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Catholic Social Thought and Criminal Justice Reform

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Abstract

Professor Cassidy examines the criminal justice reform movement in the United States through the lens of Catholic social thought. In particular, he focuses on God's gift of redemption and the Gospels' directives that we love one another and show mercy toward the poor, the oppressed and the imprisoned. Cassidy then examines the implications of these fundamental Catholic teachings for the modern debate about the death penalty, sentencing reform, prisoner reentry and parole.

I. Introduction

The topic of this essay is Catholic social thought and criminal justice reform. First, I need to make a few disclaimers. I am not a theologian. I am a former prosecutor and current law professor who has been teaching and writing in the field of criminal law for over twenty years. If I am an expert on anything, it is on criminal justice reform, not Catholic social thought. But I am also a practicing Catholic who strives (imperfectly) to live a life according to the Gospels. So, this essay might more aptly be titled: Criminal Justice Reform: One Catholic's Perspective.

In Catholic social teaching there are essentially two different methodologies for understanding God's will: scripture (and its appeal to revelation) and natural law theory. Many of the pastoral letters and encyclicals follow the former approach,² while St. Thomas Aquinas and St. Augustine followed the latter, building on Greek and Roman philosophy. I am not a moral philosopher, and particularly not a natural law theorist. In this essay I will take the first path and ask what scripture and papal encyclicals can teach us about criminal justice reform.

Third, I want to emphasize that punishment of criminals—even at times *harsh* punishment of criminals -- is not only consistent with Catholic social teaching, but it is also compelled by it. Safety and security are essential to the flourishing of individuals

¹ Professor of Law and Faculty Director, Rappaport Center for Law and Public Policy, Boston College Law School. This essay is adapted from an address given by the author at Villanova University on November 6, 2017. The author is grateful to Matthew A. Sawyer (BCLS Class of 2019) for his extremely capable research and editorial assistance.

² U.S. Conference of Catholic Bishops, *Sharing Catholic Social Teaching: Challenges and Directions* at 4 (1998).

and families. How we organize our society —legally, politically and economically— directly effects human dignity and the ability of citizens to thrive. So when I speak in this essay about the dignity of the person, this applies not only to the accused but also to the victims of crime and their families. Especially for violent crimes, sexual offenses, and hate crimes we need to stand in solidarity with victims about their pain and loss, condemn those who have abused them, and protect the rest of society from future misconduct.

With these disclaimers in mind, I would like to focus on three tenets of Catholic social thought that have animated my recent thinking about criminal justice reform: love, mercy, and the capacity for redemption. I will briefly describe the doctrinal basis for these Catholic ethos before I turn to implications for reform.

A. Love

In the Old Testament justice was the organizing principle that the prophets believed would promote solidarity among people and lead to eternal life. In the New Testament, that guiding principle is love. Love is the transcendent value that will lead to justice, not the other way around.

When asked by an expert in the law what one had to do to inherit eternal life, Christ answered (albeit indirectly) “Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind”; and, “Love your neighbor as yourself.” (Lk. 10: 26-27). Christ then used the Parable of the Good Samaritan to illustrate the concept of who is our neighbor. (Lk. 10: 30-37) All human beings are supposed to be our neighbors, even if they are members of some despised or marginalized group.³ In §11 of his 1991 encyclical *Centesimus Annus*, John Paul II reminds us that every individual—whatever his conduct and regardless of his social, political or economic status—bears the image and likeness of God and deserves our love.

When Christ and the prophets speak of loving one’s neighbor, it is typically the impoverished and the oppressed (*e.g.*, widows, orphans, aliens) who are the center of their attention.⁴ Lest there be any doubt that this commandment requires us to love *criminals*, Christ reminds us in the Parable of the Sheep and the Goats that whoever fails to care for the hungry, the sick *or the imprisoned* will be subjected to eternal punishment. In this dialogue, Christ imagines himself a prisoner, and states that “Truly I tell you, whatever you did not do for one of the least of these, you did not do for me.” (Mt. 25:36-41).

³ Jeffrie G. Murphy, “Christian Love and Criminal Punishment,” in *AGAPE, JUSTICE AND THE LAW* 153 (Cochran, J.R.F., & Calo, Z.R. eds., 2017).

⁴ Nicholas Wolterstorff, “Love, Justice and the Law,” in *AGAPE, JUSTICE AND THE LAW* 112.

French philosopher Simone Weil once famously proclaimed that “Love sees what is invisible.”⁵ No group is more invisible in our society than prisoners. Do we love them, and if so how? Catholics involved in the criminal justice system—whether prosecutors, defense counsel, judges, probation officers, or legislators—should examine their consciences and ask whether they truly are following the commandment to love their neighbor in their daily work, or whether they are succumbing to fear and “tough on crime” political rhetoric.

B. Mercy

Human misery (including poverty, oppression and imprisonment) are “obvious signs of the inherited condition of frailty and need for salvation in which man finds himself as a consequence of original sin.”⁶ Mercy is one of the eight Beatitudes described by Christ in the Sermon on the Mount. (Mt. 5: 1-2). Showing compassion to widows, the poor, the frail, and people who are imprisoned are “works of justice” pleasing to God.⁷

In the criminal context, it is important to distinguish mercy from forgiveness. Mercy is the capacity of individuals to extend compassion to those suffering by lessening their harm or pain. Forgiveness is the capacity of individuals to let go of feelings of hatred or revenge against criminals. Although these virtues are related (and often overlap) one can show mercy without truly forgiving a criminal, and one can forgive a criminal without showing mercy. As Jeffrie Murphy, Regents Professor of Philosophy and Law at Arizona State University so aptly described, “the requirement to exhibit mercy is best understood *not* as a requirement never to punish, but rather as a requirement to develop a character that is not hardened and rigidly formalistic—a requirement that leaves room for considering relevant features of a criminal...that might legitimately incline one to favor a reduced sentence for that criminal.”⁸

C. Redemption

My faith teaches that we are all sinners who occasionally turn away from God. As importantly, each of us has the capacity for reconciliation with God through contrition, confession, satisfaction, and absolution.⁹

God gave his only son so that all humans, be they believers or non-believers, could be redeemed by Christ’s sacrifice. “There is not, never has been, and never will be

⁵ Simone Weil, *WAITING FOR GOD* 149 (Harper Collins, 2009).

⁶ CATECHISM OF THE CATHOLIC CHURCH § 2448 (Libreria Editrice Vaticana, 1993).

⁷ *Id.* at § 2447.

⁸ Murphy, *supra* note 3 at 160 (emphasis supplied).

⁹ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 6 at §§ 1450-1461.

a single human being for whom Christ did not suffer.”¹⁰ The Catholic Church rejects the Calvinistic notion that Christ died for the salvation of a predestined elect, or that certain people are destined to damnation. God desires all to be saved, yet only the individual can accept God’s love and gift of redemption.¹¹

Due to this capacity for redemption, the Catholic Church calls on its members to “clasp sinners to their bosom,” just as Christ did in inviting sinners to his table.¹² In their 2000 letter *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* at 7, the U.S. Conference of Catholic Bishops declared “We are all sinners, and our response to sin and failure should not be abandonment and despair, but rather justice, contrition, reparation, and return or reintegration of all into the community.” Here the capacity for redemption is directly linked to Christ’s commandment that we love our neighbor. “Agapic love is concerned not simply with satisfying preferences, alleviating distress, providing for people’s material well-being, and thereby making their lives more pleasant...It is also centrally concerned with promoting their moral and spiritual good.”¹³

With these fundamental principles in mind, I now turn to the modern debate regarding criminal justice reform. Certainly, there is lots that can be improved about the criminal justice system in the United States. For pragmatic reasons, and with a hope to be of some influence in the ongoing debate, I will focus on five discreet problems that are ripe for a legislative “fix.” More subtle but equally pervasive concerns with our criminal justice system—such as implicit racial bias, income inequality, and the corrosive effect of plea bargaining on the rights of the accused—must await future treatment.

II. Implications for Criminal Justice Reform

A. Abolish the Death Penalty

Although the death penalty is not wholly outside the Catholic tradition and is mentioned approvingly in the New Testament (Mt. 15:4), the modern church has now recognized clear evils associated with it that vastly outweigh its benefits. The death penalty has a disparate impact on people of color, the poor, and the marginalized. It is

¹⁰ *Id.* at § 605.

¹¹ This is the difference between redemption and salvation. Not everyone will choose to *accept* the redeeming grace of God. The death of Christ on the cross opened the gates of heaven so that all people *might* be saved, but someone can choose to reject Christ’s grace and gift of redemption. Redemption is just the first step toward salvation, which begins with God’s grace touching our hearts and calling us to repent.

¹² CATECHISM OF THE CATHOLIC CHURCH, *supra* note 6 at § 605

¹³ Murphy, *supra* note 3 at 155.

not free from irremediable error. And, most importantly, it stands in direct conflict with the Church's teachings on the dignity and sacredness of life. In *Evangelium Vitae* (March 25, 1995), John Paul II stated that legitimate purposes of criminal punishment should be public safety, retribution, and reformation—not vengeance. Given the developments and capacity of the modern penal system, the need to execute a convicted felon is “practically nonexistent.” *Id.* at ¶56.¹⁴

Both internationally¹⁵ and in jurisdictions within the United States, the modern trend is to abolish the death penalty. Since 2004, seven states within the U.S. have eliminated the death penalty—three by judicial decision (DE, NY and CT) and four by legislation (IL, MD, NJ, NM).¹⁶ In total, nineteen states and the District of Columbia have now abolished the death penalty.¹⁷

There are grounds for cautious optimism, even on the federal level. In the 2002 case of *Atkins v. Virginia*,¹⁸ the Supreme Court ruled that the Eighth Amendment's prohibition of "cruel and unusual punishments" forbids the execution of the mentally disabled. The determination whether a punishment is cruel and unusual turns on its consistency with "evolving standards of decency that mark the progress of a maturing society."¹⁹ In concluding that the execution of the severely mentally disabled was unconstitutional, the Court invoked a brief filed by the European Union which catalogued the overwhelming repudiation of this practice by the rest of the world.²⁰ As more jurisdictions outlaw the death penalty, the Supreme Court may face pressure from its own precedent under *Atkins* to revisit its constitutionality.

B. Eliminate Mandatory Minimum Sentences

¹⁴ The Pontiff was more definitive on this point four years later, when he stated “the dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself, without definitively denying criminals the chance to reform.” Pope John Paul II, Papal Mass in St. Louis, Missouri (Jan. 27, 1999).

¹⁵ Over 160 of 193 Members States of the United Nations have either abolished the death penalty or do not practice it. *See*, United Nations Human Rights: Office of High Commissioner, “Death Penalty,” (Feb. 5, 2018), <http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx>.

¹⁶ Death Penalty Information Center (Nov. 9, 2016), <https://deathpenaltyinfo.org/states-and-without-death-penalty>. In addition, governors in five other states have declared a moratorium on executions. *Id.* Nebraska voters approved Referendum #426 in 2016 and reversed 2015 legislation that repealed the death penalty. In 2016, the Delaware Supreme Court struck down that state's death penalty, *see* Rauf v. Delaware, 145 A.3d 430 (Del. 2016), although, there is now legislation pending to reinstate it. *See* H.B. 155, 149th Gen. Assemb. 1st Reg. Sess. (Del. 2017).

¹⁷ State by State, National Coalition to Abolish the Death Penalty, (Sept. 8, 2017) <http://www.ncadp.org/map>.

¹⁸ 536 U.S. 304, 311 (2002).

¹⁹ *Id.* at 311-12.

²⁰ *Id.* at 324.

I spent five years as a drug prosecutor in the late 1980's and early 1990's. In retrospect, I think I sent people to prison for too long for violating criminal statutes that were too draconian. During that time, the distribution of 200 grams of cocaine (less than ½ lb.) was punished in Massachusetts by a mandatory 15 year prison sentence.

My thinking on this issue has evolved considerably over the past two decades. Mandatory sentencing has been studied extensively and proven ineffective at deterring crime.²¹ Moreover, mass incarceration resulting from mandatory sentencing has destroyed families, torn apart communities of color, and massively depleted state budgets. As former Attorney General Eric Holder admitted in an August 2014 public address, “Too many Americans go to too many prisons for too long and for no truly good law enforcement reason.”²²

Mandatory sentences are fundamentally inconsistent with the Catholic ethos of mercy.²³ A judge should be allowed to exhibit compassion and to take the unique characteristics of each offender into account at the time of sentencing—especially in those instances where the defendant played a minor role in a joint transaction, suffered from a history of mental illness or abuse, or committed the crime under dire financial or physical circumstances. Those who are concerned that judges will misuse that authority and engage in unjustifiably lenient sentencing should support presumptive sentencing guidelines (subject to appeal by either the prosecutor or the defendant where a sentence departs) rather than mandatory sentencing. Mandatory sentences simply transfer the power to bestow mercy from a judge to a prosecutor²⁴—a player less well equipped for the task, and less informed about the unique circumstances of the defendant than the probation department, which typically reports to the court.²⁵

²¹ See, e.g., Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 28-29 (2006); Cassia Spohn and David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 350 (2002).

²² The Editorial Board, *Smarter Sentencing*, N.Y. Times, (Aug. 13, 2013), <http://www.nytimes.com/2013/08/14/opinion/smarter-sentencing.html>.

²³ See U.S. Conference of Catholic Bishops, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (November 15, 2000).

²⁴ A prosecutor may avoid the results of a harsh mandatory sentence by engaging in charge bargaining before indictment, or by agreeing to a plea bargain after indictment whereby she dismisses the charge carrying a mandatory sentence and substitutes a charge that does not.

²⁵ Creating a “safety valve,” which allows a judge to deviate from a mandatory sentence for certain offenses and for certain reasons, is a step in the right direction—but in my view it is a political compromise. There are currently 195 federal crimes carrying mandatory sentences. See, U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm. The Safety Valve implemented by the Sentencing Reform Act of 1994 and amended in 2002 applies only to five low-level federal drug offenses. See 18 U.S.C. § 3553(f). Moreover, the federal safety valve has strict prerequisites: (1) no one was harmed during the offense, (2) the offender had little or no history of criminal convictions, (3) the offender did not use violence or a gun during the crime, (4) the offender was not a leader/ organizer

Today, I am opposed to mandatory sentences except for 1st degree murder, 3rd and subsequent drunk driving convictions, and the most extreme cases of habitual violent crime. In those three limited instances, mandatory sentencing may be justified on public safety grounds alone, without resort to retributive or general deterrence arguments.

Although arguably motivated by fiscal concerns rather than compassionate ones, several states have recently repealed mandatory minimum penalties for certain offenses.²⁶ Other states have *reduced* their mandatory minimum penalties for drug crimes, and/or increased the weight thresholds and decreased the school zone distances that must be met before a mandatory sentence takes effect.²⁷ In total, 23 states have enacted significant sentencing reforms in the past several years to counter the effects of mass incarceration.²⁸ This is a laudable beginning, and a sign that the pendulum on this issue has begun to swing in the right direction, at least for drug crimes. But significant work remains to be done in the 27 states which have not yet enacted reform.

C. Promote Diversion where Possible through Expanded Mental Health Courts

Pre-trial diversion is the practice of channeling certain offenders out of the criminal process after arrest—it is an early intervention strategy that promotes personal accountability and responsibility, and avoids the stigma and collateral consequences of a criminal conviction. Many states now have special diversion courts for drug offenses, domestic violence, and veterans. They usually work as follows—the probation department determines whether the defendant qualifies for diversion by looking at such issues as his or her prior criminal record and the severity of the crime and injury; if eligible, the defendant may choose to accept an offer of diversion in exchange for stay of criminal proceedings; and, upon successful completion of the conditions of diversion, the judge will dismiss the criminal charges. The goal of these so-called “problem solving” courts is to address the underlying causes of the criminal conduct, while avoiding conviction and incarceration.

A problem solving court follows a “therapeutic jurisprudential” model, working with community service providers to address the social, behavioral, psychological, or

of the offense, and (5) the offender told the prosecutor all that he knows about the offense. Only if all of those requirements are met may the court sentence an offender below the mandatory prison term. *Id.*

²⁶ 2010 S.C. Acts 1937; 2009 R.I. Pub. Laws 1651; 2002 Mich. Pub. Acts 2455; 2009 N.Y. Sess. Laws 232 (McKinney).

²⁷ 2012 Mass. Acts 942; 2014 Miss. Laws 1159; 2011 Ark. Acts 1851.

²⁸ See Families Against Mandatory Minimums, *Recent State-Level Reforms to Mandatory Minimums Laws* (June 1, 2016), <http://famm.org/wp-content/uploads/2013/08/Recent-State-Reforms-June-2016.pdf>; See also The Pew Charitable Trust, Issue Brief: *Justice Reinvestment Initiative Brings Sentencing Reforms in 23 States* (Mar. 16, 2017), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment>.

substance abuse problems that brought the individual before the court.²⁹ It is called “therapeutic” jurisprudence because its focus is on rehabilitation; it is beneficial to public safety and community order to keep the defendant out of the criminal justice cycle by improving his or her psychological and physical well-being.³⁰

Problem solving courts--sometimes known as “specialty courts”--have enjoyed a rapid rise in the United States over the past twenty years.³¹ Most of the research on the effectiveness of problem solving courts has been done in the drug area. “Studies on drug courts have shown that they significantly reduce repeat offenses”³² “One study from defendants enrolled in a Portland Oregon drug court over a ten year period were as much as 30 percent less likely to reoffend than those who went through the regular court system”³³

My recommendation is to extend the problem solving court model by creating more “mental health” courts in America. According to the National Institute of Justice, there are now over 3000 drug courts in the United States following a problem-solving model, but only 400 mental health courts.³⁴

People with mental health issues are ill. While their *conduct* is worthy of condemnation, the *actors* are deserving of compassion and mercy due to their frailty. Creating mental health courts for misdemeanors and non-violent felonies will allow judges to divert select defendants with mental illness into judicially supervised, community-based treatment. For those who agree to participate, a team of court staff and mental health professionals will work together to develop treatment plans and supervise participants. One survey of defendants who worked through a mental health problem solving court in Florida reported higher scores on a dignity scale and lower scores on a perceived coercion scale than any group of criminal defendants ever studied.³⁵

D. Classification, Programming and Re-Entry Services

²⁹ Kristine A. Huskey, *Justice for Veterans: Does Theory Matter?*, 59 ARIZ. L. REV. 697, 705 (2017).

³⁰ *Id.* at 712, 714. See also James L. Nolan, Jr., *Redefining Criminal Courts: Problem Solving and the Meaning of Justice* 40 AM. CRIM. L. REVIEW 1541, 1546 (2003).

³¹ Leon Neyfakh, *The Custom Justice of ‘Problem-Solving Courts’: A New Kind of Court is Reshaping the American Legal System – with Little Oversight*, BOS. GLOBE, Mar 23, 2014.

³² *Id.* at 1.

³³ *Id.* at 2.

³⁴ See U.S. Dep’t of Justice: Office of Justice Programs, *Drug Courts* (June 2015), <https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx>.

³⁵ Neyfakh, *supra* note 31 at 1.

While sometimes incarceration is necessary, it is usually harmful—to individuals, to relationships, to families, and often to the spiritual and emotional well-being of those employed in our prisons.³⁶

Ninety five percent of inmates will eventually return to their communities.³⁷ Historically, these prisoners have not come out better off than when they went in. Individuals who have been swept up in the mass incarceration movement have left prison with significant if not insurmountable barriers—fractured family relationships, no home, no education, little work experience or job prospects, massive child support and other court-mandated financial obligations, and the same substance abuse and mental health issues that contributed to their incarceration in the first instance.

One goal of corrections should be to promote healing in prison and prepare the offender for reintegration into society. Not only is this critical for improving public safety (by reducing recidivism) it is also consistent with Catholic social teaching about love and redemption. Pope Francis echoed these themes on September 27, 2015, when he visited inmates at the Curran-Fromhold Correctional Facility in Philadelphia:

It is painful when we see prison systems which are not concerned to care for wounds, to soothe pain, to offer new possibilities. It is painful when we see people who think that only others need to be cleansed, purified, and do not recognize that their weariness, pain and wounds are also the weariness, pain and wounds of society.³⁸

Many prisons in the United States still focus predominantly on security and segregation, with behavior modification an afterthought. If we are to successfully shift this emphasis, corrections departments will need to confront and surmount three major obstacles: overclassification, insufficient programming, and inadequate commitment to re-entry services.

Prisoners are typically “classified” upon entering the prison population as maximum, medium, or minimum security inmates. States use a variety of risk assessment instruments to classify prisoners based primarily on offense characteristics, prior criminal history and length of sentence. “Overclassification” (for example, classifying a prisoner as a maximum security inmate when penal objectives could be fairly advanced by classifying him as a medium security inmate) leads to two problems:

³⁶ See Jeffrie Murphy, *Why I am Now Reluctant to Teach Criminal Law*, in 72 CRIMINAL JUSTICE ETHICS 72-73 (2014).

³⁷ Rebecca Beyer, *Attorney Hopes to Import the Best Practices of European Prisons to the United States*, ABA MAGAZINE, Oct. 2017 at 18.

³⁸ Transcript available at <http://time.com/4051332/pope-francis-us-visit-philadelphia-prison/>.

it is very expensive,³⁹ and it blocks participation in significant treatment because many educational programs require available free periods and/or group interaction with other inmates.⁴⁰

States need to place a moratorium on building expensive maximum security facilities and redesignate more of their present maximum security beds as medium or minimum security. Moreover, because offenders tend to “age out” of violence, there should be a presumption that offenders serving longer terms of incarceration will “step down” from higher to lower security levels throughout their period of incarceration.

Second, we need to realign our correctional budgets and redirect money currently being spent on maximum security beds toward programs geared to behavior modification. According to a 2014 Rand Corporation Study, the odds of recidivating for prisoners who participated in educational programs while incarcerated were 43% lower than the odds of recidivating among a comparison group of inmates who did not.⁴¹ Violence prevention, anger management, Alcoholic and Narcotic Anonymous programs, GED Equivalency courses and vocational training are all proven ways to reduce the likelihood of re-offense. But there are now huge waiting lists for many of these programs in both state and federal correctional facilities, due to massive budget constraints brought on by overspending on security.

Finally, state and federal corrections need to double down on re-entry strategies that have proven to be effective. “Re-entry planning” once entailed getting an inmate a social security card and a bus ticket home. Now the goal of re-entry is far broader—it demands not only recidivism reduction programs, but also strategies for addressing a person’s employment, housing needs, interpersonal relationships, substance abuse problems, and other factors affecting a person’s well-being.⁴²

Correctional departments should commit to having most prisoners spend the last six to twelve months of their sentence in a regional pre-release or re-entry center. Once

³⁹ See Jacob McClelland, NPR, “The High Costs of High Security at Supermax Prisons,” June 19, 2012 available at <https://www.npr.org/2012/06/19/155359553/the-high-costs-of-high-security-at-supermax-prisons>. One recent study in Massachusetts found that the annual cost of housing a prisoner increases \$10,000 at each level of security. Daniel Bennett, *Final Report of the Special Commission to Study the Criminal Justice System*, Commonwealth of Mass. Exec. Office of Pub. Safety and Sec., Dec. 31, 2014, 44-46, <http://www.mass.gov/eopss/docs/eops/report-of-the-commission-to-study-the-commonwealths-criminal-justice-system-12-31-2014.pdf>.

⁴⁰ The supervision level of a facility “can place especially sharp limits on the variety and delivery of programs” offered. See Edward E. Rhine, Joan Petersilia and Kevin R. Reitz, *The Future of Parole Release*, 46 CRIME AND JUST. 279, 310 (2017).

⁴¹ Lois Davis *et al.*, How Effective is Correctional Education, and Where Do We Go From Here?: The Results of a Comprehensive Evaluation, Rand Corp., at 18 (2014).

⁴² Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L. J. 259, 288-89 (2009).

known as “halfway houses” because they were halfway between incarceration and liberty, re-entry centers at the federal level are now called “Regional Re-entry Centers” and at the state level “Community Correction Centers.” They are a form of minimum security facility designed to facilitate transition to independence, where residents are eligible (but not automatically authorized) to work part time. Because these centers are smaller and more geographically dispersed than prisons, a re-entry center brings the prisoner geographically closer to his home and family, which can help bridge the interruption of social support caused by incarceration.⁴³ One U.S. Sentencing Commission study concluded that offenders who served a mixed sentence of prison followed by confinement in a regional re-entry center recidivated at a rate nearly half that of those who served a straight term of imprisonment.⁴⁴

Although the re-entry movement is now more than ten years old,⁴⁵ a “fragmentation of the reentry response” remains an obstacle towards significant progress.⁴⁶ Federal, state and county prisons and jails all operate various forms of re-entry centers. Some are run by the government, some are privatized. There is no reason that multiple sovereigns and stakeholders cannot cooperate—both financially and in terms of staffing, training and evaluation—in locating and running re-entry centers. The budget implications of such cooperation can be solved by calculating and allocating a per day bed fee allocated based on utilization rates.⁴⁷ What is important is that multiple stakeholders follow data-driven decision-making and utilize curricula proven to be effective.⁴⁸ If corrections departments are utilizing *privatized* re-entry facilities, renewal

⁴³ “Removing individuals from families and communities creates a loss of social supports, financial means, and communal identity.” Jennifer Lerch *et al.*, “Town Hall” *Strategies for Organizational Change*, 73 FED PROB. 2 (Dec. 2009).

⁴⁴ U.S. Sentencing Comm’n., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, 13, 33 (May 2004). A more recent meta-analysis of reentry research found that “programs that targeted high risk offenders, were offered by criminal justice agencies, adhered to a therapeutic community treatment model, and were at least 13 weeks in length were associated with a significant impact on recidivism.” Mirlanda Ndrecka, *The Impact of Re-entry Programs on Recidivism: A Meta-Analysis*, (Feb. 27, 2014).

⁴⁵ The “Second Chance Act of 2007” authorized the United States Department of Justice to provide grants and research support to states interested in improving assistance and services for prisoners returning to their communities. Pub. L. 110-199; 122 Stat. 657 (2007).

⁴⁶ Jessica A. Focht-Perlberg, *Two Sides of One Coin: Repairing the Harm and Reducing Recidivism*, 31 HAMLINE J. PUB. L. & POL’Y 219, 244 (2010).

⁴⁷ Immigration detention is one such model for multi sovereign cooperation, where the federal government pays local jails a per-day fee for housing immigration detainees. See *The Math of Immigration Detention*, THE NAT’L IMMIGR. F. BLOG, (Aug. 22, 2013), <http://immigrationforum.org/blog/themathofimmigrationdetention>.

⁴⁸ The Council of State Governments has compiled a database of research on the effectiveness of a wide variety of reentry programs and practices. See <https://whatworks.csgjusticecenter.org/focus-area/cognitive-behavioral-treatment>.

of contracts should be conditioned on meeting specifically articulated performance objectives (i.e., escape rates, re-arrest rates, employment rates, etc.).⁴⁹

Sometimes necessity is the mother of invention. In May, 2011 the Supreme Court ordered California to reduce its prison population within two years by 25% (to 137% of its total design capacity).⁵⁰ In response, Governor Jerry Brown signed the Public Safety Realignment Act of 2011.⁵¹ Under this law, non-violent, non-serious, and non-sexual offenders in California with sentences of longer than one year are housed in county jails rather than state prisons. The law also provided new funding for county facilities for the management of their increased populations. This realignment in California corrections—that is, the devolution of authority and custody from state to county officials—has been described as one of the biggest criminal justice experiments ever conducted in America.⁵² What is encouraging is that since 2011, counties in California that devoted new state financial resources to prisoner reentry services and programming have seen far better recidivism outcomes than counties that invested their state appropriation in additional sheriffs or jail beds.⁵³ This experiment suggests not only that inter-sovereign cooperation on re-entry can be successful, but also that moving prisoners at the end of their carceral period to a lower level of security closer to their families generally leads to positive outcomes.

E. Presumptive Parole

Most states vest substantial discretion in their parole boards to allow release of prisoners at some percentage of the offender’s minimum term where there is a reasonable probability that the offender will live and remain at liberty without violating the law. Likelihood of re-offense is a difficult thing to predict—and parole boards tend to be highly risk averse due to the political consequences of error. Parole rates thus vary considerably from state to state, and depend on the severity of offense, the prisoner’s prior criminal record, disciplinary history while in prison, and which party has the burden of proof.

More states should commit themselves to “presumptive parole” for designated classes of nonviolent crimes (*e.g.*, drug, property and fraud offenses). These prisoners should be presumed eligible for parole on their first eligibility date unless the board

⁴⁹ See Derek Gilna *When Halfway Houses Pose Full-Time Problems*, PRISON LEGAL NEWS, Jan. 10, 2015. The author suggests that more states should follow a Pennsylvania model that links contract renewal of social service providers to improved recidivism outcomes. *Id.* at 6.

⁵⁰ *Brown v. Plata*, 131 S.Ct. 1910 (2011). This order affirmed a ruling of a three-judge panel of the US District Court that California’s overcrowded prisons (and particularly the lack of medical attention caused by overcrowding) constituted cruel and unusual punishment under the 8th Amendment. *Id.* at 1933.

⁵¹ Public Safety Realignment, A.B. 109, 2011 Gen. Assemb., Reg. Sess. (Ca. 2011).

⁵² Mia Bird and Ryken Grattet, *Realignment and Recidivism*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 176, 177 (2016).

⁵³ *Id.* at 190.

finds by a preponderance of the evidence that the offender presents a significant risk of re-offense. The burden of demonstrating that risk should be on the Department of Correction. A handful of states have already moved to this presumptive parole approach,⁵⁴ although admittedly sometimes due to fiscal concerns and prison overcrowding rather than altruistic motives. Other states are actively considering presumptive parole provisions in their current legislative sessions.⁵⁵ A number of prominent experts have recommended this approach,⁵⁶ describing it as the “incipient movement” in corrections.⁵⁷

Presumptive parole is consistent with Catholic social teachings about mercy and redemption. In their 1973 letter *Rebuilding Human Lives*, the U.S. Catholic Bishops issued twenty-two specific recommendations about prison life and prison reform in America. Presumptive parole, then way ahead of its time in terms of state legislative action, was one such recommendation.⁵⁸

III. Conclusion

Our society has become alienated from the ideals of love, mercy, and the opportunity for redemption emphasized in the Gospels and pastoral teachings. Refocusing on these values can serve as a critical focal point for our national debate on criminal justice reform.

⁵⁴ See COLO. REV. STAT. Ann. §17-22.5-404.5 (West 2011); MISS. CODE ANN. §47-7-18 (West 2015); S.D. CODIFIED LAWS §24-15A-38 (1996)(presumption available only to prisoners who complete designated programs).

⁵⁵ See, e.g., S.B. 120, 2017 Leg., Reg. Sess., (Ky. 2017); S. 779, 190th Gen. Court Reg. Sess. (Ma. 2017); S. 3095A, 2017 Leg., 238th Sess. (N.Y. 2017).

⁵⁶ See Rhine, *supra* note 40, at 295.

⁵⁷ Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 243 (2017).

⁵⁸ Catholic Bishops of the United States, *Rebuilding Human Lives*, ORIGINS 3 at 344-50 (November, 1973).