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WHY “TOUGH ON CRIME” IS NEITHER CHRISTIAN NOR CONSERVATIVE

MATTHEW T. MARTENS*

The title of my talk today is, “Why ‘Tough on Crime’ is Neither Christian Nor Conservative.” I understand that the title of this speech alone is somewhat provocative given this setting. I’ve joked with Dr. Neal, who extended the invitation to speak here today, that I’ll do my best not to get him fired for inviting me.

In all seriousness, you should know that I don’t give this speech as someone who is anti-law enforcement, a liberal, or anti-Christian. I was a federal prosecutor for nearly eight years. I have a brother who is a police officer. I am most definitely not a liberal. And I am a committed, historically-orthodox Christian. I hope that you will hear what I have to say as someone speaking from that perspective.

There is much to love about our constitutional system of criminal justice in the United States. In fact, the Sixth Amendment to our Constitution alone is a bonanza of protections for criminal defendants against the power of the government.

The Sixth Amendment guarantees to criminal defendants “the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”¹ The right to a trial by jury found in the Sixth Amendment means that your government cannot take your liberty without the unanimous concurrence of a jury of ordinary citizens. Employees of the state, those operating the apparatus of government, and those who are interested in maintaining the authority of the state, cannot alone take your liberty. As Thomas Jefferson rightly observed, “I consider [the trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.”²

The right to a jury trial is a tremendous guarantee, and I hope that, if given the opportunity—and it is an opportunity—to serve on a jury, that you will not devise ways to avoid that duty, but instead relish the opportunity you have to serve as a check against the state’s infringement on the liberty of your fellow citizens. I can say that, in my nearly eight years as a prosecutor, people were rarely enthused at the outset

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1. U.S. CONST. amend VI.
2. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 404, 408 (Albert Ellery Bergh ed., 1905).

about the prospect of serving as jurors, but I never met a single juror who, after the fact, was not glad to have had the experience.

The Sixth Amendment not only grants a criminal defendant the right to a jury trial, but also a public trial. When it comes to criminal justice, we do not tolerate secret justice in America. As Supreme Court Justice Louis Brandeis observed in 1913, "If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects."³ Or, as he put it even more succinctly, "Sunlight is said to be the best of disinfectants."⁴ I can speak from experience that the press does not always get it right when it comes to reporting on trials. They often fail to capture the nuances of the trial, either because they don't understand or their tight deadlines and space limitations don't allow room to explore the nuances. But for all of the press's failings in the reporting of trials, the press gets it close enough to serve a valuable purpose. The press exposes the excesses of the prosecution, the abuses of the police, and the poor judgment of some judges. And this serves as an invaluable check on governmental overreach.

The Sixth Amendment also guarantees to a criminal defendant the right "to have the assistance of counsel for his defense."⁵ Since the Supreme Court's decision in *Gideon v. Wainwright*⁶ in 1963, criminal defendants at both the federal and state level have been guaranteed the right not just to counsel of their choice, but counsel provided at the expense of the state if they are unable to fund their own defense.⁷

The Sixth Amendment also affords a criminal defendant the right "to be confronted with the witnesses against him."⁸ In other words, if you say it, you're going to have to say it to my face. No accusations whispered behind closed doors. No convictions by affidavit. If you are going to accuse me of a crime, you are going to have to say it to my face, and you are going to have to answer a few questions about your accusation. As John Wigmore, the author of the most famous legal treatise on evidence ever written, said about cross examination, it is "the greatest legal engine ever invented for the discovery of truth."⁹ After nearly twenty years of trying cases across the country, I can attest to this truth.

The list of rights that our Constitution affords to criminal defendants goes on and on. From the right to be convicted only on proof of guilt beyond a reasonable doubt to the right to exculpatory evidence in the possession of the government, our Constitution affords criminal defendants an abundance of procedural rights designed to protect against wrongful convictions and to serve as a buffer against the overreach of the state.

3. Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in *THE FAMILY LETTERS OF LOUIS D. BRANDEIS* 100 (Melvin I. Urofsky & David W. Levey eds., 1971).

4. Louis Brandeis, *What Publicity Can Do*, *HARPER'S WEEKLY*, Dec. 20, 1913, at 10.

5. U.S. CONST. amend. VI.

6. 372 U.S. 335 (1963).

7. *Id.*

8. U.S. CONST. amend. VI.

9. 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1367 (James H. Chadbourne rev. vol. 1974).

But once a criminal defendant is rightfully convicted, our constitutional system of government offers little protection against unjust and unduly harsh punishments. The Eighth Amendment prohibits the government from requiring excessive bail before conviction and from imposing excessive fines or “cruel and unusual punishments” after conviction.¹⁰ The prohibition against cruel and unusual punishments has been read by the Supreme Court as, in theory, protecting defendants from grossly disproportionate punishments.¹¹ In reality, there is no such protection. Why do I say that? Let me offer a few examples.

In 1980, the Supreme Court, purporting to apply the Eighth Amendment’s protection against cruel and unusual punishments, ruled that a life sentence in prison was not a grossly disproportionate punishment for a man convicted of theft of \$121 by false pretenses, when his only prior convictions were for fraudulently using a credit card to obtain \$80 worth of goods and passing a forged check for \$28.36.¹² For three crimes that amounted to stealing about \$229, the Supreme Court ruled that a life prison sentence was not a grossly disproportionate punishment.

In 1982, the Supreme Court ruled that forty years in prison was not a grossly disproportionate prison sentence for the crime of possession with intent to distribute nine ounces of marijuana.¹³ Forty years.

In 1991, the Supreme Court ruled that a life sentence without the possibility of parole for a first time offender convicted of possession of 672 grams (about 1.5 pounds) of cocaine was not a grossly disproportionate punishment.¹⁴ Life in prison with no possibility of parole for possession of 1.5 pounds of cocaine.

And, most recently, in 2003, the Supreme Court ruled that a prison sentence of twenty-five years to life for a recidivist thief who stole three golf clubs was not a grossly disproportionate punishment.¹⁵

If life in prison for stealing \$229 is not grossly disproportionate, then the truth is that the Eighth Amendment provides no protection whatsoever against disproportionate prison sentences. It would be better if the Supreme Court just said so, rather than go through the charade of pretending to provide such protection.

It is not surprising, then, that without meaningful constitutional protections against the severity of the sentences imposed, our sentencing of criminal defendants is among the harshest in the world and is, without a doubt, the harshest among civilized Western nations. Indeed, our sentencing of criminal defendants is at its harshest in decades. Let me offer some examples.

In the mid-1970s, the incarceration rate in the United States—measured as the number of people incarcerated per 100,000 of popula-

10. U.S. CONST. amend. VIII.

11. *Rummel v. Estelle*, 445 U.S. 263 (1980).

12. *Id.*

13. *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam).

14. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

15. *Ewing v. California*, 538 U.S. 11 (2003).

tion—was approximately 150.¹⁶ Out of every 100,000 residents in our country, approximately 150 were incarcerated in the mid-1970s. Over the next ten years, that number doubled, to about 300 prisoners for every 100,000 of population.¹⁷ Within another ten years, from the mid-1980s to the mid-1990s, the incarceration rate doubled yet again, to about 600 prisoners for every 100,000 of population.¹⁸ By 2007, the incarceration rate in the United States peaked at 767 prisoners per 100,000 in population.¹⁹ In other words, the rate of incarcerating our fellow citizens—our fellow Americans—is about 4.3 times higher today than it was in the mid-1970s.

So where does that place our incarceration rate in the context of the world at large?

The United States accounts for less than five percent of the world's population, but incarcerates approximately twenty-two percent of the world's prisoners.²⁰ The United States incarcerates more of its citizens per capita than any nation in the world, with an incarceration rate ten times that of certain countries in Western Europe.²¹ In terms of raw number of prisoners, the United States had 2.24 million prisoners in 2012, compared to the next closest total of 1.64 million prisoners in China, followed by approximately 680,000 prisoners in Russia.²²

A comparison of incarceration rates in the United States and the United Kingdom is particularly striking. The United Kingdom has a prison population of 147 prisoners per 100,000 in population;²³ this is about where America's prison population was in the mid-1970s. Today, however, the United States has a prison population of 716 prisoners per 100,000 of population. Our incarceration rate per capita is nearly five times that of the United Kingdom.

If you find that comparison striking, you should know that, within the United States, the incarceration rate varies widely from state to state. In Louisiana, the incarceration rate is 1,341 prisoners per 100,000 in state population.²⁴ The rate in Missouri is just under the national average at 701.²⁵ Virtually all of the top fifteen states in terms of incarceration rates are in the Bible Belt: Louisiana, Mississippi, Oklahoma, Georgia, Texas, Arizona, Kentucky, South Carolina, West

16. Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC, Oct. 2015, at 60, 64.

17. *Id.*

18. *Id.*

19. *Id.*

20. ROY WALMSLEY, INT'L CTR. FOR PRISON STUD., WORLD PRISON POPULATION LIST 1, 3 (10th ed. 2013), http://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_10.pdf (explaining that the United States has 2.24 million prisoners of the 10.2 million worldwide prisoners).

21. *Id.* at 1, 3, 5.

22. *Id.* at 3–5.

23. *Id.* at 5.

24. Peter Wagner, Leah Sakala & Josh Begley, *States of Incarceration: The Global Context*, PRISON POLY INITIATIVE, <http://www.prisonpolicy.org/global/> (last visited Feb. 14, 2016).

25. *Id.*

Virginia, Florida, Arkansas, New Mexico, Alabama, Virginia, and Colorado.²⁶

Notably, the state with the lowest incarceration rate, Vermont—at 254 prisoners per 100,000 in population—still has an incarceration rate higher than that of the United Arab Emirates, Mexico, Turkey, Saudi Arabia, Vietnam, China, Iraq, Uganda, Haiti, Pakistan, Canada, Spain, France, Germany, and Norway, to name just a few.²⁷ Are the citizens of Vermont that much more lawless than the citizens of Mexico with an incarceration rate of 210, Canada with an incarceration rate of 118, Spain with an incarceration rate of 147, France with an incarceration rate of 98, or Germany with an incarceration rate of 79?

Are the people of Missouri, with an incarceration rate of 701, really ten times more lawless than the people of Norway, with an incarceration rate of seventy-two?

I. IS IT CHRISTIAN?

Why have I spent all this time alerting you to these statistics? Because every single one of those 2.24 million people incarcerated in the United States is a human being made in the image of God. At least that is what we as Christians claim to believe.²⁸ Yet, the harshness of the prison sentences that we impose on our fellow human beings raises serious questions about whether our criminal justice system is implemented in a manner consistent with Christian principles.

I am not claiming I know the answers to those questions. Sorting out all the issues that surround a fair evaluation of sentencing in our criminal justice system, the causes of the statistics I have just described, is far beyond the scope of one fifty-minute speech. I do think, however, that these statistics should cause us to pause and ask ourselves whether we are administering justice consistent with biblical commands.

So what are some of those biblical commands? Running throughout the Scriptures is a command not only to act justly, but to temper that justice with mercy. In Micah 6:8, we are told that God “requires” of His people that they “do justly” and “love mercy.”²⁹ It is not an either-or, but a both-and, command. Jesus echoed this command in the Gospel of Matthew, where it is recorded that he accused the Pharisees of “neglect[ing] the weightier matters of the law: justice and mercy.”³⁰ Similarly, James, the brother of Jesus, wrote in his epistle that judgment without mercy will be shown to those who show no mercy.³¹

26. *Id.*

27. *Id.*

28. *Genesis* 1:26–27.

29. *Micah* 6:8.

30. *Matthew* 23:23.

31. *James* 2:3.

A. Justice

So what is justice? Saint Augustine, in *City of God*, said that, “justice is a virtue distributing unto everyone his due.”³² Justice is not, as Augustine went on to explain, simply “[t]hat . . . which is profitable unto the greatest.”³³ In other words, when it comes to justice as understood by Christians, might does not make right. A government with the power to impose a punishment is not necessarily a government acting justly if the punishment is not that which is properly due for the wrong committed. Justice, as that term is used in the Bible, carries with it a requirement of proportionality, a correspondence between the wrong committed and the severity of the punishment imposed.

You see this principle of proportionality in punishment running throughout Scripture. In Psalm 28:4, David prays to God that he would render to the wicked “according to their works and according to the evil of their deeds.”³⁴ In Matthew 10, Jesus speaks of the Day of Judgment being more tolerable for Sodom and Gomorrah than for those towns that heard the words of the disciples and rejected them.³⁵ This gradation in judgment that Jesus speaks of reflects a principle of proportionality. In Romans 2:6, Paul writes that God will render to every man “according to his works.”³⁶ A search of the phrase “according to” in Scripture yields numerous instances in which punishment is spoken of as being meted out “according to” the wrong done. The judgment, even God’s judgment apparently, will be measured out to match the degree of the wrong. No more than deserved for the wrong done.

In the Old Testament, the concept of proportionality in punishment was explicit. In Leviticus 24: 17–20, the Lord said to Moses,

Whoever takes a human life shall surely be put to death. Whoever takes an animal’s life shall make it good, life for life. If anyone injures his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; whatever injury he has given a person shall be given to him.³⁷

Whether a property crime, a violent crime, or a capital crime, the Lord called for a proportionate response in punishment.

B. Mercy

It is important to understand that this principle of proportionality in punishment is, for the Christian, a maximum that can be inflicted, not the punishment that must be inflicted. Proportionality is a principle of restraint, not a principle of necessity. Our tendency is, when hit, to hit back harder. Those who have children have seen this in action, and the tendency does not diminish with age. Jesus made clear in his

32. 2 SAINT AUGUSTINE, *THE CITY OF GOD* 235 (John Healey trans., T&T Clark 1909) (1610).

33. *Id.*

34. *Psalm* 28:4.

35. *Matthew* 10:15.

36. *Romans* 2:6.

37. *Leviticus* 24: 17–20.

Sermon on the Mount that the Lord's command of proportionality was meant to limit our tendency toward disproportionate responses to those who harm us; but Jesus called for forgiveness and for mercy, in the face of wrongdoing. As Jesus put it,

You have heard it said, An eye for an eye and a tooth for a tooth. But I say to you, Do not resist the one who is evil. But if anyone slaps you on the right cheek, turn to him the other also. And if anyone would sue you and take your tunic, let him have your cloak also. And if anyone forces you to go one mile, go with him two miles.³⁸

In other words, while the law allows proportional punishment, tempering justice with mercy sometimes means forgoing retribution. As Gandhi put it, "An eye for an eye leaves the whole world blind."³⁹

For the Christian, then, these concepts of mercy and justice must be balanced. Thomas Aquinas said, "Mercy without justice is the mother of dissolution; justice without mercy is cruelty."⁴⁰ The law is meant to be a terror to the wicked, as the Apostle Paul tells us in Romans 13.⁴¹ But the law, strictly applied, condemns us all.⁴² But for the grace of God, there go I.

When measured by the biblical concept of justice, defined by proportionality but tempered by mercy, our system of incarceration should give us pause. Are we being unduly harsh, unforgiving, or unmerciful? Are we being too exacting, too demanding, or too unrelenting?

In some instances, the answer to that question is clear. Life in prison for stealing \$220 is neither justly proportionate nor merciful. Our incarceration statistics as a whole that I recounted should cause us to ask, to reflect on, and to examine whether we are being unjust and unmerciful on a wider scale.

II. IS IT CONSERVATIVE?

I am a conservative, and I suspect that many of you are as well, and so I think it is also useful to ask ourselves whether a criminal justice system that incarcerates at the rates we incarcerate people in the United States is consistent with conservative principles. We speak of personal accountability, valuing family, hard work, sexual morality, small government, and financial austerity, but does unduly severe incarceration serve those ends?

Imprisonment is in tension, at least, with the concept of personal accountability, since many impacts of imprisonment are visited on someone other than the wrongdoer. Families suffer, emotionally and financially, when a breadwinner or caregiver is imprisoned. I was reminded of this at almost every sentencing hearing that I handled as a federal prosecutor for nearly eight years. As I would leave the house for

38. *Matthew* 5:38–41.

39. RALPH KEYES, *THE QUOTE VERIFIER* 74 (2006).

40. NATALIE FLOWERS, *CRUELTY GREATEST QUOTES* (2016).

41. *Romans* 13:3–4.

42. *Romans* 3:23; *James* 2:10.

work each morning when I had a sentencing hearing on my agenda for the day, I would say to my wife, “I hate sentencings.” I hated sentencings because I understood that imprisoning an offender would often have a devastating impact on the family left behind and could dramatically affect the trajectory of the lives of the children left without a parent.

What is more, prisons are rampant with sexual immorality and, more alarmingly, inmate-on-inmate rape. According to a report by the U.S. Justice Department, in 2011–12 an estimated four percent of state and federal prisoners were subject to sexual victimization in their first twelve months after incarceration.⁴³ While it is all too common to joke—even for Christians—about the risk of rape faced by prisoners, it is no joking matter. It is an evil. It is an evil when visited on a prisoner no less than when visited on the most innocent and upstanding of citizens. There is no crime for which forcible rape is an appropriate penalty. It is only in recent years that this topic has gained any concerted attention and focus by politicians. A system of imprisonment that renders men and women vulnerable to rape is worth, at least, reconsidering.

Furthermore, as Steve Bibas, a University of Pennsylvania law professor and former colleague of mine at the Supreme Court, recently observed in an article published by the *National Review*,⁴⁴ incarceration separates parents from children, often for extended periods of time, usually meaning that the kids will grow up without a father. Conservatives, especially Christian ones, frequently lament the impact of single-family households on the well being of children. When it comes to imprisonment, however, the issue gets little attention from conservatives. Obviously, this separation of parent and child is an inevitable consequence of imprisonment, and it may be justified as a necessary evil in order to protect public safety. Given the collateral consequences prison has on innocent family members and the futures of young children forced to grow up without a parent, we should again ask ourselves whether our rates of incarceration are balanced against our belief, as conservatives, in the importance of two-parent families to the stability of society.

The cost of prisons is also a reason for conservatives to be concerned about the exploding incarceration rates. The average cost of housing a prisoner, whether state or federal, is somewhere just north of \$30,000 per year.⁴⁵ The *Washington Post* reported just this past June

43. ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 6 (2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

44. Stephanos Bibas, *The Truth About Mass Incarceration*, NAT'L REV. ONLINE (Sept. 16, 2015, 4:00 AM), <http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform>.

45. Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12523 (Mar. 10, 2015); CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 14 n.9 (2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

that we spend \$17 billion annually in the United States holding approximately 480,000 people in custody prior to conviction because of their inability to make bail.⁴⁶ Three quarters of these people being held and awaiting trial are nonviolent offenders arrested for traffic violations, property crimes, or drug possession. There are 480,000 people convicted of nothing, 360,000 of whom are accused only of traffic violations, property crimes, and drug possession, being held at a cost of \$17 billion dollars. From a conservative perspective, does this use of government funds really make sense?

And prisons are just another opportunity for big government excesses and corruption. As Professor Bibas observed, prisons, like, any other big government program, are subject to manipulation and exploitation by special interests, like prison guard unions. Construction companies build prisons at the cost of billions of dollars, creating risks of crony capitalism, where contracts are passed out to political supporters, who in return make political campaign contributions. And like all large government bureaucracies, prison systems suffer from waste, abuse, and inefficiency that plague all of government.

III. WHAT IS THE REMEDY?

So if there is reason for concern that our current system of incarceration is contrary to Christian principles of justice and mercy, and runs afoul of conservative principles regarding the proper role and scope of government, what is the remedy to this problem within our constitutional system? How do we correct for unduly harsh sentences already imposed, and how do we protect against such sentences going forward? Focusing on the federal criminal justice system, I think the answer is found in needed reforms in the conduct of each of the three branches of government.

A. Legislative

First, let me start with Congress. Article I, Section 1 of the Constitution vests all legislative powers of the United States in Congress.⁴⁷ As you all learned, I am sure, in high school, our federal government is one of limited, enumerated powers. There is no general police power by which the federal government can act in the public interest. That general power to pass laws in the public interest rests with the states. Section 8 of Article I lists, or enumerates, the federal legislative powers, including the power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations.⁴⁸

Now, you might wonder if those are the crimes that the Constitution provides explicitly that Congress can define, how exactly did we

46. Christopher Ingraham, *Why We Spend Billions to Keep Half a Million Unconvicted People Behind Bars*, WASH. POST (June 11, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/06/11/why-we-spend-billions-to-keep-half-a-million-unconvicted-people-behind-bars/>.

47. U.S. CONST. art. I, § 1.

48. U.S. CONST. art. I, § 8.

end up with all these federal prisoners? Is there really that much felonious conduct on the high seas and against the law of nations? Have I overlooked an outbreak of piracy that the network news is not covering? The answer, of course, is no.

What has happened is that Congress has aggressively interpreted its other powers, such as the power to regulate commerce among the states and even its power to establish post offices, as empowering it to define crimes. Thus, the crimes of wire fraud and mail fraud. And thousands of other crimes.

As a result of Congress's expansive reading of its limited powers, the number of federal crimes has proliferated out of control and continues to grow every year. In 1982, the U.S. Justice Department was asked to count the number of federal crimes. The Department couldn't do it. The best it could do was to estimate that the number of federal crimes in the United States Code was somewhere around 3,000.⁴⁹ In 2008, the Heritage Foundation estimated that the number of federal crimes that exist in the federal code, not to mention state and local crimes in each of the fifty states, had grown to 4,450.⁵⁰

To make matters worse, these crimes are frequently defined in sweepingly broad terms for fear that someone, somewhere, might evade their reach. Often, Congress has attached to these crimes mandatory minimum sentence of five, ten, fifteen, or twenty years, or even life. Meaning that anyone convicted of some of these crimes can be sentenced to no less than those mandatory terms of imprisonment, and often will receive much longer sentences. The judge has no discretion to lower the sentence below this statutory minimum regardless of the circumstances surrounding the offense. Such laws can, and at times do, work gross injustices.

Thankfully, in recent months there has been a bi-partisan movement afoot in Congress to reform the law surrounding mandatory minimum sentences. As Christians or as conservatives, these reforms are worthy of our attention and consideration, at a minimum.

B. *Judicial*

Second, the federal judiciary has played a role in the mass incarceration in America. For years, the federal judiciary imposed sentences under rigid sentencing guidelines that measured the propriety of sentences based on points, scores, charts, and graphs without meaningful regard to the facts and circumstances of the case or the characteristics of the offender. This rigidly numerical approach to sentencing that

49. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <http://www.wsj.com/articles/SB10001424052702304319804576389601079728920>.

50. John S. Baker, *Revisiting the Explosive Growth of Federal Crime*, HERITAGE FOUND. (June 16, 2008), <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

eschews discretion has in recent years been ruled unconstitutional by the Supreme Court,⁵¹ and that is, in my view, a welcome development.

C. *Executive*

Finally, the executive branch bears most of the responsibility for the increase in our nation's incarceration rates. All the laws in the world and even the harshest of sentencing judges will not send one person to prison for a single day unless and until the executive branch chooses to use its discretion to prosecute an individual.

As we consider the role of the executive branch in the incarceration rate of our fellow citizens, I want to consider two clauses of the Constitution. At the federal level, Article II of the Constitution vests in the President the executive power of the United States.⁵² That executive power carries with it a variety of duties, including duties related to the enforcement and administration of the criminal laws.

1. Take Care

Article II, Section 3 of the Constitution confers on the President the duty to "take Care that the Laws be faithfully executed."⁵³ This clause requires the President to enforce the laws, but implicit in that duty to enforce the laws is a corresponding duty to use discretion in the enforcement of the laws. Why?

As a practical matter, the executive lacks the resources to prosecute every breach of the laws, no matter how minor. Thus, financial necessity compels the executive to exercise discretion. In fact, I would argue that starving the executive branch of resources when it comes to law enforcement actually serves a useful purpose, from a conservative perspective, because it requires the executive to exercise discretion when enforcing often overly-broad laws. As the resources of the executive increase, the amount of discretion that must be, and will be, exercised decreases. This results in more heavy-handed and sweeping enforcement of the laws.

But even aside from the practical necessity of exercising discretion when enforcing the laws, the exercise of such discretion is inherent in the duty to execute the laws faithfully because one can only be faithful to the legislature's intent in passing a law if the law is enforced in a manner consistent with the harm that the legislature sought to combat with that law. As I have mentioned, laws are often written broadly in their scope because it is not always possible to predict in advance precisely how a wrongdoer will seek to cause the harm that the legislature is attempting to protect against. But the breadth of the laws does not necessarily mean that Congress intended to reach every act that technically falls within the law's scope.

51. *United States v. Booker*, 543 U.S. 220 (2005).

52. U.S. CONST. art. II, § 1.

53. U.S. CONST. art. II, § 3.

To take one recent example, it was reported this week that prosecutors in Maryland charged a thirteen-year-old boy with the crime of second-degree assault for kissing a fourteen-year-old girl on a dare from fellow students.⁵⁴ Are you kidding me? Second-degree assault? I understand that the conduct might literally fall within the scope of the assault statute. But that doesn't mean this is what the legislature was attempting to get at when it passed the assault statute. Send the boy to the principal's office. Call his parents. Suspend him for a day or two. But you have to be out of your gourd to charge this boy with a crime, much less the crime of second-degree assault.

This lack of common sense is not restricted to state prosecutors. The Supreme Court last term considered a case entitled *Bond v. United States*,⁵⁵ in which federal prosecutors charged a woman with the use of a "chemical weapon" because she spread some mildly irritating chemicals on the doorknob of her husband's mistress in retaliation. That's right, what would in any sane system be nothing more than a simple assault was charged as a use of a chemical weapon under a law passed to implement an international chemical weapons treaty. Did the conduct technically fit within the language of the statute? Perhaps. Should the prosecutor who charged that case be drug tested on suspicion of smoking crack cocaine? Most certainly. Mindless fixation on the elements of a criminal statute with no exercise of judgment is no more a faithful execution of the laws than is a wholesale refusal to enforce those laws because of a policy disagreement with them.

2. Pardons and Reprieves

But the executive's authority with regard to the enforcement of criminal laws does not end with the decision to charge a defendant. After conviction, the Constitution affords the President, in Article II, Section 2, the "Power to grant Reprieves and Pardons for Offenses against the United States."⁵⁶ Chief Justice John Marshall, perhaps the most famous of the Chief Justices of the United States, has referred to a pardon under this authority as "an act of grace."⁵⁷ It is a decision entirely within the discretion of the President to make, and his decision is not reviewable by any court.

Alexander Hamilton, writing in defense of this power in *Federalist No. 74*, said this:

Humanity and good conscience conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to

54. Emily Shapiro, *Boy, 13, Charged with Assault for Allegedly Kissing Girl, 14, Against Her Will*, ABC News (Sept. 12, 2015, 5:33 PM), <http://abcnews.go.com/US/boy-13-charged-assault-allegedly-kissing-girl-14/story?id=33713800>.

55. 134 S. Ct. 2077 (2014).

56. U.S. CONST. art. II, § 2.

57. *United States v. Wilson*, 32 U.S. 150, 160 (1833).

exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.⁵⁸

In other words, the law is harsh, too harsh, if it is a law under which there is no opportunity for pardon. Hamilton wrote this 200 years before the proliferation of 4,500 federal criminal laws, mandatory minimum sentences, and incarceration rates in Vermont three times those of other Western nations. What Hamilton said about the cruelty of a law without pardon in the eighteenth century is all the truer today.

Regrettably, however, presidents have been less and less willing in recent years to make use of this power. In 1900–01, President William McKinley pardoned 291 prisoners and commuted 123 sentences.⁵⁹ President Theodore Roosevelt pardoned about 84 prisoners a year during his eight years in office, and he commuted the sentences of about another 45 prisoners a year.⁶⁰ President Franklin Roosevelt was pardoning between 114 and 424 prisoners a year during his years in office, and commuted the sentences of 183 prisoners in only his second year in office.⁶¹ Harry Truman pardoned no less than 91 and as many as 400 prisoners in a given year.⁶² Even Richard Nixon was granting as many as 235 pardons in a single year.⁶³

But under President Reagan, the numbers began to drop precipitously. In no year did he pardon more than 91 prisoners, and his average was fewer than 50. He granted only 13 commutations in his entire 8 years in office.⁶⁴ President George H.W. Bush granted fewer than 20 pardons a year and only 3 commutations in his entire four-year term.⁶⁵ President Clinton was equally stingy, with fewer than 50 pardons a year on average, three years without a single pardon, and fewer than 8 commutations a year on average.⁶⁶

President George W. Bush has the second worst record of our last five presidents, granting an average of fewer than 25 pardons a year on average and only 11 commutations (one of which was to Scooter Libby) during his entire presidency. By the end of President Bush's first term, he had granted a grand total of 19 pardons in four years.⁶⁷

The worst record in the last five presidencies goes, however, to our current President, Barack Obama, who has pardoned only 64 federal convicts during his nearly seven years in office (an average of just over 9 a year), and only 89 commutations.⁶⁸ In his first four years in office, President Obama only barely edged out President Bush in his first four

58. THE FEDERALIST No. 74 (Alexander Hamilton).

59. *Clemency Statistics*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/pardon/clemency-statistics> (last updated Mar. 10, 2016).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

years with 22 pardons in total.⁶⁹ President Obama pardoned more Thanksgiving Day turkeys in his first two years in office than he pardoned human beings.

IV. CONCLUSION

So, in conclusion, what does all this mean for you? Well, for one it means that, as Christians concerned about “the least of these,”⁷⁰ we should add the millions of nameless, faceless prisoners to the list of those who have no voice and yet face injustice or justice without mercy.

On a practical level, perhaps it means that at the next presidential debate, the candidates should all be presented with this question: In light of incarceration rates in the United States that are multiples of those in every other Western country, how would you use your pardon power to achieve justice for those prisoners subject to sentences that are more harsh than is just?

Their answer to that question may not tell us everything, but it certainly would tell us a lot about how conservative and how Christian those candidates actually are. And my question for you is whether their answers would matter to you? Would you care what they said?

Thank you for having me here today. It’s been a pleasure.

69. *Id.*

70. *Matthew* 25:40.