocenceproject.org) (last visited Feb. 10, 2010).

<sup>118</sup> See generally GERSHMAN, *supra* note 50; Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241 (2001); But see Osborne, *supra*

Once a person is executed, there is no way to correct a miscarriage of justice. This is reason enough to eliminate the death penalty.

The death penalty is perhaps the form of prisoner mistreatment that most clearly violates the Jesus Principles. Adherence to the Jesus Principles would lead to the abolition of the death penalty. In essence, sentencing someone to death is the ultimate insult to the Jesus Principle that everyone's life is of equal value. The death penalty communicates to the inmate and to society at large that the prisoner's life is worthless and will therefore be extinguished. The death penalty is also an act of violence,<sup>119</sup> and Jesus said "blessed are the peacemakers."<sup>120</sup> The death penalty also fails to recognize the possibility that people can be reformed.<sup>121</sup> Finally, the death penalty is completely unforgiving.

Jesus' personal experience with the death penalty highlights his disapproval of its use. On one occasion, a woman who had been caught engaging in adultery was brought before Jesus. The law at that time would have permitted the woman to be stoned to death. Rather than engaging in or encouraging the stoning of the woman, Jesus said, "If any of you is without sin

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note 51 (the Supreme Court held that a defendant has no constitutional due process right to DNA evidence that might prove his or her innocence).

<sup>119</sup> It is ironic that as a society we are willing to spend tens of thousands of dollars to keep someone like Terri Schiavo alive, who was in a persistent vegetative state for more than a decade, because we want to err on the side of life, *c.f.* *Schindler v. Schiavo*, 780 So.2d 176 (2001), yet we have no problem executing a physically healthy human being who has been convicted of a capital offense.

<sup>120</sup> *Matthew* 5:9 (New Int'l Version).

<sup>121</sup> See generally CAHILL, *supra* note 1, at 83.

let him be the first to throw a stone at her.”<sup>122</sup> Recognizing that they were not without sin, the crowd began to disperse one by one.<sup>123</sup>

Jesus also faced the death penalty himself and was ultimately crucified. His response to his own imminent death was forgiveness: “forgive them; for they do not know what they are doing.”<sup>124</sup> Jesus’ words suggest that by killing him, his executioners were doing something that required forgiveness. Were we to follow Jesus’ example, we would abolish the death penalty and treat the imprisoned as people entitled to forgiveness despite their criminal acts, making every effort to rehabilitate them.

However instead of treating prisoners with forgiveness, some prisons go to extreme measures when dealing with inmates, specifically, some states subscribe to the practice of shackling pregnant female prisoners when they are giving birth. Even a young child would probably understand that the likelihood of a woman in labor escaping or harming someone is slim. Moreover, to the extent that there is a minor threat of misbehavior, more humane solutions could be devised by prison administrators. Such inhumane treatment is unnecessary and has been recently met with resistance.

Although a few states now disallow the shackling of prisoners in labor, the practice nonetheless persists throughout the country.<sup>125</sup>

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<sup>122</sup> *John* 8:7 (New Int’l Testament). The people walked away and Jesus told the woman that he did not condemn her. *John* 8:11 (New Int’l Testament).

<sup>123</sup> *John* 8:11 (New Int’l Version).

<sup>124</sup> *Luke* 23:34 (New Int’l Testament).

<sup>125</sup> See, e.g., *Nelson v. Corr. Med. Servs.*, 533 F.3d 958 (8th Cir. 2008).

Shackling prisoners in labor not only violates the Jesus Principles, but portrays fear over common sense and regard for one another. It demonstrates that one can rationalize almost anything. The fear is expressed as though it were based on reason. Thus, the “rational” approach would be that sometimes prisoners attempt to escape; therefore we must prevent prisoners from escaping; because pregnant women are not confined to their cells during labor, we must shackle them to prevent them from escaping. While this strictly “rational” approach may in fact ensure that pregnant women in labor do not escape, it ignores the Jesus Principles. Because the sole focus of the “rational” approach is on the possibility of escape, which is unlikely during labor, it shows disregard for the dignity of the prisoner. While going through what is an extremely painful process for most women, it is clear that a prisoner needs the flexibility to move her legs as freely as possible during the labor process. To cause unnecessary pain shows a lack of love and concern for others. Other more humane alternatives, which consider the Jesus Principles, would be to place a guard outside the door or to have the door locked. Failure to

rehabilitate prisoners is another area that shows a lack of love and compassion.

The Jesus Principles demand that we remember that prisoners are our neighbors and must be loved and treated accordingly. In order to be consistent with the Jesus principles, the goal of incarceration must be rehabilitation.<sup>126</sup> By rehabilitating the prisoner, he or she can emerge from prison as a whole and productive member of society, rather than as a hardened criminal, likely to reoffend.<sup>127</sup> Unfortunately, the rehabilitative rationale for incarceration has lost ground over the past few decades.

The social work or rehabilitative approach was the dominant twentieth-century approach to punishment and criminal policy until the 1970s. Scholars provide divergent accounts of the resurgence of the retributivist rationale; some suggest that public perception that "the system had failed to control crime spurred on the movement to change the criminal justice system," while others describe the phenomenon as a pushback against too much "articulation of primarily or exclusively utilitarian purposes in law." But regardless of the cause, the 1970s saw a marked turn away from interest in and emphasis on rehabilitative and utilitarian justifications and a turn toward retribution. The change was neither gradual nor discrete, and it has shown no sign of abating. In the 1970s retribution became, and today it continues to be, the "most widely accepted justification for punishment in the United States."<sup>128</sup>

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<sup>126</sup> Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM L. REV. 115, 136-37 (2008). *See also* Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87 (2008).

<sup>127</sup> *Williams v. New York*, 337 U.S. 241, 248 (1949).

<sup>128</sup> Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM L. REV. 115, 136-37 (footnotes omitted) (the author criticizes a trend toward extensions of and exceptions to statutes of limitations laws. *See also* Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87 (Summer 2008).

Espousing one theory over another is not simply an academic exercise; it directly affects criminal laws and policies regarding prisoner treatment.<sup>129</sup> Prisoner mistreatment undermines efforts to rehabilitate,<sup>130</sup> makes society less safe, and violates the Jesus Principles. For those who are justifiably imprisoned, to protect themselves or others, the Jesus Principles demand that we treat them with compassion, forgiveness, and love. Instead, we all too often do just the opposite, and expose prisoners to inhumane living conditions.

Despite the fact that prisoners are legally entitled to health care, they are often denied critical medical treatment and die unnecessarily.<sup>131</sup> Juveniles have been treated as adults, with no effort to rehabilitate them.<sup>132</sup> Rape in prisons has been well-documented.<sup>133</sup> Prisoners are disenfranchised, permanently in some states.<sup>134</sup> The list goes on.<sup>135</sup> The placement of prisons in remote, rural areas renders visitation difficult for prisoners' family and

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<sup>129</sup> Powell, *supra* note 128, at 137 ("The resurgence of retributivism has influenced the development of many areas of the criminal law. The earliest and most notable example is sentencing reform. Beginning in the later 1970s, states began to discard the indeterminate sentencing model . . . Since then, sentencing law has witnessed a 'thirty-year trend of increasingly, severe sentences ...").

<sup>130</sup> *The Brian Lehrer Show*, *supra* note 1.

<sup>131</sup> See generally, MUSHLIN, *supra* note 12.

<sup>132</sup> *Roper*, 543 U.S. at 578 (2005) (precludes the death penalty for individuals who were under the age of 18 when they committed their crimes).

<sup>133</sup> Prison Rape Elimination Act, 42 U.S.C. §§ 15601 et seq. (2003).

<sup>134</sup> While the prisoners are disenfranchised while imprisoned, for census purposes they are considered residents of the rural areas in which most prisons are located. Accordingly, resources that might otherwise go to the urban communities from which they come, instead get diverted to rural communities. Cf. Anthony Thompson, Op-Ed, *Democracy Behind Bars*, N.Y. TIMES, Aug. 6, 2009 at A29, available at

<http://www.nytimes.com/2009/08/06/opinion/06thompson.html>.

<sup>135</sup> Cf. *Hudson v. McMillan*, 503 U.S. 1 (1992).

friends, who often have to travel long distances to reach their loved ones. Because visitation from family and friends has been shown to play a vital role in rehabilitating prisoners,<sup>136</sup> failure to facilitate visitation is also a form of prisoner mistreatment.

### *Race*

Race is a factor that contributes to the enormous growth in the prison population, and is inextricably intertwined with all of the factors discussed above. On the educational front, urban schools that serve large communities of color are most likely to be sub-standard. Harsh drug sentences disproportionately impact people of color and those who are poor. The dichotomy between the punishments for crack cocaine versus powder cocaine is hard to explain except for the racial link. When it comes to drugs, the wealthy can engage in illicit drug use or sale behind closed doors in upscale neighborhoods. Harsh drug sentences have not served to reduce illicit drug use, nor has incarceration.

The prison industrial complex benefits white rural workers at the expense of people of color who are imprisoned in disproportionate numbers. And since people of color make up a majority of the prison population, the discussion of mistreatment of prisoners, in essence, is a discussion about the mistreatment of people of color. Approximately 66 % of the prison

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<sup>136</sup>*Cf.* CAL. PENAL CODE § 6350 (2009) (“The Legislature finds and declares the following:

(a) Maintaining an inmate’s family and community relationships is an effective correctional technique which reduces recidivism . . . (c) The location of prisons and lack of services to assist visitors impedes visiting.”).

population consists of persons of color.<sup>137</sup> 38% are African American, 20 % Hispanic, and three percent other.<sup>138</sup> In 2008, one in fifteen African American men were in prison,<sup>139</sup> were incarcerated at 6.6 times the rate of white males.<sup>140</sup> Many of these individuals have been convicted of non-violent drug related offenses.<sup>141</sup>

A conspiracy theorist might conclude that a conscious effort was undertaken to imprison blacks through extended sentencing for non-violent drug offenses. As pressure has mounted, making that policy increasingly politically untenable, the immigrant population has become a primary substitute prison population. All of these policies need to be re-examined.

In looking at the sheer number of incarcerated people of color and what they are imprisoned for, we have to ask whether the very fact of their incarceration violates the Jesus Principles. In many cases, the incarceration appears that to serve no purpose at all. We need to release inmates who should not be imprisoned in the first place. For those properly incarcerated,

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<sup>137</sup> Dep't of Justice, Bureau of Justice Statistics, Bulletin: Prisoners in 2008 (Dec 8, 2009), available at <http://bjs.ojp.usdoj.gov/content/pub.ascii/p08.txt>.

<sup>138</sup> *Id.* SABOL, MINTON & HARRISON, *supra* note 67. "On June 30, 2006, an estimated 4.8% of black men were in prison or jail, compared to 1.9% of Hispanic men and 0.7% of white men. More than 11% of black males age 25 to 34 were incarcerated. Black women were incarcerated in prison or jail at nearly four times the rate of white women and more than twice the rate of Hispanic women."

<sup>139</sup> Daryl C. Hannah, *Obama Vs. Skyrocketing Incarceration Rates: Is Dr. King's Dream a Reality?*, Diversity Inc., Jan. 19, 2009, <http://www.diversityinc.com/article/5055/Obama-Vs-Skyrocketing-Incarceration-Rates-Is-Dr-Kings-Dream-a-Reality/>

<sup>140</sup> *Id.*  
<sup>141</sup> Bob Herbert, Op-Ed., *Anger Has Its Place*, N.Y. TIMES, Aug. 1, 2009, at A17 ("While Whites use illegal drugs at substantially higher percentages than blacks, black men are sent to prison on drug charges at thirteen times the rate of white men.").

we should relocate prisoners to locations more easily accessible to their families.<sup>142</sup>

To be consistent with the Jesus Principles, we must treat the incarcerated with dignity and respect and make an effort to rehabilitate them so that they may successfully rejoin the rest of society. The only way to explain the degree of mistreatment and injustice toward prisoners is that we must consider them to be different from, and less than, those of us who are law-abiding. This “us versus them” mentality makes it easier for us to formulate policies that dishonor them; policies which are inconsistent with the Jesus Principles. Pursuant to the Jesus Principles *everyone* is of equal value. *Everyone* is loved. Therefore, we must behave accordingly. In the case of the imprisoned, it means treating them humanely and with love, compassion, forgiveness, and fairness. To mistreat anyone, prisoners included, violates the Jesus Principles.

### C. The Case of Dominique Green<sup>143</sup>

Many of the inhumane criminal justice policies discussed above have evolved notwithstanding laws designed to protect those who have entered the system. Despite the Sixth Amendment’s guarantee of effective “assistance of

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<sup>142</sup> A policy could be established, for example, mandating that prisoners be confined within 45 miles of their primary residence at the time of sentencing. This would serve two purposes. First, it would allow inmates more frequent contact with their friends and family. The toll on children of prisoners, for example, might be minimized if the inmates had more frequent contact with them. It could also provide a rehabilitation incentive for the inmate. Second, it would provide jobs in communities that tend to need them most. *Cf.* Erik Eckholm, *With Higher Number of Prisoners Comes a Tide of Troubled Children*, N.Y. TIMES, July 5, 2009, at A13.

<sup>143</sup> While this article highlights the case of Dominique Green, we have failed many other prisoners in similar ways.

counsel,”<sup>144</sup> and the Eight Amendment’s prohibition on “cruel and unusual punishment,”<sup>145</sup> Dominique Green was executed. He was executed despite the fact that we require proof beyond a reasonable doubt in an effort to prevent false convictions,<sup>146</sup> and he was convicted despite the fact that the only witnesses who identified Dominique as the killer were his co-defendants who got lesser sentences in exchange for their cooperation.<sup>147</sup> It is not enough to articulate rights; we must also ensure that those rights are enforced in practice.

Although it is unclear what crime or crimes Dominique Green actually committed, we do know that when he entered the criminal justice system, he did not receive adequate representation.<sup>148</sup> His court-appointed attorneys did not properly interview or prepare witnesses to make the best use of their testimony. Dominique’s mother was called as a witness without bothering to find out what her testimony would be. In addition, the attorneys hired a racist psychologist.<sup>149</sup> Dominique’s trial was unfair. Dominique’s later efforts to try to overcome that poor representation and help himself were nothing short of heartbreaking. He desperately tried to obtain a trial transcript and to

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<sup>144</sup> See *supra* note 45 and accompanying text.

<sup>145</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>146</sup> See *supra* note 46 and accompanying text.

<sup>147</sup> The Supreme Court has recognized such co-defendant testimony as “inherently unreliable.” *Lee v. Illinois*, 476 U.S. 530, 546 (1986), *overruled* *Bourjaily v. United States*, 483 U.S. 171 (1987) (need not have independent indicia of reliability). The one White person involved in the crime was never charged.

<sup>148</sup> See *supra* text accompanying note 1; see also CAHILL, *supra* note 1, at 26, 28-31.

<sup>149</sup> CAHILL, *supra* note 1, at 29.

determine whether a videotape from a nearby convenience store might help his case.<sup>150</sup> Race, poverty and the lack of family support and involvement created an environment that allowed Dominique to be executed through a system of legalized injustice.<sup>151</sup>

Our criminal justice system is not just if it does not provide those accused of crimes with adequate counsel. Many prisoners are poor and in no position to retain private attorneys. While court-appointed attorneys are a good idea, there must be some oversight to ensure that they adequately represent their clients. In Dominique's case, there was no oversight. A system that overlooks inadequate representation is not a system of true justice and does not follow the Jesus Principles of loving our neighbor as ourselves, the Golden Rule, and doing the best for those less fortunate.

If we examine how Dominique was treated while incarcerated, we see that the Jesus Principles were also violated. It is mind-boggling that we lock our fellow human beings up in cages for twenty-three hours a day. It is perhaps more mind-boggling to realize that this policy can exist regardless of the inmate's good behavior.

How would the Jesus Principles enter the equation? We would view Dominique not as someone who is evil, but as someone who, like many others, was troubled. He had a lack of love growing up and needed people who believed in him and his ability to reform. Determining what to do with

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<sup>150</sup> *Id.* at 116-120.

<sup>151</sup> It was not simply his court appointed attorneys who failed him, but the entire criminal justice system that failed.

Dominique would involve love and forgiveness. If Dominique committed a violent crime, it would be inappropriate to leave him free to harm others. Love for community would dictate that he be confined. Love for Dominique also dictates confinement because to the extent he harms others; he also harms his own spirit. In this case, so long as Dominique remained a threat to others, he would need to be confined.

Approaching his confinement from the Jesus Principles perspective would result in very different confinement conditions than are currently the norm. The conditions would be suitably habitable. Confinement for twenty-three hours per day is not suitably habitable. Suitable confinement would include counseling for Dominique and would require a compassionate staff, which could help create a healing and supportive environment for him and the other inmates.<sup>152</sup> In other words, Dominique's confinement would attempt to heal and rehabilitate him. It would punish him for the original crime, but in a humane setting. Once Dominique was rehabilitated and deemed to no longer be a threat to others, he would be released.<sup>153</sup>

Both Dominique's confinement and his death penalty violated the Jesus Principles. The death penalty is the antithesis of the notion of forgiveness. Rather than forgive, we demand a life. In fact, Dominique Green

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<sup>152</sup> Barbara L. Atwell, *The Jurisprudence of Love*, 85 U. DET. MERCY L. REV. 499-502 (2008) (discussing love as an energetic force).

<sup>153</sup> We would arguably have no mandatory sentencing laws because they fail to account for the individual circumstances involved.

embodied the Jesus Principles far more than anyone involved in the criminal justice system. We could view Dominique like the Prodigal Son. He clearly had a troubled youth and engaged in inappropriate activities. He subsequently was rehabilitated and wanted to come home, like the Prodigal Son. Instead of acting like the father who welcomed his son home in the parable, society continued to push Dominique away and ultimately killed him.

We might also view Dominique the way we viewed the wounded man in the case of the Good Samaritan. The criminal justice system treated Dominique the way the priest and the temple helper treated the wounded man. It basically looked the other way and allowed him to perish. Instead, we should have a criminal justice system that would fill the role of the Good Samaritan. Yet it was Dominique, who followed Jesus' mandate to "[l]ove your enemies and pray for those who persecute you."<sup>154</sup> Archbishop Desmond Tutu, who met with Dominique, described him as "a remarkable advertisement for God."<sup>155</sup>

Dominique "was deeply impressed by" Archbishop Desmond Tutu's book *No Future Without Forgiveness*, about the archbishop's experience as chairman of South Africa's Truth and Reconciliation Commission.<sup>156</sup> Archbishop Tutu stated: "[U]nder Dominique's leadership many, perhaps even most, of the inmates on Death Row in the State of Texas have now

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<sup>154</sup> *Matthew* 5:44 (New Int'l Version).

<sup>155</sup> CAHILL, *supra* note 1, at 82.

<sup>156</sup> CAHILL, *supra* note 1, at 4.

forgiven everyone who has harmed them and, insofar as they can, have asked forgiveness from those they have harmed.”<sup>157</sup>

Just as Dominique forgave those who have failed him, “it [may] be beneficial to society if .... we were to permit [others] who are sincerely sorry to repent, atone for their crimes, and to seek ... an official forgiveness-- a fresh start.”<sup>158</sup> Likewise, we as a society would benefit from forgiving those who commit crimes. “Do we want to be healed or do we want to go on suffering from an offense committed against us by leaving it lodged unforgiven in our institutional memory?”<sup>159</sup> The Jesus Principles argue for the path of forgiveness.

#### D. Signs of Hope

Fortunately, there are now a multitude of programs designed to reverse some of the abuses described above and to help people like Dominique Green. For example, New York City has a program aimed at keeping young offenders out of juvenile facilities and keeping them closer to home in “community-based counseling programs.”<sup>160</sup> It aims to rehabilitate these offenders and to keep them from committing future crimes as adults.<sup>161</sup> Preliminary data suggests that the effort at community-based counseling pays

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<sup>157</sup> *Id.*

<sup>158</sup> Richard Lowell Nygaard, *On the Role of Forgiveness in Criminal Sentencing*, 27 SETON HALL L. REV. 980, 983 (1997).

<sup>159</sup> *Id.* at 1021.

<sup>160</sup> Editorial, *Help Closer to Home*, N.Y. TIMES, July 11, 2008, at A16.

<sup>161</sup> *Id.*

off. Data from New York City community-based programs indicate recidivism rates as low as 35%.<sup>162</sup>

An adult program with similar aims, Resolve to Stop the Violence (RSVP) has been implemented in several locations.<sup>163</sup> RSVP includes group therapy sessions in which the inmates explore their challenges with violence. The group sessions endeavor to help the inmates overcome those challenges, through individual and group psychotherapy, access to education, and other initiatives.<sup>164</sup>

[RSVP] incorporates victim restitution, offender accountability, and community involvement to reduce recidivism, responsibly return ex-offenders to their communities, and prevent further violence. These efforts of the Sheriff's Department have effectively restored a sense of humanity to violent offenders, reduced instances of prison violence, and promoted successful re-entry of former prisoners into society. . . . Through multi-dimensional and non-traditional approaches, RSVP addresses inmate violence by addressing the pathologies that cause it.<sup>165</sup>

In 2008, Congress passed the Second Chance Act,<sup>166</sup> which is designed to help prisoners transition from prisons back to their communities. It creates job placement programs, drug treatment, and mental health care along with

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<sup>162</sup> *Id.*

<sup>163</sup> Kate Stone Lombardi, *Program Aims to Curb Violence By Inmates*, N.Y. TIMES, July 6, 2008, at WE1. See also *Resolve to Stop the Violence Program*, <http://www.innovations.harvard.edu/awards.html?id=3632> (last visited Apr. 10, 2008).

<sup>164</sup> HARVARD SCH. ASH CTR., RESOLVE TO STOP THE VIOLENCE PROGRAM, <http://www.innovations.harvard.edu/awards.html?id=3632> (last visited July 13, 2008) (“Instead of isolating violent offenders, RSVP advocates an integrated mediation, counseling, and teaching curriculum that both addresses *the needs of the victim and engages the offender in an examination of his use of violence.*”) (emphasis added).

<sup>165</sup> *Id.* (the longer an inmate participates in RSVP, the more effective the program has proven to be in terms of preventing further violence).

<sup>166</sup> Second Chance Act, 42 U.S.C. § 17501 (2008).

other services for ex-inmates.<sup>167</sup> A significant portion of the prison population could be reduced if recidivism could be reduced. The Second Chance Act is designed to serve this purpose.<sup>168</sup> The Justice Center, a branch of the Council of State Governments, is devoted to the review of prison policy.<sup>169</sup> Among other things, the Justice Center highlights the imprisonment of many individuals who are mentally ill and provides guidelines for dealing with them more effectively.<sup>170</sup> Another creative program for inmates is Puppies Behind Bars, which allows inmates to train puppies who will later serve as service dogs for the disabled or for returning war veterans.<sup>171</sup> Bonding with the puppies and training them provides an emotional connection for the inmates that may bridge the way for similar emotional connections to people. While these programs represent steps in the right direction, too many individuals remain incarcerated under inhumane conditions. Accordingly, there is much more work to be done.<sup>172</sup>

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<sup>167</sup> Editorial, *Shrinking the Prison Population*, N.Y. TIMES, May 11, 2009, at A22.

<sup>168</sup> 42 U.S.C. § 17501

<sup>169</sup> JUSTICE CENTER, [http://justicecenter.csg.org/national\\_projects](http://justicecenter.csg.org/national_projects) (last visited Feb. 8, 2010). Cf. *Shrinking the Prison Population*, *supra* note 168, at A22 (noting that President Obama has asked for more than \$100 million from Congress to support prisoner re-entry programs).

<sup>170</sup> JUSTICE CENTER, Mental Health Resource, [http://justicecenter.csg.org/resources/mental\\_health](http://justicecenter.csg.org/resources/mental_health) (last visited Apr. 10, 2010).

<sup>171</sup> See generally Puppies Behind Bars, [www.puppiesbehindbars.org](http://www.puppiesbehindbars.org) (last visited Apr. 10, 2010).

<sup>172</sup> See *Shrinking the Prison Population*, *supra* note 168, at A22 (arguing that these programs are a “down payment, but only a down payment on what is needed”). While the treatment of prisoners beyond United States borders is beyond the scope of this article, it goes without saying that any kind of torture, including water boarding, violates the Jesus Principles. Moreover, torture is inconsistent with the human rights outlined in the Geneva Conventions. Cf. R. Jeffrey Smith & Dan Eggen, *Gonzales*

The current recession may be beneficial to the criminal justice system. The recession is highlighting the fact that we have incarcerated far more individuals than needed,<sup>173</sup> costing states a great deal of money. In turn, states have begun to question the need to keep so many people in prison. It costs “\$60,000 per inmate”<sup>174</sup> annually to keep a person in jail. The cost of running prisons and jails nationally is approximately 40 billion dollars per year.<sup>175</sup> “We simply can’t afford to be that punitive, especially when it doesn’t give us any public safety benefit. It actually increases crime.”<sup>176</sup> Not surprisingly, states’ recognition that large prisoner populations are contrary to their financial well-being coincides with their recognition that many who are currently incarcerated need not be. States are now acknowledging that there may be other, less expensive alternatives to incarceration.<sup>177</sup> Fiscal incentives may lead states to turn away from incarceration and toward other forms of

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*Helped Set the Course for Detainees*, WASH. POST, Jan. 5, 2005, at A1, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A48446-2005Jan4.html>.

<sup>173</sup> *Id.* (discussing re-entry programs that are reducing the recidivism rate and saving states “hundreds of millions of dollars”).

<sup>174</sup> *The Brian Lehrer Show*, *supra* note 1.

<sup>175</sup> MUSHLIN, *supra* note 12, at 2 n. 7.

<sup>176</sup> *Id.* at 4 (stating that “imprisonment on the present scale imposes a sizeable drain on the public treasury”).

<sup>177</sup> Jennifer Steinhauer, *To Trim Costs, States Relax Hard Line on Prisons*, N.Y. TIMES, Mar. 25, 2009, at A1, *available at* <http://www.nytimes.com/2009/03/25/us/25prisons.html?fta=y>. It is unfortunate that money rather than concern about others is driving this revelation. *See also* Editorial, *Two Meals and Not Always Square*, N.Y. TIMES, Jun. 29, 2009 at A20, *available at* <http://www.nytimes.com/2009/06/29/opinion/29mon2.html?scp=1&sq=Two%20Meals%20and%20Not%20Always%20Square&st=cse>. Moreover, some states are using the recession to impose yet other forms of prisoner mistreatment, such as reducing the number of meals served. (“[A]cross the country, there have been increasing reports of substandard food. This is inhumane. Adequate meals should be a nonnegotiable part of a civilized penal system.”)

punishment; like community service requirements, drug rehabilitation programs, suspended sentences and the like.<sup>178</sup>

There are signs of hope that we may soon reach the tipping point for true reform of the criminal justice system. The variety of community based programs and renewed efforts to rehabilitate those entering the criminal justice system are encouraging. Perhaps most encouraging is the introduction of the National Criminal Justice Commission Act of 2009. It recognizes that a systemic approach to change is required. The bill's sponsor notes:

America's criminal justice system has deteriorated to the point that it is a national disgrace. Its irregularities and inequities cut against the notion that we are a society founded on fundamental fairness. Our failure to address this problem has caused the nation's prisons to burst their seams with massive overcrowding, even as our neighborhoods have become more dangerous. We are wasting billions of dollars and diminishing millions of lives.

We need to fix the system. Doing so will require a major nationwide recalculation of who goes to prison and for how long and of how we address the long-term consequences of incarceration.<sup>179</sup>

These approaches are also what the Jesus Principles would seem to demand. To incarcerate a non-violent offender simply for the sake of

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<sup>178</sup> On the other hand, budget cuts are having an adverse impact on some progressive programs. See, e.g., Peter S. Goodman, *Budget Cuts Eroding Progress in Juvenile Justice*, N.Y. TIMES, Jul. 11, 2009 at A9, available at <http://www.nytimes.com/2009/07/11/us/11juvenile.html>.

<sup>179</sup> See Webb, *supra* note 1.

punishment seems to serve no loving or humane purpose.<sup>180</sup> Since Jesus taught love and forgiveness, He would favor an approach that increased rather than decreased the chance for a person to turn his or her life around. Making the Jesus Principles the primary guiding force for criminal laws and policies will lead to an improved system.

### Conclusion

Jesus remains highly relevant today in both law and public policy. Millions of people throughout the world follow His teachings, and His fundamental mandate to love our neighbors as ourselves, is an appropriate starting point when assessing our laws. To be sure that we create laws consistent with the Jesus Principles, we must be mindful when evaluating them to focus not just on rationality, but on humanity. In the criminal justice context, this means remembering that those who have been accused and/or convicted of crimes are human beings, entitled to love and respect. We must ensure that their legal rights are enforced and that punishment reflects appropriate compassion for a fellow human being.

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<sup>180</sup> Some would argue that the punishment itself will deter others from committing similar crimes. While there may be some validity to this argument, it certainly would not do well to incarcerate non-violent offenders for extended periods of time.