

Shmuly Yanklowitz is a rabbinical student at Yeshivat Chovevei Torah Rabbinical School and a Wexner Graduate Fellow. He holds a Masters in Human Development & Psychology from Harvard University and is completing a Masters in Jewish Philosophy at Yeshiva University.

PRISON REFORM: A TORAH PERSPECTIVE ON THE AMERICAN CRISIS Shmuly Yanklowitz¹

Introduction

Shocked and dismayed only months after visiting European concentration camps, I now found myself walking throughout former African slave cells in Ghana where captured civilians were sent to American soil for purchase. I had read Jewish literature on the horrors of slavery and genocide, but on the issue of basic incarceration, I found myself clueless to offer a traditional explanation. Does the Jewish tradition justify or support any type of incarceration? What was the role of prison for our sages?

Having taken on a personal mission to visit prison cells of all sorts from Africa to Philadelphia and from Western Europe to New York City, my eyes have been opened to a new reality of consternation. In my continuing research, I have been greatly disturbed by the unremitting reports that I have read of inhumane conditions and the ineffectiveness of the United States penal system. This current pernicious crisis, in turn, is having a negative impact upon our education system, health care, employment, taxes, and security. All institutions produced within any given culture are generally the result of a broader conception of a social good and of human nature and needs. Thus, these institutions are inevitably deeply interconnected in their intentions and structures since they are embedded in the cultures in which they exist. Any given culture's penal system since antiquity, albeit mostly unconscious to citizens, has also impacted how providently that culture's educational, mental health, and legal systems have operated.

One might understand a primary Jewish mission to be found both in the written and oral Torah as the creating of a society that can balance the con-

¹I would like to thank Devin Villarreal, Mike Schultz, Benjamin Shiller, Akiva Dovid Weiss, and Drew Kaplan for all of their assistance. I would also like to thank Rabbi Melvin Sachs for mentoring me at the Rikers Island Detention Center, and my family for their love and support. Most importantly, I would humbly like to thank the *Ribono Shel Olam* for all blessings and opportunities that I have been granted to allow me to engage in a life of *mitzvot* and *tikun olam*.

stant demands of a passive, faith-based pursuit of peace with a proactive and bold search for justice. By tracing the Jewish tradition's approach to the use of prison, we can learn more effective ways to address the current crisis of the American penal system. As will be demonstrated, the Torah takes a fascinating approach, primarily rejecting prison as a punitive measure. This author appreciates that prison reform is unlikely to rise to our absolute top communal priority because there is an understandable communal and personal fear of criminals that tends to inhibit this discourse. Nevertheless, this is a task in which Americans of conscience, and, *a fortiori*, the American Jewish public must engage. It is my hope that this article will help to further a larger discourse within the American Jewish community around the various positions in the Jewish tradition on punishment, American penal history, moral penal philosophy, and our responsibilities regarding American prison reform. I wish to emphasize at the outset that this article clearly does not serve as an attempt to provide a definitive approach to solving the current prodigious moral predicament. The choice has been made to utilize halakhic (Jewish legal) texts only to advocate Jewish moral imperatives, not by any means to set forth any legal rulings or binding positions upon any individual or our system at large. This will by no means make our discussion irrelevant; to the contrary, it will assist in the holy enterprise of creating a modern, traditional Jewish discourse on values and social justice outside and beyond, yet based upon halakha.

Current Crisis in the United States

The United States has the highest rate of incarceration in the world, currently housing well over 2.3 million inmates and about 7 million in custody of the state (in prison or jail, on probation, or on parole). The rate of incarceration has grown exponentially over the past decade, increasing from one in every 218 U.S. residents in 1990 to one in every 147 U.S. residents in 1999. Prisoners are most often locked within cells that average around 30 square feet (4 ½ by 6 ½ ft.) and are forced to use toilets without privacy right next to their beds. Former Virginia Attorney General Mark Earley testified before the U.S. Congress in 2002 that “anywhere from 250,000 to 600,000” (14,500 of whom are juvenile boys and girls) of America’s 2.3 million inmates have been traumatically lambasted and raped behind bars.² Additionally, the New York state correctional system has an HIV rate of 8.5 percent, which continues to be spread deleteriously through rape.³ Over the past few decades, prison as a means of rehabilitation has lost support in favor of retribution, and thus opportunities for education, job training, and drug treatment have become more limited. Sentences have increased for non-violent offenders, and it is increasingly likely for a criminal to serve a life sentence for categorically non-violent crimes, most commonly for a drug charge. Over half of today’s inmates are incarcer-

² Jens Soering, *An Expensive Way To Make Bad People Worse* (NY: Lantern Books, 2004).

³ *Ibid.*

ated on drug charges, despite evidence that rehabilitation programs are much more effective at preventing future drug offenses than prison. A scholar at the John Jay College of Criminal Justice recently informed me that 70 percent of murders in this country are situational (passion crimes caused by anger, greed, or instantaneous reward). While clearly not justifying crimes, this data has led scholars to conclude that murderers are most often not repeat offenders.

While interning at Rikers Island, New York City detention center, I learned that group punishment is often administered to all inmates when only one inmate breaks a rule. Most often, during a period of collective punishment, criminals there can live in 23-hour-a-day detention with a one-hour optional exercise activity with no library access and silent meals. In addition, the tremendous disparity in arresting among different races should be noted.⁴ The complexity of the role of racial dynamics in the penal system however, is well beyond the scope of this essay.

In recent years, there has been a plethora of inmate litigation alleging civil rights violations resulting in prison riots, rapes, torture, deprivation, and physical abuse. Yet the last ten years have also seen enormous increases in rates of crime, drug addiction, and recidivism. Due to increased arrests, lengthy sentences, and ineffective drug prevention, many prisons have become filled beyond capacity. While about 625,000 inmates are released each year, a new batch of about 623,000 enters the US penitentiaries (165,000 are violators, 158,000 are recidivists, and 300,000 are first-time felons). 20 percent (around 440,000) of United States inmates are considered to be mentally ill; 37 percent were under the influence of alcohol when they committed their crime; another 33 percent were under the influence of drugs; 19 percent of prisoners are illiterate, 40 percent are functionally illiterate, convicts on average have an IQ of 8-10 points lower than the general population; and 38 percent of arrests are of young males between the ages of 15-24.⁵ Because, in general, prisoners were too drunk, too high, too uneducated, and too young to consider the legal repercussions of their actions, toughening laws is unlikely to serve as a deterrent. Additionally, age is said to be the greatest predictor of criminal behavior, indicating a need for more educational and service opportunities to be offered to 17 to 18-year-old high school students.

Jeremy Travis of the U.S. Department of Justice and the fourth president of John Jay College of Criminal Justice writes that only about 25 percent of the violent crime reduction in the 1990s was due to “incapacitation,” showing

⁴ If the American penal system has been successful at anything, it has been successful at fu -
thering a racial divide in American society, as inmates are disproportionately from minority
communities. According to the Bureau of Justice Statistics, an estimated 32 percent of black
males will enter prison during their lifetime, compared with 17 percent of Hispanic males and
5.9 percent of white males.

⁵ Soering

that keeping criminals off of the street is not the solution to crime reduction.⁶ Similarly, former New York City Mayor Rudy Giuliani's corrections commissioner Michael Jacobson pointed out that the city's nation-leading decline in street crime in the 1990s coincided with a decline in the use of incarceration as a mechanism for crime control. The same situation occurred in San Diego, which ranked second in the nation in crime reduction between 1993 and 2001, when the state sent fewer people to prison than in previous years.⁷ The British government's Justice Office reinforced that research, showing that a 25 percent increase in the number of inmates would only reduce crime by 1 percent.⁸ Most criminology researchers agree that the best way to reduce crime is to increase the speed and certainty of arrest for those who break the law, rather than to increase the severity of their sentences.

Rehabilitation efforts have not been wholly effective, perhaps in part, because such programs have been allocated only 6 percent of state penitentiary funds nationally. Inmates often suffer from mental illnesses, drug and/or alcohol addictions, illiteracy, sub-average I.Q.s, inadequate parenting, and a history of physical or sexual abuse, and yet there is too little funding allocated to educational and psychological development and growth. 40 percent of jails and 17 percent of prisons never even make the effort to test the mental health status of their inmates. Perhaps most tragic is that about half of the juvenile prisons in the U.S. do not provide any educational services that meet the state or national legal requirements, and 90 percent of juveniles leave adult prisons without a high school diploma or a GED. Pell grants for ex-convicts were canceled in 1994, even while the statistic is known that leaving the penitentiary with a GED degree reduces the chances of recidivism by over 25 percent, compared to those who leave without a high school diploma.⁹ It is reported that only 17.3 percent of rapists and molesters ever commit another sex crime after their release, and according to a study conducted by Canada's Solicitor General, that number can be cut to under 10 percent with the help of modern psychotherapy treatments.¹⁰

New religious rehabilitation programs have been instituted in many prisons, and prisoners have reported that they impinge upon their religious freedoms. These evangelical programs (many created in Texas under the auspices of George W. Bush serving as governor) explicitly aim to "remove sin" from inmates and to "cure them" of their evil.¹¹ In a lawsuit in June of 2006, Judge Robert W.

⁶ Travis, *They All Come Back: Facing the Challenges of Prisoner Reentry* (Washington, DC: Urban Institute Press, 2002).

⁷ Soering

⁸ *Ibid.*

⁹ Larry E. Sullivan, *The Prison Reform Movement: Forlorn Hope* (Boston: Twayne Publishers, 1990).

¹⁰ Soering

¹¹ Laura Magnani & Harmon L. Wray, *Beyond Prisons: A New Interfaith Paradigm for Our Failed Prison System* (Minneapolis: Fortress Press, 2001).

Pratt, the chief judge of the federal courts in the Southern District of Iowa, determined that this religious rehabilitation system had been an unconstitutional use of taxpayer money, used for religious indoctrination.¹² The Iowa prison program, however, is not unique. Since 2000, courts throughout the U.S. have cited more than a dozen programs for having unconstitutionally used taxpayer money to pay for religious activities or evangelism aimed at prisoners, recovering addicts, job seekers, teenagers, and children.

Yet the evangelical faith programs continue to expand. The Corrections Corporation of America, the nation's largest prison management company, which has 65 facilities and 71,000 inmates under its control, is substantially expanding its religion-based curriculum and now has 22 institutions offering residential programs similar to the one in Iowa.¹³ The Federal Bureau of Prisons, which manages at least five multi-faith programs at its facilities, is preparing to seek bids for a single-faith prison program as well. In 2002, the Supreme Court ruled that public money could be used for religious instruction or indoctrination, but only when the intended beneficiaries would make the choice themselves between religious and secular programs. The Supreme Court emphasized the difference between "indirect" financing, in which the money flows through beneficiaries who choose that program, and "direct" funding, where the government chooses the programs that receive money.¹⁴

Mark L. Earley, the former Attorney General in Virginia, is currently the president and chief executive of Prison Fellowship Ministries, which has almost \$56 million a year in revenue and oversees the InnerChange Freedom Initiative, which operates the Iowa prison program. This arrangement provides one example of the private interests of corporations and religious groups surreptitiously blurring the distinction between the separation of church and state.¹⁵ It should be noted, however, that many responsible religious rehabilitation programs have actually been quite effective. A Prison Fellowship program in New York showed that its participants recidivated at a rate of 14 percent where as the control group of non-participants re-offended at a rate of 41 percent.¹⁶

There have been numerous cases of over-sentencing for elderly inmates, a particularly expensive mistake, as they are the most costly to care for (three times more than that of young inmates) and have the lowest recidivism rates. According to a study done by the Sentencing Project, one out of every eleven penitentiary inmates is serving a life sentence (an 83 percent rise since 1992),¹⁷ yet, according to the Bureau of Justice statistics, only 1.4 percent of ex-cons

¹² Diana Henriques and Andrew Lehren, "Religion for Captive Audiences, With Taxpayers Footing the Bill," *New York Times* 10 December 2006, final edition, sec. 1, p. 1.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Soering.

over the age of 45 re-offend.¹⁸

Our penal system has become even stricter due to the vested interests of a number of factions in the industry. Various corporations benefit from the needs created by increasing penitentiary inmates, and politicians benefit in their popularity by increasing the “tough on crime” rhetoric. Yet the number of inmates has increased more quickly than the funding allocated to the penal system, resulting in overcrowding, double-bunking in tiny cells, increased mental illness, and inadequate physical and mental healthcare.

Unfortunately, not only are these conditions alarming, they are ineffective as well. According to the Bureau of Justice Statistics, more than two-thirds of released prisoners are re-arrested within three years.¹⁹ Our streets are made less safe due to more dangerous and unhealthy inmates being released, and thus, the penal system is extraordinarily draining on the American taxpayer while leaving her less safe. According to CBS News, taxpayers are paying an estimated \$40 billion a year for prisons.²⁰ Looking at this data pragmatically, we should learn that prisons do not address the task they are assigned to do. As taxpayers we have a moral responsibility to ensure the government acts justly with our funds. Is the government’s penal system improving or exacerbating societal problems? Is it using tax money responsibly or irresponsibly? Are prisoners back on the street in a more stable or a more dangerous state than when they entered? The current state of the system does not respond favorably to these questions.

Punishments lose their potential efficacy when not followed by a proper prisoner-society re-entry program. It has been shown that released offenders view themselves as being “in” but not “of” society,²¹ and that some would rather accept a prison sentence than be subjected to loss of all autonomy or hope of living in the community.²² Victoria Mitrani, Ph.D., Department of Psychiatry and Behavioral Sciences at the University of Miami School of Medicine, wrote that:

Any crisis represents an opportunity to make important changes in personal and family life as values and priorities are re-evaluated and individuals are more motivated to make changes. Unfortunately, the typical prison experience, which is dehumanizing and not directed at rehabilitation, makes such positive changes all but impossible.²³

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Robert Johnson, *Hard Time: Understanding and Reforming the Prison*, 3rd ed. (Belmont, California: Wadsworth, 2002).

²² Todd Clear and George Cole, *American Corrections*, 3rd Ed. (Pacific Grove, California: 1994).

²³ The Aleph Institute, “Project H.E.L.P.”, <http://www.aleph-institute.org/help.htm> (a -

With little positive reinforcement and limited opportunities for success, reintegration is doomed for failure, while a criminal record makes future employment very difficult. Understandably, one of the major contributors to criminal recidivism has been the lack of hope provided for those released from prison to recreate a life. If one has a prison record, one can lose access to all low-income government-housing programs, employment opportunities, and even the right to vote.²⁴ As the American system has mostly abandoned an emphasis on rehabilitative work and prison education programs, the prison confines have created a culture conducive to moral decadence. The theory that no rehabilitation works is coming under more scrutiny by scholars studying criminal justice and prison reform. A tremendous amount of literature has begun to reflect programs and interventions that have been found to reduce offender recidivism.²⁵

While many injustices remain in the penal system, it should be noted that there are many benefits to prison life as opposed to a free life lived in poverty. In prison, one receives free room and board, meals, and medical attention. Often, even educational and recreational opportunities are available. Yet jail removes a person from most opportunities to strive to fulfill one's own personal meaning of existence and perhaps from any chance to freely serve God and make manifest what is good and holy in society. No matter what amenities are provided, time spent in prison can be one of the most miserable forms of suffering; one makes few decisions for oneself and is usually in constant solitude and under strict surveillance.

cessed 5 July 2007).

²⁴ The Personal Responsibility and Work Opportunity Reconciliation Act in 1996 barred ex-felons with a drug conviction from receiving food stamps, family welfare benefits, and access to federally subsidized housing. In 1998 with the Higher Education Act, former drug offenders began to be excluded from student loans. Over 4 million Americans (over 2 percent of the American adult population) are not allowed to vote even after their incarceration has ended. In response, U.S. Supreme Court Justice Thurgood Marshall wrote: "[Ex-offenders] are as much affected by the actions of government as any other citizen, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of a right to vote to such a person is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens." (*Richardson v. Ramirez*, 418 U.S. 24 (1974))

²⁵ D.A. Andrews, Ivan Zinger, Robert D. Hoge, James Bonta, Paul Gendreau, & Francis T. Cullen, "Does Correctional Treatment Work? A Clinically-Relevant and Psychologically-Informed Meta-Analysis," *Criminology* 28 (1990): 369-404; Paul Gendreau, "Offender Rehabilitation: What We Know and What Has To Be Done," *Criminal Justice and Behavior* 23 (1996): 144-161; M.W. Lipsey & D.B. Wilson, "Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research," in *Serious and Violent Juvenile Offenders: Risk Factors and Successful Interventions*, eds. R. Loeber & D. Farrington (Thousand Oaks: Sage, 1998): 313-345; Lawrence W. Sherman, Denise Gottfredson, Doris MacKenzie, John Eck, Peter Reuter, & Shawn Bushway, "Preventing Crime: What Works, What Doesn't, What's Promising," (Washington, DC: U.S. Department of Justice, National Institute of Justice, 1997).

A Brief History of Prison Reform and the Philosophical Influence in the U.S.

For thousands of years, penal systems consisted of the death penalty, slavery, intense corporal punishment, maiming, and other brutal forms of punishment. In the modern era, much of the physical punishment of antiquity has been done away with worldwide. William Penn, in the American (British) colonies in 1682, prescribed labor as a punishment for crime in place of physical abuse. Upon his death in 1718, however, the government reauthorized corporal punishment. During the early colonial times in America, religious missionary conceptions of the need to save humans from vice and degradation lead to the creation of a prison that was to be “a benevolent system” founded on behavioral correction and religious affirmation. Advocating solitary confinement and opportunities to reflect on one’s sins were expected to be the stimuli for the reformation. The Quakers by the late eighteenth century once again advocated prison reform based on labor. A hierarchy of punishments was to be based on a system of deterrence, not of revenge. John Howard, in England, put into practice this deterrent system calculating punishment not based on the severity of the punishment but on the certainty of the punishment when the criminal was acting. By the eighteenth century, this was the practice in the U.S. as well.

In many ways, moral philosophy has heavily swayed the movement of systems of punishment. Immanuel Kant, the eighteenth-century German philosopher, was a proponent of deontological ethics as opposed to utilitarianism or consequentialism, which is to say that for him moral obligations and duties are necessary and binding in themselves, regardless of any initial assessment of the resulting harm or benefit created to others. Such a conclusion has great implication for a penal system as can be seen in his following remarks:

The penal law is a categorical imperative; and he is to be pitied who slinks through the tortuous maze of utilitarianism, in search of some (opposing) good which may absolve him from punishment (or even, from the due measure of punishment) where justice requires him to be punished.²⁶

Kant’s ethical system led him to conclude that the government should only create punitive systems where the punishment matches the crime. In eighteenth-century America, however, optimistic ideas for a “progressive penology” based on reformation and cleansing the soul of sin and evil had taken precedence over Kantian deontological ethics. Utilitarian ethics played a leading role in determining the future of the American system, mostly ignoring the intention of the criminal and focusing upon the crime itself and its effect on society. According to most systems of utilitarian ethics, a good action or good society is one that brings the greatest amount of happiness and least amount of suffering to the

²⁶ Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington (Indianapolis: Hackett, 1993).

greatest number of people. It was Jeremy Bentham, a leading eighteenth-century utilitarian thinker, who advocated the famous “Panopticon Prison” where convicts would be placed under constant surveillance from a central control station.²⁷ However, by the late twentieth century, due to various interconnected social and political forces, the penal system had transitioned from the utilitarian conception of a justice system back to the deontological neo-Kantianism and the usage of the penal system for the sake of retribution.²⁸

Alexander Maconochie, the eighteenth and nineteenth-century Scottish prison reformer, invented the concept of indeterminate sentencing, which is an incentive-based system involving early release for hard work and good behavior. Maconochie said, “When a man keeps the key of his own prison, he is soon persuaded to fit it to the lock.”²⁹ He argued for task—not time—sentences where one’s term ends based on the completion of a measurable amount of labor. Indeterminate sentencing was used in the U.S. for much of the nineteenth and twentieth centuries, until 1974, when sociologist Robert Martinson published an article arguing that, “with few and isolated exceptions” there was no evidence that any rehabilitation programs successfully reduced recidivism.³⁰ His article, along with the high crime rates of the 1970s, caused a shift in the emphasis of crime policy from rehabilitation to punishment and just deserts—the revenge theory of getting what one deserves. Later, in 1979, Martinson retracted his

²⁷ There are two important moral paradigms relevant to this discussion: the utilitarian and the absolutist. The utilitarian is primarily concerned with what will happen. Absolutism is primarily concerned with what one is doing. In discussing the legitimacy of our current penal system it seems that we must hold ourselves accountable not only for the future safety of our streets, but also for the moral standard of our current actions. On a practical level, we are clearly very distant from the ramifications if both paradigms were true and accepted.

²⁸ There has been a moral and legal debate as to whether retributive justice is in fact just and whether one should be punished for the sake of punishment itself and with a punishment “equal” to one’s crime. An opposing theory of law would allow other values and purposes to affect the determination of a punishment, such as deterrence, compensation/actual damages, prevention from committing other crimes, and other contributions to the larger social good. But retributive justice and deterrence theory as ultimate grand theories are far too limiting. Deterrence does not have to be carried out to punish one “more than deserved” in order to be effective at deterring. On the other hand, a retributive justice model is interested in giving the unsuccessful murderer the same punishment as the successful one. This seems unjust, as our criminal system should not be concerned simply with the *mens rea* (intention) but also with the consequence of an act. In the end, this offender has not brought actual harm to society and it cannot be justified to inflict harsh punishment without an initial wrong that caused damage. On the other hand, such attempts must also be deterred and do create a society that feels less safe.

²⁹ Michael Ignatief, “Prisons, the State and the Labour Market, 1820-1842,” in *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850* (London: Peregrine Books, 1979), 174-206.

³⁰ Martinson, “What Works? Questions and Answers About Prison Reform,” *The Public Interest* 35 (1974): 22-54.

argument, acknowledging that some rehabilitation programs actually did have “an appreciable effect.” But there was no turning back at that point. In 1977, California became the first state to abandon rehabilitation and indeterminate sentencing in favor of punishment and fixed sentences. States around the country quickly followed suit.³¹

The majority of the U.S. community at this point had, perhaps unconsciously, adopted a retributive justice approach. Moreover, there was a sentiment that the convict simply needed to be removed from society and be virtually disposed of at all costs to solve crime problems. Concomitant to such convictions was an appreciation for the death penalty. Most states in the 1980s abolished parole, instituted a “three strikes and you’re out” rule, and lowered the age at which juveniles could be tried as adults from 16 to 14. Additionally in the 1980s, there was a massive prison build-up and an increase in stringency in drug laws. By the 1990s, most discussions about hopeful prison reform for better prisoner treatment and more treatments were abandoned.

In recent years, due to budget crises, about half of U.S. states have begun to take steps such as eliminating mandatory minimum sentences, restoring parole opportunities, and relocating non-violent offenders in treatments from prisons. Now, many of the discussions have moved to address the needs of partnership, moving from a model of a prisoner’s responsibility in rehabilitation to the community’s responsibility in assisting re-entry.

When George W. Bush became President in 2001, he did not terminate the Clinton-era re-entry programs, and instead adapted them to fit with his faith-based plans. Many see Bush as one of the most pro-prisoner presidents in the history of the nation. In his 2004 State of the Union Address, Bush asked Congress to grant 300 million dollars to prisoner re-entry programs.

Michel Foucault, the twentieth-century French post-modern philosopher, argued extensively that western society during the Enlightenment period embraced the humanistic virtues of reason and justice, which led to fundamental shifts in the use of power and discipline. The penal system had shifted from regulating one’s body by means such as torture and corporal punishment, and replaced it with “technologies of punishment” that regulate one’s thoughts and behavior by means such as strict surveillance and psychological abuse. This “disciplinary punishment” provides a potential abuse of power on the part of the parole officer, jailer, psychologist, and program facilitator over the prisoner. Foucault does not see the penal system as existing only on the margins of society but rather it manifests itself in many different ways throughout society. He views the prison, the school, the army barracks, and the workshop as completely interconnected in how discipline is administered. Foucault also argues that the disciplinary measures taken within the prison walls perpetuate “criminal factories,” convincing the inmates that they are lazy, evil, useless,

³¹ Sullivan

deviant, failures, and worthless.³²

The Jewish Penal System and the Biblical Just Society: *Tzelem Elokim & Kavod Ha-Beriyot*

Before addressing Jewish sources on the ethics of punishment and the legal ramifications, let us turn to the foundational concepts of *tzelem Elokim* and *kavod ha-beriyot* (human dignity).

“And God created man in God’s image, in the image of God (*tzelem Elokim*) God created him; male and female God created them.” (Gen. 1:27) Maintaining the dignity (*tzelem Elokim*) of all human beings is a foundation for biblical ethics, and is a principle that plays a major role in how social justice is manifested. Due to the infinite dignity held by every human being, the Sages inquired as to how it could possibly be just to detain someone and embarrass them prior to finding them guilty (*Sanhedrin* 7:10). Furthermore, the well-known Jewish legal regard for accurate testimony required the testimony of at least two witnesses, thus severely limiting the frequency of detention.³³

Furthermore, the dignity of the guilty was taken very seriously, not just descriptively, but prescriptively. Executions were prescribed to only take place immediately after a guilty verdict, so as not to torment a prisoner with extended imprisonment or pillory (*Sanhedrin* 4:1, 11:4). The rabbinic prohibition of *inui ha-din* similarly forbade the prolongation of a case or stalling to carry out a sentence since it adds unwarranted anguish to the punishment.

While the Sages operated under a corporal punishment model, human dignity still remained the top priority. The Mishnah teaches us that if one urinates or excretes while being lashed, all further lashing is ceased because the criminal has been shamed (*Makot* 3:14). The Sages took tremendous care to value the dignity of the criminal and, thus, rejected punishment for its own sake. The ethics of *tzelem Elokim* balanced with general social welfare and security are at the forefront for how the Torah teaches of our criminal systems.³⁴

³² Michel Foucault, *Discipline and Punishment: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1975).

³³ To arrest without proper evidence would be ethically wrong according to the Sages, as a person should never be degraded in public even though he may be suspected of having sinned (*Avot* 3:11; *Menahot* 99b; *Bava Metzvia* 58b). Similarly the Sages said that one who shames his fellow in public (*ve-ha-malbin penei haveiro be-rabim*), even if he has Torah knowledge and good deeds, has no portion in the world to come (*Sanhedrin* 99a). Additionally, the Midrash (*Genesis Rabah* 24:7) teaches that to embarrass another person is to diminish God. It is even possible, based on this midrash, that in the world-to-come, the legislators, judges, and prison staff could get a harsher punishment than the murderer inmate himself! A murderer, according to the Sages, does not lose his share in the world to come, whereas one guilty of embarrassing another could lose his eternal reward (*Avot* 3:11; Rambam *Hilkhot Hovel U-Mazik* 3:7, 5:9).

³⁴ In this moral reasoning, one might apply the biblical command “*ve-ahavtah le-rei’akha kamokha*” (Leviticus 19:18), the imperative to treat others as we ourselves want to be treated (Rambam *Hilkhot De’ot* 6:3; *Avot* 2:10) and the Kantian categorical imperative, or Rawls’ “veil

The Talmud even goes so far as to say that *kavod ha-beriyot* (human dignity) is so important that it can push off a Torah prohibition (*Berakhot* 19b). The medieval commentator Meiri commented on this text, calling human dignity the most dear and beloved quality in all of Judaism.³⁵ The Sages taught that even embarrassment of the “lowest” poor person must be compensated (*Bava Kama* 90b). *Tzelem Elokim* can be seen as a foundation of the Torah, creating a culture of people who strive to no lower a moral standard than that of God’s. That each human is created with such dignity automatically grants them infinite rights and impresses upon all others infinite obligations to them.

It is true that some values were considered great enough that they permitted the shame of another. For example, the Sages taught that a father could be shamed to force him to feed his children (*Ketubot* 49b). However, these cases seem to have been generally limited to situations where one who is not officially obligated must be influenced to live to a higher moral standard since the risks for another helpless individual were too severe.

One might argue that prisoners who have broken the social contract with the nation have forfeited their rights and protections and have potentially even lost their *tzelem Elokim*. The moral imperatives set forth throughout the Torah, however, seem to indicate the opposite—that even the unjust deserve just treatment.³⁶ In sum, it is clear that the tradition did not regard incarceration as a time of ethical anarchy.

Biblical Times

Prison was not emphasized in biblical Jewish culture, and it seems that it was generally instituted more within surrounding cultures than in the Jewish society. Prison was certainly widespread among the ancient Egyptians (Gen. 39:20; 42:16-19; Ex. 12:29), the Philistines (Judges 16:21, 25), the Assyrians (2 Kings 17:4), and the Persians (Ezra 7:26). It is hard to tell though what conditions were like in such prisons. The jail may have been a place of repentance and growth for Joseph: “for out of prison, one came forth to reign.” (Ecc. 4:14) Although the Egyptian problem didn’t have a program set in place, incarceration was a place where Joseph may have had the space to manage on his own to learn and grow.

For the Hebrews, we also find imprisonment, or custody (“*mishmar*”) used within the Torah for the blasphemer (Lev. 24:12) and for the Sabbath violator of ignorance” device, and one might ask oneself how one would want their own punishment (or one’s child’s punishment to be) if they missed the mark. Holding on to the tension of securing our streets and preventing crime on the one hand with showing the necessary mercy for the criminal on the other hand is a challenging moral task laid upon us.

³⁵ See also *Megilah* 3b, *Sotah* 32b, *Bikurim* 3:7, *Mo’ed Katan* 27a, and *Ta’anit* 31a.

³⁶ R. Naftali Tzvi Yehudah Berlin mentions honoring the dignity of an enemy in his introduction to Genesis (*Ha-Emek Davar*) where he notes that the prophets refer to the Book of Genesis as *Sefer Ha-Yashar*—“The Book of the Just,” because the Patriarchs were called “*yashar*.” (*Avodah Zara* 25a)

(Num. 15:34). This jailing, however, only served the purpose of keeping the felon under custody until a verdict could be reached. In both cases, Moses went to God to decide the punishment and the incarceration was not considered part of the penalty. Joshua also told Moses to incarcerate (*kela'em*) Eldad and Medad (Num. 11:28). However, in these cases, the imprisonment seems to have served as a temporary detention pending trial rather than as a punitive measure. There is no source in the Torah for incarceration as punishment.

The clear exception to biblical practice, which utilized incarceration strictly for temporary detention, can be found within the powers of the king. Both the kings of Judah and of Israel maintained prisons (1 Kings 22:27; Isa. 24:22; Jer. 37:4, 15-16, 18, 21; 38:6-7, 9-13, 28), and prophets who spoke against the king in power often found themselves in prison. It appears that the kings were entitled to inflict imprisonment and corporal punishment outside the controls of a formal judicial system. The king's decisions, however, are not viewed traditionally as the legal or moral norms of the Torah, but rather as a supra-legal institution created to address larger social issues.

Much can be learned about the Torah's stance on punishment from the two very pragmatic and creative solutions that it offered for criminals: the institutions of *ir ha-miklat* (city of refuge) and the *eved ivri* (indentured servitude).

The *eved ivri* is most often a thief sold by the court to make retribution to his victims. This indentured servant worked under secure, humane, and autonomous conditions, while perhaps even focusing on his rehabilitation. In the case of the *eved ivri*, the Talmud (*Pesahim* 88b) teaches us that "he who acquires a servant, has really acquired a master."³⁷ It may be cogently argued that the servant is treated with the highest ethical standards because the purpose of this servitude is not pure retribution, but also deterrence, rectitude, and rehabilitation. In fact, if the servant was not happy with his living conditions and decided to run away from his mentor/owner, he had the right to asylum (Deut. 23:15-16).³⁸ The servants were, however, still bound by Torah commandments throughout their service. Also, if a slave became sick or incapacitated, his master still had to support him, and this nevertheless counted toward his years of service for up to three years. When the slave received his freedom, he received a severance gift (Deut. 15:13-14). If the slave had a wife and children, his master was also obligated to provide for their livelihood as well. The servant, very significantly, cannot be given humiliating work, nor can he be overworked (Lev. 25:39-43). The Talmud teaches that slaves would leave their servitude with crowns on their heads and in states of joy (*Rosh Hashanah* 8b). It was vital that they not be disgraced upon re-entry into society. This paradigm has much to teach as a model for a just and constructive penal system.

The second solution offered criminals, *ir ha-miklat*, while not a perfect comparison to prison since it was reserved only for the *rotzeah be-shogeg* (unin-

³⁷ "Kamah eved, kamah rav."

³⁸ See also *Mishneh Torah, Hilkhot Avadim* 8:10.

tentional murderer) and was not necessarily even a means of punishment, can, nonetheless, shed tremendous light upon our current subject, as it provided a new community and asylum for the unintentional murderer to live in autonomously while free from victim vengeance. In modern times, one may argue that the majority of prisoners may, in fact, be viewed as not fully intentional criminals according to traditional standards. This possibility needs to be explored given the fact that so many of the current prisoners are in their situation due to being uninformed, underage, or under the influence. This model of *ir ha-miklat* can thus shed tremendous light upon our modern situation. The Talmud proves, at great length, that the purpose of the *ir ha-miklat* is to provide protection from the *go'el ha-dam*, the relative of the victim seeking to redeem the deceased by killing the accidental murderer. This system suggests that there is also a punishment involved for negligence. Much of the personal moral war of conscience in life is fought within the *be-shogeg* moments, since one should be accountable for not being careful and avoiding unintended negligence. Yet the goal is still not the punishment of the killer himself. Rejecting retributive justice in favor of a mediated deterrence theory, while combined with pragmatic concerns, the Torah's laws of punishment served as a way to protect society at large and to preserve the dignity of the criminal by protecting him from the family of the murdered.

Perhaps most profoundly, the Levites (those whose lives have been dedicated to a life of religious service) were the ones chosen to be present with the murderers. Moshe Greenberg, describing the *ir ha-miklat*, wrote:

The humanitarian purpose of these laws is obvious, and their aspiration to control vengeance by making it possible for public justice to intervene between the slayer and the avenger has long been recognized as an advance over the prior custom of regarding homicide as a purely private matter to be settled between the families of the two parties.³⁹

In other words, the institution of the city of refuge is an attempt to bring vengeance into the control of the civil system, and thus protect the *rotzeah be-shogeg* from the *go'el ha-dam*. The city of refuge was neither to be overpopulated nor deserted (*Sifrei Bamidbar* 159), but should be like a city which has marketplaces and proper living conditions (*Makot* 3:8). The Mishnah appears to describe life as a comfortable one within the city of refuge (*Makot* 3:6). Prisoners in such a system had the right and opportunity to live normal lives within the city and to make a living. By virtue of the Torah verse “and that he may live” (Deut. 4:42, 19:5), it is ensured that the dignity of prisoners could be maintained and that they could remain productive. If the prisoner was a scholar, he could take his school with him to the city of refuge, and if he was a

³⁹ Moshe Greenberg, “The Biblical Conception of Asylum,” *Journal of Biblical Literature* 78, no. 2 (June 1959), 125.

student, he could have his teacher brought to him (*Makot* 10a). Not only did the Torah mandate that the prisoner work and live freely, but that he should have full access to all learning possibilities, even if it meant bringing a whole school into the auspices of the city.

Most astounding are the procedures that were put in place by the Sages to ensure a proper re-entry into society if and when one was released from a city of refuge. There is a very important dispute between Rabbi Yehudah and Rabbi Meir over whether the freed accidental murderer may return to a position of authority after being released (*Makot* 2:8, *Sifrei Bamidbar* 160). Rabbi Meir believes that the punishment will have relieved the family's anger. The law concludes that the former prisoner who was released should be returned to his former office or position (*Makot* 2:8). Rabbi Meir essentially argued that felons should not be prevented from receiving work, but should rather return to their former status in order to maintain the convict's honor and increase his chances of success in social re-entry. Commenting on the cities of refuge, the Sages said that if divine law provided "paths and ways for homicides to save themselves, how much more must the right of refuge be accorded to the righteous?" (*Numbers Rabah* 23:13)

Ir ha-miklat, as explained above, is based on a system of unintentional crime. The Jewish legal system requires warnings before certain crimes in order for one to be held accountable. Maimonides claimed that, "transgressions can be divided into four classes: involuntary transgressions, sins committed in ignorance, sins done knowingly, and sins done spitefully."⁴⁰ The American system, on the other hand, hardly allows for the negligence of law to be claimed. We have witnessed a failure of society to teach the proper expectations, and have a criminal justice system that shows little mercy to the uneducated transgressor. In comparison, while it is true that Jewish courts could administer *malkot* (lashes) and other forms of corporal punishment, such punishments had very strict requirements to convict, including *hatra'ah* (a warning perfectly timed and accepted).

Both of the Torah's criminal institutions limited the criminal's freedom, yet provided pragmatic theories to address the bereaved or damaged. It likewise protected the criminal and avoided harsh punishment for its own sake. The Bible did not even imagine utilizing prisons, but when necessary, provided temporary loss of liberties to address the situation pragmatically. Yet, even in these cases, a tremendous amount of protection and rights were provided for the criminal.

Talmudic Times

The Talmud further developed procedures of justice based pragmatically on the Torah's rejection of prisons as a punitive measure, yet expanded its role for temporary detention. Early on, Ezra began to empower the courts to

⁴⁰ Moses Maimonides, *Guide of the Perplexed* III:41.

begin applying imprisonment within Jewish law (*Mo'ed Katan* 16a). Although there is no record that it was ever actually utilized, one example in Talmudic law where incarceration was applicable was the temporary incarceration of the *zaken mamre* (rebellious elder) during the pending inquiries of three courts (*Sanhedrin* 11:2-4). Another example of Talmudic incarceration was pre-trial detention for one who wounds another and must wait to see if the wound he inflicted was fatal (*Ketubot* 33b).⁴¹ Also, in capital cases, the accused would be detained pending trial (*Sifrei Shelah* 114), yet it was possible at times to be released on bail (*Mekhilta Mishpatim* 6).

Remarkably, only perpetrators—not procurers, nor instigators—could be criminally liable (*Kidushin* 42b). That said, it deserves note that the Sages instituted a form of imprisonment called “*kipah*,” which was essentially a small chamber where those perpetrators found guilty—or very serious criminals who were held under special circumstances—could be detained “for many years,”⁴² or at times, imprisoned for life.⁴³ The Sages employed the verse “and you shall put the evil away from your midst” (Deut. 13:6, 17:7, 19:9) to argue for its use. *Kipah* was most often used for murderers not killed due to legal technicalities or for one who sinned three times punishable by *karet*. *Kipah* was not an internal legal solution but an auxiliary device allowed by halakha, similar to the power of the king to inflict punishment and the death penalty when the system didn’t prescribe it. Both the case of *kipah* and the acts of the king were employed temporally in Jewish history to achieve a social good and protection outside of the standard legal requirements. Neither institution, I contend, was created to provide the necessary consequence to the criminal but to maintain the proper social order. There were certain times when an offender would be imprisoned, such as during the waiting period to see if the victim will pass away (*Ketubot* 33b),⁴⁴ but imprisonment was never a punishment under the primary Torah law.

At a later point in Talmudic history, imprisonment became more standard, used for debtors and the enforcement of divorce orders (*Pesahim* 91a and Rashi ad loc.). Criminals who were repeat offenders but were never able to be executed were “placed in a cell” (*Sanhedrin* 81b); however, the detention was often times still not a punishment but was only preparation for a different solution.

Talmudic law allowed many benefits for prisoners (*Pesahim* 8:6; *Sotah* 4:5; *Yevamot* 12:5; *Mo'ed Katan* 3:1). The law also provided provisions for those being released from prison and for those escaping from prison, such as that

⁴¹ See also *Mekhilta Nezikin* 6, *Sanhedrin* 78b, and *Pesahim* 91a.

⁴² *Mishneh Torah, Hilkhot Rotzeah* 2:5.

⁴³ Often, these prisoners were kept on a brutal barley diet leading to death (*Sanhedrin* 9:5 and 12:8) This harsher penal theory seems to be an anomaly and has not been proven, as far as this author is aware, to have ever been actualized. This treatment must, of course, be seen within its cultural context.

⁴⁴ See also Rashi, Ex. 21:19, s.v. *ve-nikah ha-makeh*.

recorded in *Yevamot* 106a: “If a man escaping from prison beheld a ferryboat and said [to the ferryman], ‘Take a *dinar* and lead me across,’ the boat provider can only claim his ordinary fare.”⁴⁵ There is even a special prayer that one who is released from prison recites upon celebration of the cessation of the injustice of capture (*Berakhot* 54b).

Similarly, the *mitzvah* of *pidyon shevuyim*, the redeeming of Jewish prisoners, is greatly emphasized within Talmudic law. While such a commandment would rarely, if ever, apply to the U.S. criminal system, halakha does teach that a Jew does not belong in non-Jewish captivity. The Kantian ethic demanding that we honor this same code for non-Jews can be expressed in Jewish law through the principle of “*mipnei darkhei shalom*,” which obligates that non-Jewish prisoners be treated equally to Jewish prisoners in such a case. The Torah’s anti-captivity stance is so strong that if a Jew is captured, it is even viewed as a pressing *mitzvah* to rescue him or her (with the exception of hostages who are ransomed in excess of their worth).⁴⁶ While the *mitzvah* of *pidyon shevuyim* does not directly relate to our current system, the values learned from this concept are very telling of the Sages’ philosophy of punishment, freedom, and of incarceration by non-Jewish courts.

The Sages, when stating: “The repentance of the absolutely (wicked) blocks punishment,” (*Yoma* 86b) also acknowledged that even the most nefarious of criminals can change their ways. Even Jeroboam, accredited to be the greatest sinner of all, and perhaps Elishah ben Abuya (“*Aher*”), were nevertheless, implored to repent (*Sanhedrin* 102a). Certain *midrashim* even claim that at the ends of their lives, both Pharaoh and Sanheriv repented and were accepted by heaven. These cases of reformed sinners par excellence might demonstrate how Jewish tradition rejects the modern theory that there are criminals doomed to spend their lives in irredeemable sin. The Sages understood a quasi-prison to be a necessary institution to hold criminals waiting for trial, to deter crime, and to rehabilitate those needed, but never was it used for retributive punishment as vengeance for the crime itself.

The death penalty was another issue that the Sages viewed consequentially and pragmatically. Rabbi Simeon ben Gamliel responded to the claim of Rabbi Tarfon and Rabbi Akiva that no one should ever be put to death, with the observation that such a policy would only multiply the blood shedders in Israel (*Makot* 1:10). The debate whether to ever implement a death penalty was not only based on principles of justice, but also on the efficacy of deterring crime.

Medieval and Modern Times

During medieval times, the role of prison seems to have been expanded.

⁴⁵ See also *Mishneh Torah, Hilkhhot Gezeilah* 12:7.

⁴⁶ “*Ein podin et ha-shevuyim yoter al kedei demeihen*,” *Gitin* 4:6.

Imprisonment was extended to sexual offenses,⁴⁷ property offenses,⁴⁸ religious offenses,⁴⁹ nonpayment of community taxes,⁵⁰ and other transgressions.⁵¹ Yet along with expanding the role of prisons, new, additional limitations were placed upon the system as well. For example, Maimonides wrote that imprisonment due to debt should be disallowed:

It is Torah law that when a creditor has sued for the debt due to him, he may satisfy himself out of the debtor's property except such as is exempt from attachment; and if it is found that the debtor has no property, or that all his property is exempt, then let him go his way; *he may not be imprisoned*, nor may he be called upon to prove that he is destitute, nor may an oath of insolvency be administered to him—such is the rule in the law of the gentiles.⁵²

The Talmud had already taught the commandment to free a captive (*pidyon shevuyim*) since “no captive can release himself from prison,” (*Berakhot* 8b, *Nedarim* 7b, *Sanhedrin* 95a). This idea was probably intended to be employed primarily for psychological distress, but perhaps could be applied all the more so for physical distress involving actual imprisonment as well. It is also considered a “high commandment” to help a prisoner or captive attain his or her liberty (*Bava Batra* 8a-b). Maimonides could not be clearer about this priority when he states that:

*The release of prisoners takes priority over the maintenance of the poor. There is no greater commandment than the release of prisoners, the prisoner being included in the hungry and thirsty and naked in danger of their lives; and whoever abstains from ransoming them, transgresses the prohibitions of “thou shall not harden thy heart, nor shut thy hand” (Deut. 15:7), “thou shall not stand against the blood of thy neighbor” (Lev. 19:16), and “the other shall not rule with rigor over him in thy sight” (Lev. 25:53), as well as violates the injunctions of “thou shall open thy hand wide unto him” (Deut. 15:8) and “thou shall love thy neighbor as thyself” (Lev. 19:18), and many other similar exhortations—and there is no greater obligation for you than this.*⁵³

⁴⁷ Rabbi Isaac ben Sheshet Perfet (late fourteenth-century, Spain), Responsa *Rivash*, #351.

⁴⁸ Rabbi Yom Tov Asevilli (early fourteenth-century, Spain), Responsa *Ritva*, #159.

⁴⁹ *Ibid.*, #179.

⁵⁰ Rabbi Asher ben Yehiel (early fourteenth-century, Spain), Responsa *Rosh*, 7:#11.

⁵¹ Simcha Assaf, *Ha-Onshin Aharei Hatimat ha-Talmud* (Jerusalem, 1922), 25-31.

⁵² *Mishneh Torah, Hilkhot Malveh ve-Loveh* 2:1 (emphasis added).

⁵³ *Mishneh Torah, Hilkhot Matanot Aniyim* 8:10 (emphasis added).

While in the medieval period, prison was expanded in its scope, in more modern times Jewish legal authorities stated that imprisonment for debt was incompatible with the spirit of the Torah law.⁵⁴ In fact, Jewish thinkers have rarely advocated punishment for its own sake. This is a Christian idea related to purgatory, external damnation, and suffering in the name of Jesus. Judaism traditionally has affirmed life as the highest value and has viewed punishment as a means of solving a communal problem or as a deterrent concerned with the consequence. Modern civil law often incarcerates a robber as a punishment, without ever requiring him to pay back what he stole if he is unable. Jewish criminal law is about repaying and fixing the wrong. If an individual steals and is not able to pay back what was stolen, the Jewish court evaluates the worth of the individual on the open market and sells his services as an indentured servant to ensure that he can pay back what he stole.

In addition to rectifying financial wrongs, systems like the *eved ivri* were created to help the wrongdoer grow. Rehabilitation does not happen when one is isolated from society. Maimonides wrote that *teshuvah* is done when one finds oneself in a situation they were in previously, yet this time they make the right choice.⁵⁵ In this worldview, one needs choice to develop and transform oneself through exposure to real human situations.

The issue of retributive justice addressed earlier can now be revisited in the Jewish context of the medieval and modern eras respectively. Maimonides rejected retributive justice and argued that deterrence is the ultimate purpose of punishment.⁵⁶ Punishment is thus not always proportionate to the severity of the crime. One need not accept Maimonides' conclusion though, in order to reject retributive justice. A more nuanced, pragmatic punishment philosophy should allow for various reasons and mitigating factors to contribute to how the system operates beyond only deterrence and retribution.

Rabbi Avraham Yitzchak HaCohen Kook argued that other values and mitigating factors must weigh in on justice decisions in addition to the need for punishment. R. Kook argued that punishment cannot just be *nekamah*—for the sake of revenge.⁵⁷

Rabbi Shalom Carmy has informed me that Rav Aharon Soloveichik argued that while the halakha teaches that *Benei Noah* (non-Jews) are given capital punishment for transgressions, this only means that it is *permissible* to kill them, but not obligatory. Rav Aharon taught that there were many other moral and social factors that must weigh on our penal system in addition to just deserts or retribution for what the law condemns.

Judaism, I submit, advocates restitution in personal injury cases, favoring an

⁵⁴ *Sefer Mitzvot Gadol* 1:93; Responsa *Rosh*, 7:#11, 68:#10; *Shulhan Arukh, Hoshen Mishpat* 97:15.

⁵⁵ *Mishneh Torah, Hilkhot Teshuvah* 2:1.

⁵⁶ Maimonides, *Guide for the Perplexed* III:41.

⁵⁷ *Igeret* 89.

emphasis on retribution. Contemporary thinker David Novak describes concern for the needs of victims as based on two considerations:

First, we are more concerned with rectification than punishment. In other words, rather than making the criminal suffer physical pain and mutilation similar to the victim's, a procedure that neither helps the victim nor reforms the criminal, we make the criminal compensate the victim as he would have to compensate himself if he had harmed himself. Second, true equality is in practice impossible through a procedure as brutal as reciprocal mutilation. This comes out in three of the arguments the Talmud presents to show that "an eye for an eye" is to be taken symbolically rather than literally.⁵⁸

Certain situations may, in fact, necessitate, according to deterrence theory, that one be punished "more harshly" than the crime deserves, although it should be admitted that such calculations are extremely complex. According to what objective scale are we possibly able to equate a crime with a punishment? There are so many external factors in addition to the crime itself that deserve consideration. For example, should not the psychological damage given to a culture in spreading a culture of violence or law-breaking be weighed into the assessment of the punishment? Such a realization should lead us to conclude that we are in need of a more advanced and complex model for guiding our justice systems. Ultimately, the *ir ha-miklat* rejects retributive justice, as the punishment does not equal the crime due to the mitigating factors. The Torah thus mandates that the unintentional murderer not be punished by any procedures beyond being removed from society.

It is agreed by all philosophers that some level of punishment be justified, as it is assumed that members of society are moral agents with moral responsibility. However, punishment does not need to be given solely for the purpose of revenge or deserts. Cain was given seven times the usual punishment for killing his brother Abel, presumably to serve as deterrence for future potential offenders. It should be noted, however, that just because deterrence may have been an effective tool in biblical times does not necessarily mean that it is as effective today. As the psychology of societies changes, so must the penal systems. There needs to be a reassessment of the effectiveness of rehabilitative theories, deterrence theories, and the needs of our current society. Retribution will always have a minimal weight, and other theories should be adjusted based upon the communal needs and psychology. A midrashic work teaches that humans are not permitted to respond with vengeance in any situation where God has not commanded as such.⁵⁹ Theories cannot be based solely on deterrence or retribution or any unified theory for that matter. Rather, a

⁵⁸ David Novak, *Jewish Social Ethics* (New York: Oxford University Press, 1992), 171.

⁵⁹ *Midrash Ha-Gadol, Bereshit 37.*

pragmatic approach should be developed to fix the problem: compensate the loss, prevent the damager from doing any more harm, and facilitate programs for *teshuvah* (repentance) and reformation.

Even the most condemned in the Torah have an opportunity to do *teshuvah* and save themselves. Rabbi Abraham Sachatochover wrote regarding the condemned biblical nation Amalek, “If they (Amalek) repent from their [wicked] ways and accept the Noahide Laws, they no longer continue in the way of their forefathers, and are no longer held responsible for the sins of their forefathers.”⁶⁰

Coming out against retribution, Rava said, “Anyone who relinquishes his measures [of retribution, the Heavenly Court] relinquishes his sins for him.” (*Rosh Hashanah* 17a) According to Rava, God would look more favorably upon an individual, or a court system, that does not engage in retribution. Additionally, the Talmud says, “Great is repentance, for it tears up a person’s [evil] decree.” (*Rosh Hashanah* 17b) Should we not create systems that emulate God’s ways of tearing up our evil decrees by doing so for those who have changed their ways? Do we even have mechanisms in place that can properly assess growth of those being punished in our system and adjust to their needs?

Potential Future Improvements of the Situation

Today, of course, prisons are needed to maintain social order. No attempt is being made here to do away completely with the penal system, rather we must realize its severe limitations and drawbacks. This author understands issues of crime and punishment as a wild, random beast that can be observed and manipulated but never fully contained or understood, and no grand theory or solution will be provided to “solve” this crisis. Evil seems to be a fundamental element in human society which cannot be solved, merely mitigated through a more secure and sophisticated system of punishment.

The 2007 Congress has been discussing The Second Chance Act, a bill that authorizes close to \$100 million over two years to address the significant problem of about 700,000 ex-offenders who will leave prison in 2007 (two-thirds of whom are likely to be rearrested within three years). The bill would provide states with grants to develop model programs for prisoners returning to society. However, this bill still has many shortcomings not adequately addressing the recidivism rate, which is increasing due to the breaking of technical parole violations. However, this bill would still serve as a great victory for prison reformers and would mark the first time in decades that legislation has attempted to ease the lives of prisoners rather than make them stricter. For example, in the 1990s, Congress ended the Pell Grant program for prisoners, restricted drug offenders from receiving federal student loans, and cut highway money for states that did not revoke or suspend a drug felon’s driver’s license. Yet in the campaign document for House Democrats recently elected to of-

⁶⁰ Responsa *Avnei Nezer*, *Orah Hayim* 2:508.

face called “A New Direction for America,” prison reform was not one of the issues that made the priorities. In 1994, issues of crime were one of the top priorities of American voters, but in 2003, only 1 percent of voters found it to be a top priority.

Many new types of prison therapy are proving to be quite successful. It has been shown that the Functional Family Therapy program has saved almost \$15,000 per child per year and has reduced recidivism rates by 30 percent.⁶¹ Multidimensional Treatment Foster Care saved over \$20,000 and resulted in 60 percent fewer days of incarceration. Multi-systemic Therapy saved over \$30,000 with to 25-70 percent lower long-term recidivism rates.⁶² These therapies involve experts administering comprehensive, consistent therapy that engages multiple involved parties (such as family members) and not just the criminal. Religious rehab with academically rigorous psychological standards and legal checks maintaining religious freedom is needed. In addition to therapy for the prisoner, it is important that the children and spouses of prisoners be prepared for the re-entry process. Counseling for couples and for orphans is also imperative to create a just and safe society.

The time has come to reconsider more progressive options for mentoring programs based on our biblical notion of the *eved ivri*, our biblical concept of deportation to private colonies in the *ir ha-miklat* model, a use of house arrest and half-way houses, a return to a focus on victim restitution, and maintenance of human rights within prison walls. An increase in rehabilitation, education, job training, family involvement, employment readiness, discharge planning, and community justice partnerships must also be considered. One of the most important changes needed in our correction systems is the improvement of the offender re-entry programs, which prepare inmates to re-enter society. More post-release supervision and support must also be provided to allow for growth sustainability. Currently, about 20 percent of released inmates do not receive any kind of supervision or support.⁶³ Through attempts to improve literacy, giving inmates citizenship responsibilities, and improving vocational skills, inmates can be more properly prepared to re-enter as socially conscious and trained citizens. Additionally, sex offenders and many violent criminals require cognitive-behavioral therapy and empathy training. By repairing their cognitive distortions and by listening to the narratives of victims, learning can be a successful rehabilitative tool. There have been many successful treatment programs that are rebuilding empathy for victims by reading painful accounts of crimes committed and learning to take the perspective of the victim.⁶⁴ While

⁶¹ Diana Henriques and Andrew Lehren, “Religion for Captive Audiences, With Taxpayers Footing the Bill,” *New York Times* 10 December 2006, final edition, sec. 1, p. 1.

⁶² *Ibid.*

⁶³ Joan Petersilia & Jeremy Travis, “Reentry Reconsidered: A New Look at an Old Question,” *Crime & Delinquency* 47, no. 3 (2001): 291-313.

⁶⁴ Goleman, 107.

I was a rabbinic intern at the Rikers Island Prison for detention in New York City, Rabbinic Chaplain Rabbi Melvin Sachs informed me that while New York State does provide some drug therapy, it does not provide any therapy for sex criminals and that the religious chaplains on staff are not generally trained to deal with these matters. There can also be a deleterious lack of coordination between the mental health workers and the religious chaplains, which can exacerbate prisoner frustrations.

Something similar to the *eved ivri* model has been implemented in some community supervision programs, where criminals remain within society as opposed to being jailed. For example, North Carolina put their model into practice in 1994, immediately reducing arrests from 42 to 20 percent, and resulting in tremendous savings (\$23,800 per prisoner, compared to \$668 for a regular supervision program and \$4,187 for the strictest enforcement and supervision).⁶⁵ In a poll of police chiefs from around the U.S., 59 percent considered court-supervised treatment more effective than sending offenders to prison or jail.⁶⁶ California's state government has found that every dollar spent on substance abuse therapy will generate seven dollars of savings through reduced hospitalization and reduced crime rates.⁶⁷

At this point, readers may still be skeptical. Who in their right mind wants to be more lenient or merciful on criminals? Yet an ABC News poll recently showed that 75 percent of Americans agree that first-time (and even second-time) offenders should be sent to therapeutic programs instead of jail. The Prison Fellowship Ministries Program in Detroit has achieved re-offense rates of 1 percent in cases where a church "adopts" a felon.⁶⁸ Other cities have tried using full-time social workers that assist parolees and probationers to find employment, which, in Brooklyn for example, has decreased recidivism rates of participants by 60 percent.⁶⁹ There are many programs like this throughout the country.

One of the most appropriate forms of rehabilitation could be conducted through more elaborate and meaningful community service work. Prisoners could be used more extensively, if willing, to assist during flood or tornado disasters. This could be very beneficial to society and could greatly improve the morale of inmates. Prisoners have also been known to successfully talk to students about the dangers of drugs and crime. Recently, a group of about thirty Colorado prison inmates devised a program to help handicapped children. The inmates were successful in training wild horses to be able to give rides to handicapped children providing a phenomenal developmental opportunity for

⁶⁵ Petersilia & Travis.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Magnani.

⁶⁹ *Ibid.*

the inmates and an additional communal good.⁷⁰ Of course, certain ethical standards should be maintained in administering work to prisoners. Rehabilitative labor should be non-humiliating (i.e., prisoners should not “bust rocks” to make gravel in an age where this is done by machine). It should be useful to society, not merely to a private interest, as this will allow some prisoners to see this labor as a way to successfully “pay a debt” that they may “owe.”

Additionally, the labor should be useful to the prisoner in some way. If the prisoner acquires some job skill, he may learn to take his ability to be productive more seriously, and have the confidence to seek gainful employment after prison. In addition, since taking the benefit of his labor under compulsion may rest on somewhat shaky ground morally, ensuring that the prisoner gets something tangible (cash, or a shorter sentence) out of the exchange should be a priority as well.

Prison staff members should be better educated to the psychological trauma experienced by inmates and should understand well that seclusion from modern society is already an immense punishment and should not be exacerbated with further abuse. Prison staff should be hired to assist the prison reformation process, not to increase punishment or stricter surveillance. Salaries for prison staff should be raised to a living wage ensuring that the staff is well enough prepared to take care of their own families and live a healthy life. Anger, resentment, and improper compensation has led countless prison staff members to abuse inmates. In addition, these employees should be placed under higher surveillance and accountability, attempting to cease all inner-prison harassment. Abuse will never improve reformation but will only delay or remove any hope of psychological progressive healing. Quality prison staff, with more sophisticated training, could feel a great sense of accomplishment working to improve prisoner reform rates.

It must be acknowledged that there are those criminals who face little chance of reform and this author proposes no leniency for these hard-core, pernicious criminals. Psychopaths generally feel no remorse for even the cruelest acts. However, these cases should generally be viewed as the exceptions to the rule. There is no magic ball revealing the potential for change for any given inmate and so we must assume that each criminal has a chance. Even those prisoners who face extended time or life sentences should be deeply involved in the reform process due to the contribution that they can make in creating the prison culture and to their own human needs and dignity. It should be made clear that this author is not advocating all types of rehabilitation with a *carte blanche*. It is clear that many types are ineffective, penurious, and even more are immorally conducted. However, many therapies and programs have great promise for success and are even desired by prisoners. Additionally, there are alternatives that can be applied in place of incarceration, such as various treatment programs.

⁷⁰ Soering.

Responsibility falls not only upon legislators, prison staff, and government officials; rather, all of society has necessary contributions to make. Some communities have begun to create faith-based advisory councils to try and narrow the prison-community divide. It behooves American Jewish communities, at the very least, to offer more and better support to Jewish criminals released in their own communities. As a bare minimum, Jewish community members can be involved with lobbying and political advocacy for prison reform. Those more inspired can volunteer time to assist the re-entry process for inured and desensitized criminals in one's home community, providing job training, relocation assistance, and other types of mentorship and friendship.

In addition, the Jewish community should continue to reinforce the importance of family life and parental education. Often, beginning in infancy, emotional neglect can leave children permanently scarred and ultimately behind bars. To prevent such situations from increasing, there should be continual reinforcement of the importance of adoption, supporting orphans, improving the educational system and after-school programs, and, of course, most challengingly, improving the quantity and quality of time spent with one's own children. Parents should reinforce the efficacy of teaching and assisting the development of their children as opposed to careless punishment for its own sake without concomitant education.

The Aleph Institute is one of the Jewish organizations that has been doing work in Jewish rehabilitation within prisons—organizing programs with workshops, one-to-one meetings with rabbis, halakha classes, videos, group discussions, mentor sessions, prayer and meditation, anger management, and discussion about communication and interpersonal relationships. They are addressing a great need, yet they still need more partners. Other clergy members, counselors, and more rabbis need the proper training to work with this population during incarceration and thereafter. In addition, our religious community needs programs to aid in the re-entry process.

As a community, let us consider two fundamental psychological inquiries: how do humans learn, grow, and change? and what motivates individuals to act? Much has been written on these questions that can shed incredible light on how we should rethink many of our communal assumptions and institutions, but primarily our penal system.

Conclusion

Fyodor Dostoevsky, the prolific nineteenth-century Russian novelist, argued that the way a society treats its prisoners is indicative of whether or not it is a moral civilization.⁷¹ It seems that the values of *tzelem Elokim*, that all humans are created in the image of God, and *kavod ha-beriyot*, human dignity, should be at the core for how we develop our communal policies and institutions. A sophisticated understanding of the interconnectivity of the influence of various

⁷¹Fyodor Dostoevsky, *The House of the Dead*.

public systems demonstrates that no system can live in isolation from another, nor can it avoid the intellectual underpinnings of the culture in which it is embedded. How we create our prison systems will inevitably affect how we raise our own children, how we view our secular legislation, our views on war theory, torture, rehabilitation and human change, and how we create our educational and health systems. In addition, any given culture's worldview and values will inevitably be remolded by how we have created our public institutions, their efficacy, and their moral standards.

The American system, in the late twentieth century, lost faith or interest in inmate reform and has come to advocate prisons as a form of retribution, revenge, and punishment as an end in itself. However, it has been argued here that the Jewish tradition has taught us that prison, if it must exist, should be used for learning, deterrence, rehabilitation, pragmatic concerns of reducing harm to all involved, and for the general protection of society at large. American Jewish citizens should be at the forefront of prison reform and at shaping American society around the most humane, just, and ethical standards. Should a prisoner endure some form of punishment, our Jewish tradition demands that it be done with standards emphasizing the convict's human dignity and potential for repentance and change.

It may be worth considering how the Torah's models of *ir ha-miklat* and *eved ivri* can inform us of ways to implement new types of home arrest, mentorship programs, and more humane and developed rehabilitation programs. Our justice system should be viewed from a pragmatic, systemic perspective, addressing issues for all involved such as: the victim's needs, the criminal's dignity, the court's authority, potential future criminals, and the security of society at large. In addition, we must become more aware of how our prison systems affect our educational systems, our understanding of human nature, our taxes, and our security. It seems that the concepts of punishment that we apply in our prisons are beginning to be utilized in school disciplining as well. For example, there has been a reported rise in suspensions and expulsions within many Jewish day schools.⁷² Also a sign of increased consciousness of punishment, it has been reported that about 80 percent of American parents still spank their children.⁷³

Our understanding of repentance within our religious practices may be connected to how we understand our communal corrective systems. A classic example is the ascetic tradition, which, for many Jews, involved engaging in penitential practices such as rolling in the snow and self-flogging so as to improve themselves morally. These actions were somewhat similar to the secular view of punishment at that time. In sixteenth-century Safed they even imposed self-affliction by imitating the four traditional methods of capital punishment.

⁷² Kwame Anthony Appiah, *The Ethics of Identity* (New Jersey: Princeton University Press, 2004).

⁷³ *Ibid.*

So too today, our methods of repentance are connected to our perceptions of our prison system. How we have viewed prisons has historically been connected to how we have viewed the mentally ill, having used tranquilizing chairs, water torture, and cages to “cure” the mentally ill with behavioral and mental reconditioning. (During those time periods, we applied these types of reconditioning to our prisoners as well.)

Most of modern, western society has removed torture, capital punishment, corporal punishment, and solitary confinement from the penal system. However, the current American penal system has fallen behind. Our Torah values and moral convictions place responsibility upon the American Jewish community to advocate for better conditions within prisons and for more creative solutions for rehabilitation than are currently being provided. In addition, greater measures need to be taken to ensure the security of prisoners from the great violations of human rights that have been experienced within their cells. The Jewish Nation has a mission to assist the helpless, and those locked away without advocates are calling to us. While our tradition may teach us that prison itself is an undesirable institution, and since we are in no position to imprudently tear down the system as a whole, we will need to think of a more moderate response to our modern situation that fully condemns only the inhumane and ineffective prisons as evil.

A world that minimizes prisons within the justice system is not an aloof messianic ideal but a real and attainable vision. What must be sought is a new western morality and a recognition of empirical facts attesting to how people change. The current American retributive justice system is driven by fear, whereas the ethics of Jewish tradition demand us to create a system based on a balance between concerns for human dignity, communal security, and, above all, peace. It may be that our society fears addressing the real, underlying issues and looking our prisoners in the eye to see his or her humanity and needs. The current system breeds more violence, more racism, more poverty, and deeper hatred. There is a need to move from many of the church’s models of religious rehabilitation to one of learning and holistic healing. Every aspect of prison life has a profound impact on the prisoner’s long-term psyche and so more care must be taken to create the proper prisoner culture, supervision, and education. It is a move from a fear-based redemptive model to one of healing and development.

The Talmud teaches us that Joseph was released from jail on Rosh Hashanah (*Rosh Hashanah* 11a). The New Year represents a time when repentance is accepted and when one has a chance to recreate one’s self. It is our responsibility to grant a “new year” to those released and to imitate God in extricating the captive and supplying them with a chance for a renewal of self. In the coming years, will we heed the call of the Psalmist who declares that we must “hear the cries of the prisoner, to liberate those condemned to die?” (Ps. 102:21)