

# Christian Love and Criminal Justice

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In Luke 10, we are told of a lawyer who stood up to question Jesus. “What must I do to inherit eternal life?” he asked.

Jesus turned the question back on the lawyer, asking him what the law said about that question.

The lawyer responded, “Love the Lord your God with all your heart, soul, mind, and strength” (quoting Deuteronomy 6), “and love your neighbor as yourself” (quoting Leviticus 19).

“You answered rightly,” Jesus responded. “Do this and you will live.”

And the lawyer, seeking to justify himself, asked, “Who is my neighbor?”

It was in response to this question that Jesus told what has become one of his most famous parables, the story of the Good Samaritan. Through that parable Jesus shows that the question we should ask is not who is my neighbor, but who am I? Jesus challenges the lawyer to be a neighbor, to love as a neighbor, to love across the deepest ethnic division in that culture.

The command to love our neighbor as ourselves is

one of the most repeated commands in all of Scripture. It appears eight times across the Old and the New Testaments. Its first occurrence is in Leviticus 19 in a passage that reads:

You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness you shall judge your neighbor. . . . You shall not take vengeance or bear a grudge against the sons of your own people, but you shall love your neighbor as yourself.<sup>1</sup>

In other words, the command to love our neighbors as ourselves was originally rooted in a command to do legal justice to our neighbors. I want to consider here what Scripture tells us are two elements of neighbor-love when it comes to criminal justice.

First, loving my neighbor as myself in the context of criminal justice means that I must love *all* my neighbors – the criminally victimized, the criminally accused, the society impacted by crime – as myself. The Anglican ethicist Nigel Biggar has written the best book I have read on the topic of neighbor-love. The book is actually about just war

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1 *Leviticus* 19:15, 18.

theory, but many of its insights apply as much to criminal justice as to war because criminal justice is, like war, an act of state-sponsored physical force. No war is waged without the use of physical force, and likewise no one is arrested and ultimately jailed except by actual or threatened physical force. Writing of war, Biggar says:

The New Testament does not generate an absolute prohibition of violence, but it does generate an absolute injunction of love. . . . This makes obvious sense when the neighbor in view is the innocent victim of unjust aggression, on whose behalf the just warrior takes up arms. However, the innocent victim is not the only neighbor on site. Since love is an absolute injunction, applying always and everywhere, the just warrior is bound to love the unjust aggressor. His love—as Jesus made plain—must extend itself to the enemy.<sup>2</sup>

In the same way, my obligation to love—your obligation to love—extends not only to those victimized by crime, not only to those impacted by crime, but also to those who perpetrate crime, to those who are, in Biggar’s words, “unjust

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2 NIGEL BIGGAR, *IN DEFENSE OF WAR* 61 (2013).

aggressors.” My Christian obligation is to love my neighbors (plural) as myself.

Second, loving my neighbor as myself means being committed to accuracy in judging between my neighbors. No one is loved by inaccurate verdicts. The wrongly convicted is obviously not loved, because he will now be punished for a wrong he did not commit. The victim too is unloved by a false conviction because he or she is misled into believing that the injustice they have suffered has been vindicated when it has not. Society at large is not loved by a false conviction because they are left exposed to the future wrongs of that wrongdoer. And, critically, the wrongdoer is unloved by a false conviction because he is denied the opportunity for the corrective discipline that a true conviction would bring to bear on him. Loving my neighbors, all my neighbors, depends on the accuracy of the criminal justice system.

So how do we achieve accuracy? To start with, accuracy depends on due process.<sup>3</sup> We are not clairvoyant, we are not mind-readers, we are not omnipresent, and we have no

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3 MATTHEW T. MARTENS, REFORMING CRIMINAL JUSTICE: A CHRISTIAN PROPOSAL 90 (2023).

time machines. Thus, if we are to achieve accurate results, it will be because we have a process, a fair process, a process that is designed to achieve accurate results, a process that *surfaces and tests* the relevant evidence. Even then, accuracy depends on impartiality. Judging with partiality is to judge on personalities rather than on the facts. And, thus, partiality corrupts the quest for accuracy even when a fair process is followed.

Still further, accuracy requires that our punishments be proportionate. We must not only accurately distinguish right from wrong, and the guilty from the innocent, but we must also speak accurately about *how wrong* a particular wrong was. Not all wrongs are of the same severity, and accuracy requires proportionate punishments that speak truthfully about the degree of the wrong committed.

Finally, accuracy requires accountability for those government magistrates who judge inaccurately. Accuracy, in other words, demands that we tell the truth about both the wrongs of the governed and the wrongs of the governors. As Irenaeus of Lyon put it in his work *Against Heresies*, when the magistrate acts “to the subversion of justice,” then

“in these things shall they also perish.”<sup>4</sup>

If this is what Scripture demands—accuracy achieved by due process, protected by impartiality, expressed through proportionality, and maintained by accountability—how are we in the United States doing when it comes to criminal justice?

Since the advent of forensic DNA technology in August 1989, 3,433 men and women have been exonerated after having been convicted of crimes they did not commit. Let me be clear, these are not people who later got off on legal technicalities. These are people who didn’t do it. And yet collectively, they spent more than 31,000 years in prison for crimes they did not commit before their innocence was discovered. Lest you think the situation is improving, 2022 was a record year for exonerations, with 249—nearly one every business day.<sup>5</sup>

Since the death penalty was reinstated in the US in

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4 Irenaeus, *Against Heresies* 5.24, in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*, ed. Oliver O’Donovan and Joan Lockwood Donovan (Grand Rapids, MI: Eerdmans, 1999), 17.

5 *Exonerations by State*, NATIONAL REGISTRY OF EXONERATIONS (Feb. 18, 2024), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

1972, just short of 9,000 men and women have been sentenced to death.<sup>6</sup> 196 have been exonerated, meaning they were sentenced to death for crimes that we now know as a fact they did not commit.<sup>7</sup> That's two percent of death sentences. One out of fifty. Those are the ones we know. But exonerations take time, fifteen years on average. Statistical modeling projects conservatively that four percent of those sentenced to death in the US are innocent.<sup>8</sup> One out of every twenty-five. Would you get into a room of fifty (or twenty-five) people knowing that one person in that room would be shot and killed? Would you send your children into that room? Will you send your neighbor into the room?

Why are we getting it so wrong so often? Why are we not more accurate? The truth is that there is no monocausal explanation, but I'll note two contributing factors to our inaccuracy:

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6 *Death Sentences in the United States Since 1973*, DEATH PENALTY INFORMATION CENTER (Feb. 18, 2024), <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year>.

7 *Innocence*, DEATH PENALTY INFORMATION CENTER (February 18, 2024), <https://deathpenaltyinfo.org/policy-issues/innocence>.

8 Samuel R. Gross, Barbara O'Brien, Chen Hu, and Edward H. Kenney, *The Rate of False Conviction of Criminal Defendants Who Are Sentences to Death* 7234 PROC. NAT'L ACAD. SCIS. 111 (2014).

First, we do not provide adequate criminal defense counsel for the poor, and it is the poor who we primarily prosecute. In March 1963, in the case of *Gideon v. Wainwright*,<sup>9</sup> the Supreme Court said that the Sixth Amendment right to counsel means that the poor who are prosecuted for crimes in either state or federal court must be provided with counsel if they cannot afford a lawyer. As the Court explained, we aren't truly providing people with due process if we give them a trial in which they must face off against a professional advocate (prosecutor) and navigate complicated procedural and evidentiary rules without the assistance of an attorney. As the Court said, someone might be convicted in that scenario not because they are guilty, but because they don't know how to show their innocence.

But the evidence is overwhelming that, now sixty-one years after *Gideon*, states still don't provide adequate funding for indigent defense. In a state-by-state series of studies, the American Bar Association has concluded that states are funding approximately one third of the lawyers needed to handle the caseloads.<sup>10</sup> In 2017, a federal judge

9 372 U.S. 335 (1963).

10 See, e.g., The Oregon Project: An Analysis of the Oregon

observed that “the Louisiana legislature is failing miserably at upholding its obligations under *Gideon*.”<sup>11</sup> In 2018, the Wisconsin Supreme Court observed that the compensation rate for appointed lawyers was so “abysmally low” that “most attorneys will not accept . . . appointments because they literally lose money if they take those cases.”<sup>12</sup>

This isn’t to malign the skill and dedication of those who serve as counsel for the poor; rather, it’s to recognize the limitations of lawyers assigned three times the caseload they can capably handle regardless of skill. Failing to fund sufficient indigent defense counsel is partiality against the poor and will inevitably lead to inaccurate outcomes.

Second, prosecutors and police officers too frequently hide evidence of defendants’ innocence but are not held

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Public Defense System and Attorney Workload Standards (American Bar Association Standing Committee on Legal Aid and Indigent Defendants, January 2022), 27 <https://www.americanbar.org/>; The New Mexico Project: An Analysis of the New Mexico Public Defense System and Attorney Workload Standards (American Bar Association Standing Committee on Legal Aid and Indigent Defendants, January 2022), 5; The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards (American Bar Association Standing Committee on Legal Aid and Indigent Defendants, November 2017), 26.

11 *Yarls v. Bunton*, 231 F. Supp. 3d 128, 137 (M.D. La. 2017).

12 *In re the Petition to Amend SCR 81.02*, No. 17-06, slip op. at 2-3, 6-11 (June 27, 2018), <https://www.wicourts.gov>.

personally accountable when they commit these injustices. In 1963, the US Supreme Court also ruled in the case of *Brady v. Maryland*<sup>13</sup> that criminal defendants are entitled to evidence of their innocence that is uncovered during police investigations. Again, the rationale for this ruling is straightforward: a trial wouldn't be a meaningful exercise of truth-seeking if the state has evidence of a defendant's innocence but is entitled to hide it from the defendant and his counsel.

And, yet, in 2013, a federal appeals court judge appointed by President Reagan observed that “there is an epidemic of *Brady* violations abroad in the land.”<sup>14</sup> Sixty percent of the exonerations since 1989 are cases of police and prosecutorial misconduct,<sup>15</sup> usually *Brady* violations. And yet almost nothing is done about it. State bar associations almost never impose any discipline on prosecutors who violate *Brady*.<sup>16</sup> Only one prosecutor has ever gone

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13 373 U.S. 83 (1963).

14 *United States v. Olsen*, 737 F.3d 625m 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc).

15 *Exonerations by State*, NATIONAL REGISTRY OF EXONERATIONS (Feb. 18, 2024), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

16 Richard A. Rosen, *Disciplinary Sanctions against Prosecutors*

to jail for violating *Brady*.<sup>17</sup> His sentence was five *days* in jail in the case of a man who was wrongly sent to prison for twenty-five years. And the Supreme Court invented the doctrine of absolute immunity for prosecutors, meaning that prosecutors cannot be subject to federal civil rights lawsuits for *Brady* violations, not even intentional ones.<sup>18</sup>

If this is our system, then we should not be surprised that 3,433 people have been wrongly convicted and spent 31,000 years in prison for crimes they did not commit. And if this is our system, it is not a Christian one, meaning it does not align with what the Christian Scriptures teach about neighbor-love. Who is the neighbor to those—crime victim and criminally accused—harmed by this system? The one who sees it and, rather than averting his or her eyes, steps in to help. “Go and do likewise,” Jesus commanded. Will you follow him?

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*for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 730-31 (1987).

17 Alexa Ura, *Anderson to Serve 9 Days in Jail, Give Up Law License as Part of Deal*, TEXAS TRIBUNE, (November 8, 2013) <https://www.texastribune.org/>; Claire Osborn, *How Ken Anderson Was Released after Only Five Days in Jail*, AUSTIN AMERICAN-STATESMAN, (November 15, 2013) <https://www.statesman.com/>. To read more about this case, see Michael Morton, *Getting Life* (New York: Simon & Schuster, 2014).

18 *Imbler v. Pachtman*, 424 U.S. 409 (1976).