

**PAPER TO BE PRESENTED AT THE PEPPERDINE CONFERENCE ON
“LOVE AND LAW”**

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Paper’s Title: “*‘What’s Love Got to Do With It?’ Incarceration in the United States and Conditions of Confinement*”

Abstract

This paper explores some of the practical repercussions and feasibility of modifying the law to bring agape love into places that, to understate the point, have not exactly been considered bastions of love – prisons. Part I provides a brief overview of the meaning ascribed in the paper to that ubiquitous term “love.” In particular, the paper will explain why the word “love” is not just different nomenclature for two other concepts – human dignity and restorative justice – that have been injected into legal analyses and policy debates.

Part II then turns to answering in one specific context – the correctional context – the question that philosopher and law professor Jeffrie Murphy was so brazen to raise in this secular era: “What would law be like if we organized it around the value of Christian love (agape)?” The paper profiles eight examples of the changes that would be wrought in correctional law if its foundation were agape love and explains why these changes are rooted in agape love. These changes include: (1) the way the law refers to confined individuals; (2) the law’s directives regarding the location of places of confinement and what they should be called, with “Community Justice Home and School” being one possible option; (3) provisions in the law establishing Community Justice Home and School Councils whose mandate is to effectuate confined individuals’ continued inclusion in the community; (4) the dismantling of the Supreme Court’s decision in *Sandin v. Conner*, in part through the participation of confined individuals and the community in the structuring and implementation of the disciplinary system at a place of confinement; (5) the elimination of the subjective state-of-mind requirement for liability when conditions of confinement fail to meet basic human needs; (6) moving away from a security-centric law model; (7) the abandonment of the defense of qualified immunity; and (8) the repeal of statutes erecting augmented barriers that impede confined individuals’ access to the courts for legal redress. The paper concludes that the “law of prisons” would be uprooted, largely unrecognizable from the law that prevails today, if agape love were its mainstay.

Part III injects a bit of realism into the discussion of the impact of Christian love – agape love – into incarceration-related law. Part III describes two of the chief objections

that would likely be mounted against incorporating agape love into the “law of prisons” and then capsulizes some of the responses that can be tendered to those objections.

Biographical Summary

Lynn Branham, Visiting Professor of Law at the Saint Louis University School of Law, is an expert on correctional and sentencing law and policy. She has held a number of leadership positions in the American Bar Association, serving, for example, as a member of the Criminal Justice Section’s Council, chair and later co-chair of the Corrections Committee, chair of the Prison Litigation Reform Act (PLRA) Task Force, chair of the Subcommittee on Effective Prison Oversight, and chair of the Subcommittee on Correctional Accreditation. She currently is the American Bar Association’s representative on the Commission on Accreditation for Corrections. A member of the Commission for fourteen years, she received the American Correctional Association’s Walter Dunbar Award for her efforts to improve the ACA accreditation process. Professor Branham also has provided training to federal judges and court staff about the PLRA and correctional law at twenty-two workshops sponsored by the Federal Judicial Center. Her many publications include a casebook and numerous articles on correctional and sentencing law and policy and a technical-assistance manual for courts, correctional officials, and attorneys general on *pro se* inmate litigation. Professor Branham received her undergraduate degree from the University of Illinois and her J.D. from the University of Chicago Law School.