

PUNISHMENT, PRISONS, AND THE BIBLE: DOES “OLD TESTAMENT JUSTICE” JUSTIFY OUR RETRIBUTIVE CULTURE?

*Martin H. Pritikin**

INTRODUCTION

It is often said that our country is founded on “Judeo-Christian values.”¹ Less often are those values defined. This Article examines the extent to which one aspect of American society—the extensive use of prisons as a modality of retributive criminal punishment—does or does not reflect the “Judeo-” part of Judeo-Christian values.²

The most common form of punishment in this country is and virtually always has been the prison. Rehabilitation of the prisoner had been the primary justification for utilizing prisons (as opposed to other forms of punishment) until the 1970s, when retribution and incapacitation gained ascendancy. The rise of retributive theory was accompanied by a dramatic increase in the prevalence and severity of prison sentences.³

One of the sources commonly invoked to defend retributive ideology and harsher sentencing practices is the Hebrew Bible, also known by some as the Old Testament.⁴ The very term “Old Testament justice” has become synonymous with harsh retribution. Even those who have never read the Torah (the first five books of the Hebrew Bible, where most of its legal codes are found) are familiar with its invocation: “An eye for an eye, a tooth for a tooth”⁵ And the Torah lists numerous offenses that carry the ultimate penalty: death.

* Assistant Professor of Law, Whittier Law School. B.A., University of Southern California, 1997; J.D., Harvard Law School, 2000. The author would like to Arnold Enker, Professor and Founding Dean, Bar-Ilan University Faculty of Law, and Samuel J. Levine, Professor, Pepperdine Law School, for their comments; and Jasmeen Ahdi for her research assistance.

¹ See, e.g., Rick Fairbanks, *The Laws of Nature and of Nature's God: The Role of Theological Claims in the Argument of the Declaration of Independence*, 11 J.L. & RELIGION 551, 551 n.1 (1995).

² This is not to suggest that Christian values would differ on this issue; it is simply to note that a comparison with the Christian tradition is beyond the scope of this Article.

³ See *infra* text accompanying notes 48-80.

⁴ See *infra* text accompanying notes 84-91.

⁵ See *infra* note 86.

But if we are going to rely on the Torah to justify modern policy and practice, how should we interpret it? Given the Torah's origins, questions of interpretation are paramount: it was written in Hebrew at least two millennia ago, in a society far different from our own. Many Jews, Christians, and Muslims believe that God revealed the Torah to Moses in the thirteenth century B.C.E.;⁶ biblical scholars who reject this traditional view contend that it was written centuries later.⁷ In either case, there is no dispute that ancient Israel was the primary audience for whom the Torah was written, and that, for at least several centuries, ancient Israel was the only society that viewed it as authoritative. Thus, it is appropriate to consider ancient Israel's understanding of the Torah.

According to the oldest sources within the Jewish tradition, the written Torah was never meant to be read on its own. Rather, it was merely a starting point to learning the Oral Law—also believed to have been given by God to Moses—which supplemented and sometimes even supplanted the written text.⁸ One need not accept this theological claim to accept the historical claim that, as far as we can tell, most of the seemingly harsh criminal laws in the Torah were never applied literally by its society of origin.

Thus, “an eye for an eye,” as understood through the lens of the Oral Law, was never understood to call for actual maiming of an offender. Rather, it required monetary compensation for the value of the victim's lost eye.⁹ Likewise, although the Torah is replete with offenses that carry the death penalty, Jewish law¹⁰ contained so many evidentiary and procedural safeguards for criminal defendants that it rarely authorized a court to carry out an execution.¹¹

In Jewish law, restitution, rehabilitation, and atonement (something akin to spiritual rehabilitation in Jewish philosophy)—and not retribution—were the primary purposes of criminal punishment.

⁶ See Brandeis: Jewish Learning Institute, Timeline: The Development of the Oral Law, <http://people.brandeis.edu/~rafrazer/> (last visited Sept. 12, 2006) [hereinafter JLI] (follow “Readings” hyperlink, then follow “Philosophy of the Oral Law” hyperlink, then follow “Introduction” hyperlink, then follow “Timeline: The Development of the Oral Law” hyperlink).

⁷ See, e.g., RICHARD ELLIOTT FRIEDMAN, WHO WROTE THE BIBLE 17-27 (2d ed. 1997) (discussing theories regarding gradual development of Torah). The Torah existed in its current form no later than approximately the second century B.C.E.—the date of the completion of the Septuagint (the translation of the entire Torah into Greek)—after which point any changes or additions could be compared against the Greek proof-text. See Wikipedia, The Free Encyclopedia, Septuagint, <http://en.wikipedia.org/wiki/Septuagint> (last visited Sept. 12, 2006).

⁸ See *infra* text accompanying notes 92-96.

⁹ See *infra* text accompanying notes 102-15.

¹⁰ The very term “Jewish law” could refer to a number of different things: Biblical law; Talmudic law; post-Talmudic rabbinic law; or even the law governing the modern state of Israel. Here, the term will refer to Biblical law as developed primarily in the Talmud, since this is the oldest surviving Biblical commentary and since it purports to record traditions existing in ancient Israel prior to the Jews' expulsion in seventy C.E.

¹¹ See *infra* text accompanying notes 119-46.

Moreover, prison as a modality of punishment was virtually non-existent. The few times prisons are referred to in Jewish law, their use is either unauthorized, or is authorized in unusual and narrowly circumscribed instances.¹²

Much can be learned by examining Jewish law's alternatives to prison—punishments that involve restrictions on the offender's freedom of movement. A primary example is the "cities of refuge," to which manslayers were exiled. Unlike modern prisons, where inmates stew in an isolating, harsh, and unproductive environment, these were cities of priests where offenders would work, learn, and interact with a community of positive role models. Rehabilitation and atonement were paramount considerations.¹³

Another alternative punishment involved subjecting a thief who could not repay his victim to involuntary servitude to pay off his debt. Not only did this facilitate restitution far better than imprisonment does, but the conditions imposed on the servitude—the offender was to work for and live with a stable family, was to be treated as an equal or superior to his master, and was to be given a substantial severance payment—facilitated rehabilitation as well.¹⁴

It is not surprising that Jewish criminal law would not provide for prisons, and that its alternatives to prison would promote rehabilitation and atonement. Judaism views everything as having been created for a purpose. The ultimate purpose of creation was mankind. Mankind's purpose, in turn, is to serve God, which people do primarily by interacting with their fellow man. When someone fails in that service, he must atone so as to cleanse his soul—not for the sake of "settling a score" with society, but for his own benefit. Locking someone in a cell, without using their time of confinement to improve their souls and make them better members of society, defeats that purpose.¹⁵

Many of the features of the aforementioned punishments were designed for a covenantal community whose members desired to obey God's law, and thus would be neither feasible nor desirable to implement in our modern, secular society. The idea that a killer should be allowed to roam freely within a city, or that anyone would want a thief living and working in their home, is alien to us, and rightly so.

However, few in the United States today are invoking the Hebrew Bible to justify establishing cities of refuge or the institution of private involuntary servitude. Rather, they are using it to justify retribution as a penological goal, which is in turn used to justify building more prisons

¹² See *infra* text accompanying notes 215-39.

¹³ See *infra* text accompanying notes 240-28.

¹⁴ See *infra* text accompanying notes 329-63.

¹⁵ See *infra* text accompanying notes 365-73.

and imposing more and longer prison sentences. This Article argues that, to that extent, they are misconstruing Jewish law.

Part I of this Article examines the possible rationales for utilizing prison as a modality of punishment, and discusses the historical shift in the United States from rehabilitation to retribution as the dominant rationale for imprisonment. Part II challenges the popular association of the Hebrew Bible with harsh retribution. It discusses how, as understood by its native society, the Bible prioritized rehabilitation and restitution over retribution. Part III argues why, despite the vast differences between ancient religious law and modern secular law, it is worthwhile to engage in a comparative analysis between Jewish and American law. Part IV analyzes incarceration in Jewish law. First, it discusses the limited role prisons played in the Jewish criminal justice system. Second, it discusses two alternatives to imprisonment in Jewish law—cities of refuge and involuntary servitude—and compares them to the modern American prison system. Part V concludes that, unless one discards Jewish law as too different to be worthy of comparison, one must concede that it only serves as weak support for modern retributivists. Moreover, if fidelity to the principles underpinning Jewish law does not require the wholesale abandonment of prisons, it would at least require a radical transformation to eliminate their more futile or counter-productive features.

I. THE PURPOSES OF IMPRISONMENT AS A FORM OF PUNISHMENT IN THE UNITED STATES

A. *Justificatory Theories of Imprisonment*

The purposes of punishment are commonly divided between the deontological—inflicting punishment for its own sake, i.e., retribution¹⁶—and the teleological or utilitarian—inflicting punishment to achieve some benefit, i.e., deterrence, incapacitation and rehabilitation.¹⁷ Restitution is also sometimes included, although some contend it is more properly characterized as a civil remedy, or that it is really just a means of promoting the other utilitarian goals.¹⁸

¹⁶ Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1240 (2005).

¹⁷ *Id.*; see *United States v. LaBonte*, 520 U.S. 751, 779 (1997) (“the basic goals of punishment [are] . . . deterrence, incapacitation, just deserts, rehabilitation”).

¹⁸ Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937-38 (1984) (discussing debate over characterization of restitution, and describing how it serves the various purposes of punishment); see Ann Haberfelde, *A Reexamination of the Non-Dischargeability of Criminal Restitutive Obligations in Chapter 13 Bankruptcies*, 43 HASTINGS L.J. 1517, 1552 (1992) (discussing prevalence of restitution as criminal penalty).

When discussing theories of punishment, at least four different questions may be involved. First, why punish at all? Second, whom should we punish? Third, how much punishment is appropriate? And fourth, which mode of punishment should we employ?¹⁹

The fourth question regarding the mode of punishment is related to, but analytically distinct from, the third question regarding the amount of punishment. Punishment could be inflicted by means of monetary penalties, imprisonment, exile, or physical torture, to name a few possibilities. Just as one could vary the amounts of different kinds of goods, so that a consumer would be indifferent between them (in that he would be willing to pay an equal price for any of them), one could, in theory, vary the amounts of different modes of punishment so that a criminal offender would be indifferent between them. For example, assuming one wanted to inflict X “units” of punishment, one might determine that a \$5000 fine, thirty days in jail, or eight lashes with a whip all achieve an equivalent “amount” of punishment.²⁰ Thus, deciding how much punishment to inflict does not dictate which modality of punishment is appropriate.²¹

As will be discussed below, although prevailing American views regarding the first three questions—why we punish, who should be punished, and how much they should be punished—have shifted over time, the primary mode of punishment employed—imprisonment—has remained virtually unchanged since the country’s early history.²² The question is, why prisons?

One could offer either negative or positive justifications for using prisons. Negative justifications involve theoretical or pragmatic problems with the alternatives. For example, capital punishment is deemed too severe for most offenses. Torture would violate the constitutional prohibition against cruel and unusual punishment,²³ and would likely be deemed too barbaric today regardless of the constitutional ban. And exile, given the required cooperation of other nations and the sophistication of modern transportation, would likely be difficult to enforce.²⁴ As for monetary penalties, most criminals probably lack the means to compensate their victims, and garnishing

¹⁹ JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 31 (3d ed. 2003).

²⁰ See Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 *LAW & INEQ.* 343, 348 (2001) (“[W]e might conclude that five years of forced labor equals ten years of exile or twelve hours of being hung on a meathook.”).

²¹ *Id.*

²² Hannah T.S. Long, *The “Inequability” of Incarceration*, 31 *COLUM. J.L. & SOC. PROBS.* 321, 324-25 (1998); Charles J. Harary, Esq., *Incarceration as a Modality of Punishment*, *Apr.* 4, 2003, http://jlaw.com/Articles/ch_incarceration.html.

²³ See U.S. CONST. amend. VIII.

²⁴ Rubin, *supra* note 20, at 349-50.

their wages would take years to yield results. Prison is arguably justifiable in that it lacks many of these drawbacks.

But drawbacks to the alternatives do not dictate that prison—as opposed to some more creative alternative—is the best solution. We need positive justifications: a showing that incarceration serves some penological goal more effectively than other modes of punishment.

Prison cannot be justified on the ground that it better serves deterrence or retribution than other punishments. After all, any unpleasant experience—be it prison, torture, exile, etc.—will promote deterrence (because both the offender and third parties will want to avoid the unpleasantness in the future) and retribution (because any harm inflicted upon the offender “squares up” the wrong he committed). Assuming one could calibrate the amounts correctly, any mode of punishment serves these goals equally well.²⁵

Nor is prison an effective means of promoting restitution. The work available to prison inmates does not pay the type of wages that would provide any significant compensation to a victim or his family.²⁶

Thus, prison is justifiable only if it serves the remaining goals of incapacitation or rehabilitation. Prison undoubtedly does incapacitate, and does so more effectively than other means of punishment (except, obviously, for capital punishment, which is inappropriate for most offenses). Corporal punishment does not incapacitate at all (unless the offender is injured). Nor do monetary penalties. By contrast, an offender is usually completely incapacitated for the duration of his confinement.²⁷

Although incarceration necessarily incapacitates, it does not necessarily rehabilitate. One cannot tell, as a theoretical matter, whether spending time in confinement will make offenders more likely, equally likely, or less likely to commit crimes upon release. The conditions of the offender’s confinement, with whom he interacts, and the activities in which he engages during his confinement, will likely impact its rehabilitative effect.²⁸

²⁵ *Id.* at 348-49.

²⁶ William P. Quigley, *Prison Work, Wages and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1164 (2004) (typical wage for inmate doing prison maintenance work is between \$0.12 and \$0.40 per hour). Even if inmates were paid the current minimum wage of \$5.15 per hour for doing this same work on the “outside,” few would likely be able to make substantial restitutionary contributions to their victims. See U.S. Dep’t of Labor, Minimum Wage, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited Sept. 16, 2006).

²⁷ Rubin, *supra* note 20, at 360. This excludes prison escapes, prisoner-on-prisoner crime, and crimes organized or planned by inmates. Prison escapes are a rarity, and prison-planned crimes are a function of the nature and extent of communication permitted between inmates and outsiders, not of prisons per se. And while prisoner-on-prisoner crime may be quite common, preventing crime within society at large, not within prisons, is usually seen as the goal of incapacitation.

²⁸ Rubin, *supra* note 20, at 361 (the rationale of “incapacitation, while it does identify prison

As the next section demonstrates, however, many now see retribution, not rehabilitation, as the purpose of prisons. As a result, much attention is paid to sending more people to prison for longer periods, with little paid to whether the time they spend there is productive.

B. *History of the Purposes of Imprisonment in the United States*

1. 1700s—1960s:

The Predominance of Rehabilitation

When the penitentiary system in the United States began in the late eighteenth century, it was specifically designed for the purpose of rehabilitating the prisoner.²⁹ With the exception of post-Civil War Southern prisons (which emphasized exploitative servitude, until the judicial decisions of the civil rights era put an end to such practices),³⁰ rehabilitation continued to be the dominant goal of the American penitentiary system for nearly two centuries—that is, until the last several decades.

Although rehabilitation remained the goal until recently, views about how inmates were to be rehabilitated changed over time. Originally, the offender was separated from his former life and made to reflect—through isolation, work, fasting, and/or Bible study—in order to change his ways.³¹ But the results of solitary confinement and starvation diets were sorely disappointing,³² and as the Industrial Revolution gained steam, “vocational and academic training came to replace remorse and discipline as the princip[al] instrument for rehabilitation.”³³ This was not an abandonment of rehabilitation as a goal, but rather a shift in approach regarding how to achieve it.

By the 1960s, a growing optimism about science in general, and psychiatry in particular, led some to view criminal behavior as a manifestation of mental illness that, with proper supervision within the criminal justice system, could be “cured.”³⁴ Indeterminate sentencing was widespread, and parole boards were effectively given the role of determining when a prisoner was “cured” and thus fit to be released.³⁵ This was, effectively, a medical model of criminal justice.

as the preferred mode of punishment, is . . . uninformative about the mode of imprisonment”).

²⁹ *Id.* at 347; Long, *supra* note 22, at 321-22.

³⁰ Rubin, *supra* note 20, at 355-59.

³¹ *Id.* at 347; Long, *supra* note 22, at 323.

³² Long, *supra* note 22, at 323.

³³ Rubin, *supra* note 20, at 347.

³⁴ Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1016 (1991).

³⁵ *Id.*

2. The 1960s and Beyond: The Transition to Retribution and Incapacitation

The medical model—and the rehabilitative model in general—came under increasing attack in the late 1960s and 1970s, from both the right and the left.³⁶ First, there was a concern that, because the medical model is deterministic, explaining all behavior without regard to the individual's will, it threatened to undermine notions of moral accountability at the heart of criminal law.³⁷ Second, some believed that the medical model operated to the detriment of the "patient:" the prisoner ran the risk that he would never be found "cured" and remain incarcerated indefinitely.³⁸ Third, the assumptions that most criminals were amenable to treatment, or that treatments ever would exist, were questioned.³⁹ Fourth, arguably too much discretion was vested in institutions that lacked the requisite authority or moral legitimacy. Said Judge Marvin Frankel: "The almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are intolerable for a society that professes devotion to the rule of law."⁴⁰ Frankel doubted that judges and parole boards had the time or training needed to make meaningful sentencing decisions.⁴¹ More radical liberals condemned the system of indeterminate sentencing as a "tool of institutional control" that was used to perpetuate class and race biases by oppressing those who "challenge . . . the cultural norm."⁴²

Scholarly critiques of rehabilitation—and corollary support for retribution—abounded,⁴³ and the critics were emboldened by research indicating that rehabilitation, did not, in fact, work. Sociologist Robert Martinson's influential 1974 paper, *What Works? Questions and Answers About Prison Reform*,⁴⁴ was widely relied on for its perceived conclusion that "nothing works" to reduce recidivism.⁴⁵

³⁶ See Rubin, *supra* note 20, at 366-67.

³⁷ Vitiello, *supra* note 34, at 1019 (citing *Powell v. Texas*, 392 U.S. 514, 535-36 (1968) (Marshall, J., plurality opinion)); see also SANFORD H. KADISH, *BLAME AND PUNISHMENT* 103 (1987) (individual's rationality gives basis for assigning blame and thus punishment despite strong compulsion to violate law).

³⁸ See Vitiello, *supra* note 34, at 1018-19 (citing *Powell*, 392 U.S. at 527).

³⁹ MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 90-91 (1973).

⁴⁰ *Id.* at 5.

⁴¹ *Id.* at ch. 2.

⁴² Vitiello, *supra* note 34, at 1020 (citing *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* 28-29 (1971)).

⁴³ See, e.g., Edward Rubin, *Just Say No to Retribution*, 7 *BUFF. CRIM. L. REV.* 17, 27 n.16 (2003) (citing over a dozen published endorsements of retribution by prominent academics between the early 1970s and 1990s).

⁴⁴ Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *PUB. INT.* 22 (1974).

⁴⁵ See Vitiello, *supra* note 34, at 1025 n.102 (citing sources).

Martinson himself later denounced the “nothing works” label attributed to his writings, and empirical research conducted by him and others in the late 1970s, 1980s and 1990s countered the pessimism regarding rehabilitative programs.⁴⁶ Gradually, more and more scholars concluded that flawed methodology—and not flaws in rehabilitative programs—was largely responsible for their poor reported results.⁴⁷

But by that point, the political tides had already turned.⁴⁸ The framework of indeterminate sentencing was rapidly dismantled. By 1983, every state but Wisconsin had adopted mandatory minimum sentencing laws.⁴⁹ In 1984, Congress passed the Sentencing Reform Act, which eliminated parole and established a complex system of determinate or presumptive sentences.⁵⁰ Congress and many state legislatures also provided for harsher penalties in a number of other ways. They imposed life sentences for a variety of crimes, and created sentence enhancement provisions such as three-strikes laws.⁵¹ They made it easier to try and sentence juveniles as adults.⁵² They also reduced resources available for programs to rehabilitate prisoners.⁵³ The “war on drugs” also led to an increase in resources allocated to criminalizing a pervasive social problem, and fewer resources dedicated to counteracting it.⁵⁴

⁴⁶ See *id.* at 1034-37 and studies cited therein; Rubin, *supra* note 20, at 367-68.

⁴⁷ Rubin, *supra* note 20, at 367-69.

⁴⁸ Harary, *supra* note 22, at 6 (“In the past two to three decades . . . , the philosophy behind punishment has shifted from rehabilitating the offender to prevention of future crimes through control and detention of dangerous persons.”); see *Developments in the Law: Alternative Punishments: Resistance and Inroads*, 111 HARV. L. REV. 1967, 1970 (1998) (“Since [the mid-1970s], a ‘just deserts’ philosophy associated with retributivism has claimed the mantle of penological predominance.”); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1431 (2001) (summarizing shift to harsher and more prevalent prison sentences that resulted from the shift toward incapacitation).

⁴⁹ Tonry, *supra* note 16, at 1235 n.6, 1245 (citing 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 132-33 (Alfred Blumstein et al. eds., 1983)).

⁵⁰ Vitiello, *supra* note 34, at 1027. The Sentencing Reform Act of 1984 was enacted as chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (codified as amended at 18 U.S.C. §§ 3551-3586, 3621-3625, 3742 (1988) & 28 U.S.C.A. §§ 991-998 (West Supp. 1990)).

⁵¹ See Vitiello, *supra* note 34, at 1029-30; Rubin, *supra* note 43, at 56. Between 1993 and 1999, Congress and nearly half the states enacted three strikes laws. Harary, *supra* note 22, at n.42 (citing NAT’L CONFERENCE OF STATE LEGISLATORS, “THREE STRIKES” SENTENCING LAWS 24 (2000)). Most states provide sentence enhancements for habitual offenders. *Id.*

⁵² Between 1992 and 1995, forty-one states passed laws making it easier to try juveniles as adults. Harary, *supra* note 22, at n.46. As of 1997, every state had at least one provision to transfer juveniles to adult courts. *Id.*; see also Theresa A. Hughes, *Juvenile Delinquent Rehabilitation: Placement of Juveniles Beyond Their Communities as a Detriment to Inner City Youths*, 36 NEW ENG. L. REV. 153, 161-64 (2001) (discussing shift toward retribution and incapacitation in New York juvenile justice system).

⁵³ Vitiello, *supra* note 34, at 1030 & 1030 n.139 (citing sources).

⁵⁴ See Louis Kraar, *How to Win the War on Drugs*, FORTUNE, Mar. 12, 1990, at 70 (describing attention given to the war on drugs, rather than on drug treatment and prevention measures). Even conservatives have concluded the war on drugs has failed. See National Review

The combination of these factors has led to a ballooning prison population. Between 1925 and 1972, the national prison population remained fairly stable.⁵⁵ But between 1972 and 1997, the number of state and federal inmates rose from 196,000 to 1,159,000—a nearly sixfold increase.⁵⁶ In the next decade, the number behind bars nearly doubled again, and now exceeds two million.⁵⁷ Our rate of incarceration—approximately one out of every 150 Americans—is the highest in the Western world by at least a factor of five, and has even surpassed the world’s previous leader, Russia.⁵⁸ It is estimated that the United States has a quarter of the entire world’s prison population.⁵⁹

The explosion of the prison population has also meant an explosion in prisons and prison costs. Between 1985 and 1995, the federal and state governments opened an average of one new prison per week.⁶⁰ Between 1982 and 1993, government spending on corrections increased over 250%, far outstripping inflation.⁶¹ The rate of spending on prisons also grew to exceed spending on other social services.⁶² For example, in 1991, the federal government spent \$26.2 billion on corrections to deal with 1.1 million prisoners and about five million probationers; at the same time, it spent only \$22.9 billion on its main welfare program, Aid to Families with Dependent Children, which serviced 13.5 million people.⁶³ Critics argue that spending billions of dollars on prisons

Symposium, *The War on Drugs is Lost*, July 1, 1996, <http://www.nationalreview.com/12feb96/drug.html> (“[T]he celebrated war has failed, and . . . it is time to go home, and to mobilize fresh thought on the drug problem in the context of a free society.”).

⁵⁵ DRESSLER, *supra* note 19, at 30.

⁵⁶ MARC MAUER, RACE TO INCARCERATE 114 (1999); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 14 (2003).

⁵⁷ Ben Trachtenberg, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REFORM 479, 489 (2005) (citing prison rates of 702 out of 100,000 Americans, or roughly 2.1 million prisoners out of a population of 300 million).

⁵⁸ Rubin, *supra* note 43, at 17. Among Western nations, New Zealand is next highest after the United States, with a rate of 145 per 100,000. *Id.*; see Trachtenberg, *supra* note 57, at 489.

⁵⁹ Harary, *supra* note 22, at 6.

⁶⁰ Alschuler, *supra* note 56, at 14. Apparently, prisons still are not being built fast enough. See Michael K. Greene, “Show Me the Money!” *Should Taxpayer Funds Be Used to Educate Prisoners Under the Guise of Reducing Recidivism?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 173, 176 (1998) (quoting Clemens Bartollas, *The Prison: Disorder Personified*, in ARE PRISONS ANY BETTER? TWENTY YEARS OF CORRECTIONAL REFORM 11, 17 (John W. Murphy & Jack E. Dison eds., 1990)) (“The runaway growth of the prison population has caused prisoners to be double- and triple-celled, and to be forced to sleep in shower rooms, corridors, dayrooms, infirmaries, gymnasiums, and vocational shops.”).

⁶¹ John Celichowski, *Bringing Penance Back to the Penitentiary: Using the Sacrament of Reconciliation as a Model for Restoring Rehabilitation as a Priority in the Criminal Justice System*, 40 CATH. LAW. 239, 242 (2001).

⁶² See Trachtenberg, *supra* note 57, at 492 (“From 1985 to 1996, state correctional and prison expenses rose by an average of about seven percent annually, more quickly than costs for education and health care.”).

⁶³ Michael Welch, *Rehabilitation: Holding Its Ground in Corrections*, FED. PROBATION, DEC. 1995, AT 3, 5-6.

diverts funds from social services that might prevent crime, and is thus counterproductive.⁶⁴

As would be expected given the retributivist mood, the growth of prisons was accompanied by a reduction in resources and programming for rehabilitation. (Amenities not directly related to rehabilitation have also been scaled back considerably.)⁶⁵ In 1994, Congress eliminated higher education grants for state and federal prisoners.⁶⁶ Following this, at least half the states reduced prisoner vocational and technical training programs.⁶⁷ By 2002, only nine percent of inmates were enrolled in full time job training or education programs.⁶⁸ In 1991, then-governor of Massachusetts William Weld put it succinctly: “[inmates] are in prison to be punished, not to receive free education.”⁶⁹ Some scholars have echoed this sentiment.⁷⁰ What seldom gets asked is whether the savings in crime reduction resulting from educating inmates offsets the costs of the “free education.”

Nor is this trend away from investing in rehabilitation likely to change. Government prisons face political pressures against allocating resources to rehabilitation, and private prisons not only find expenditures on rehabilitation programs (or any non-essential programs) unprofitable, but may have a perverse incentive *not* to rehabilitate, since it would decrease the demand for prisons.⁷¹

Despite the growth of prisons and the worsening of prison conditions, the public still believes not enough is being done to be “tough on crime.”⁷² In a poll conducted in 1996, 67% of Americans

⁶⁴ Rubin, *supra* note 43, at 56 (“The spiraling cost of these [tough-on-crime] policies has placed enormous stress on the budgets of states and counties, draining dollars from functions such as education, police, fire, sanitation, public assistance, and road repair that typically compete with the correctional budget.”).

⁶⁵ See, e.g., Sheryl Stolberg, *School’s Out for Convicts*, L.A. TIMES, Sept. 14, 1995, at A1 (“In Alabama and Arizona, chain gangs are back. In Texas, weightlifting . . . has been banned In Mississippi, convicts will soon wear striped uniforms. In the long-running debate over whether the purpose of prisons is to rehabilitate or to punish, the pendulum has swung clearly in the direction of punishment.”).

⁶⁶ Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 73-74 (2002); see Robert Ellis Gordon, *My Life as a Prison Teacher*, CHRISTIAN SCI. MONITOR, Mar. 12, 2001, at 9 (citing Washington State’s “no-frills” approach to incarceration, which led to the dismantling of the community-college system within that state’s prisons—“once a model for the nation Even high school degrees are no longer offered to those convicts who want them.”).

⁶⁷ Blumenson & Nilsen, *supra* note 66, at 73-74.

⁶⁸ *Id.* at 74.

⁶⁹ *60 Minutes* (CBS television broadcast May 5, 1991) (cited in Blumenson & Nilsen, *supra* note 66, at 74 n.66).

⁷⁰ See, e.g., Greene, *supra* note 60, at 173-74 (1998) (“Why should society ‘reward’ convicted felons for attacking innocent victims by providing felons with a free education?”).

⁷¹ Daniel L. Low, *Nonprofit Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 31 (2003).

⁷² *Alternative Punishments*, *supra* note 48, at 1967-68 (“In our political culture, what are sometimes contemptuously referred to as ‘lock ‘em up’ arguments resonate deeply with the

thought that “too little” money was being spent on stopping “the rising crime rate,”⁷³ and 78% said that the courts in their area treated criminals “not harshly enough.”⁷⁴ Another poll conducted in 1996 found that 75% of Americans favored the death penalty—twice as many as supported it in 1965.⁷⁵

This obsession with cracking down on crime exists despite empirical evidence both that crime rates are not that high,⁷⁶ and that “tough on crime” policies are not responsible for making them lower.⁷⁷ Our overall crime rates are not that different from other Western countries, undercutting the argument that we need more prisons because we have more criminals to deal with.⁷⁸ Similarly, although it was widely believed that “zero tolerance” policing implemented in New York City in 1993, and the Three Strikes Laws adopted in California in 1994, were the reasons for their declining crime rates, violent crime rates were already beginning to decline in those locales in 1990 and 1991. Moreover, crime rates declined by similar amounts during the same period in places that did not adopt or enforce such policies.⁷⁹ There is no general demonstrable connection between increasing the severity of criminal penalties and the reduction in overall crime rates.⁸⁰

In fact, just the opposite is true: the evidence indicates that incarceration actually increases crime. A 1989 California study matched comparable felons sentenced to either prison or probation, and found that seventy-two percent of the former group was rearrested within three years of release, compared to sixty-three percent of the

electorate The public is fed up with crime and frustrated with theory and speculation that fail to produce the result they care about—safer streets.”)

⁷³ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1997, at 128-29 tbl.2.47 (Kathleen Maguire & Ann L. Pastore eds., 1998); *Alternative Punishments*, *supra* note 48, at 1967 (“Concerns about the cost-effectiveness of incarceration raised in the pages of scholarly journals and books, and other technical arguments, do not translate into effective campaign speeches.”).

⁷⁴ BUREAU OF JUSTICE STATISTICS, *supra* note 73, at 134 tbl.2.50.

⁷⁵ Harris Poll, The Death Penalty, tbl.1, http://harrisinteractive.com/harris_poll/index.asp?PID=48.

⁷⁶ Long, *supra* note 22, at 325 (noting that during the period of great increases in incarceration rates, crime rates have remained stable).

⁷⁷ See STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY 79 (1984) (“[W]hat is operative is a complex and unpredictable process in which politicians seeking to obtain or retain office capitalize on public anxieties, which are only tenuously linked to the actual incidence of crime.”).

⁷⁸ See Alschuler, *supra* note 56, at 14 n.79 (citing FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 3 (1997)) (showing that, aside from lethal violence, “rates of crime are not greatly different in the United States from those in other developed nations . . .”).

⁷⁹ See Tonry, *supra* note 16, at 1243-44.

⁸⁰ Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003) (surveying the literature and concluding there is no discernable correlation between increased sentencing and crime reduction).

latter.⁸¹ Likewise, recidivism rates in a New York juvenile detention center were ten to twenty percentage points higher than those observed in a community-based alternative-to-detention program.⁸² A federal study drew the same conclusion: each instance of incarceration rendered the next more likely.⁸³

The correlation between the ideological shift toward retribution and incapacitation, and the increased reliance upon—and worsening conditions within—prisons, is no coincidence. If criminals are monsters who are either undeserving of help or are by nature incapable of reform, it is sensible to lock them up and throw away the key. By contrast, we will see that Jewish law neither views criminals as monsters, nor treats them that way.

II. THE LIMITED ROLE OF RETRIBUTION IN JEWISH LAW

A. *Challenging the Popular Linkage of Retribution with the Hebrew Bible*

As discussed above, those who favor prisons often invoke retribution as a justificatory rationale.⁸⁴ And advocates of retribution often claim that the Hebrew Bible supports their position.⁸⁵ Is their reliance justified?

At first glance, it would seem so. The phrase people most often associate with retribution is likely “an eye for an eye,” which appears several times in the Torah.⁸⁶ Prosecutors (particularly in the heavily religious South) have often used it in closing arguments to induce juries to return the harshest possible verdict: the death penalty.⁸⁷ In large part

⁸¹ Joan Petersilia, Susan Turner & Joyce Peterson, *Prison Versus Probation in California—Implications for Crime and Offender Recidivism*, 150 PRACTISING L. INST. 105, 108-09 (1989). The study concluded that imprisonment did little to deter, but did manage to incapacitate; “[h]owever, this objective was achieved at very high costs to the criminal justice system, both absolutely and relative to probation.” *Id.* at 111.

⁸² Theresa A. Hughes, *Juvenile Delinquent Rehabilitation: Placement of Juveniles Beyond Their Communities as a Detriment to Inner-City Youths*, 36 NEW ENG. L. REV. 153, 169 (2001).

⁸³ See Loren A.N. Buddress, *Federal Probation and Pretrial Services—A Cost-Effective and Successful Community Corrections System*, FED. PROBATION, Mar. 1997, at 5, 10-11.

⁸⁴ *Alternative Punishments*, *supra* note 48, at 1971 (“In the proretribution culture, incarceration is the punishment of choice.”).

⁸⁵ See *infra* notes 86-91.

⁸⁶ See *Exodus* 21:23-25; *Leviticus* 24:19-20; *Deuteronomy* 19:18-21. All citations herein to commentaries on the five books of Moses will be from RABBI NOSSON SCHERMAN, *THE CHUMASH: THE STONE EDITION* (ArtScroll Series 1993).

⁸⁷ See, e.g., *State v. Rouse*, 451 S.E.2d 543, 562 (N.C. 1994) (prosecutor’s statement to jury that “eye for an eye” was appropriate basis for inflicting death penalty was not error); *State v. Shum*, 866 S.W.2d 447, 464 (Mo. 1993) (en banc) (prosecutor’s use of “eye for an eye” in closing argument in first-degree murder case was not plain error); *Christenson v. State*, 402

because of the prominent use of this phrase, the very term “Old Testament justice” is popularly understood to mean harsh vengeance.⁸⁸ Legal scholarship, both liberal and conservative, also perpetuates this understanding.⁸⁹ So do the media and the public.⁹⁰ The Old Testament’s “eye for an eye” is often contrasted with the “turn-the-other-cheek” compassion and benevolence of the New Testament.⁹¹

S.E.2d 41, 50 (Ga. 1991) (on appeal from death sentence, holding that “prosecutor did not argue impermissibly by explaining ‘retribution’ as ‘(w)hat we learned in Sunday School as an ‘eye for an eye and a tooth for a tooth.’”); *Thompson v. State*, 581 So.2d 1216, 1243 (Ala. Crim. App. 1991) (affirming capital murder conviction and finding no error in prosecutor’s use of “eye for an eye” in closing argument).

⁸⁸ See Clifford Fishman, *The Mirror of Justice Lecture: Old Testament Justice*, 51 CATH. U. L. REV. 405, 405-06 n.4 (2002); see also Sister Grace W. Walle, *Doing Justice: A Challenge for Catholic Law Schools*, 28 ST. MARY’S L.J. 625, 626 (1997) (criticizing frequent tendency to portray “Old Testament justice” as “synonymous with vengeance”).

⁸⁹ See, e.g., Robert A. Friedlander, *Punishing Terrorists: A Modest Proposal*, 13 OHIO N.U. L. REV. 149, 150 (1986) (proposing application of “Old Testament justice. In short, what I am recommending is not only the death penalty for terrorists who cause loss of life in any fashion, but also for the court’s capital sentence to be carried out via public execution. Humiliate the terrorists. Shame them. Degrade them. Treat them as the monsters that they really are.”); Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1, 2 (1994) (blaming “Texas’ shameful experience in implementing the death penalty” in part on “the confluence of southern notions of Old Testament justice and western notions of frontier justice”); Michael Jay Willson, *A View of Justice in Shakespeare’s The Merchant of Venice and Measure for Measure*, 70 NOTRE DAME L. REV. 695, 721 (1995) (“Mr. Calder’s and Ms. Downie’s respective portrayals of Shylock and Portia [in “The Merchant of Venice”], masterfully contrasted the Old Testament and New Testament notions of justice. Calder played Shylock as an embodiment of the Old Testament ‘justice’ which was an ‘eye for an eye.’ In contrast, Downie’s Portia, like Christ in the New Testament, eloquently entreated Shylock to show mercy.”); see also Alschuler, *supra* note 56, at 19 (“Envisioning retribution as ‘an eye for an eye’ makes the other purposes of punishment look good.”).

⁹⁰ See Liam Clark, *Ardoyne: The Bitter Heart of a Divided Province*, SUNDAY TIMES, Sept. 9, 2001, at News Review 7 (describing “loyalist paramilitaries” preparing to retaliate following the death of a Protestant in Belfast, and stating that “[s]ome have already told the press to expect Old Testament justice—an eye for an eye”); Anthony Lewis, *Abroad at Home: Life and Death*, N.Y. TIMES, Apr. 23, 1992, at A25 (“A young man demonstrating outside the San Quentin prison wore a T-shirt saying ‘Gas Killer Harris’ and carried a sign quoting the Old Testament: ‘Thou shalt give life for life, eye for eye.’”). Even opponents of the death penalty share this view of the Old Testament. See, e.g., Christopher Hitchens, *Scenes from an Execution*, VANITY FAIR, Jan. 1998, at 30, 40 (referencing nightmarish possibility of executing “approximately one hundred thousand convicted murderers stockpiled in the American prison system” as “a saturnalia of eye for eye and tooth for tooth”); 1000 Executions, <http://www.1000executions.org> (last visited Sept. 12, 2006) (anti-death penalty organization featuring photograph of student holding up sign stating “An eye for an eye makes the whole world blind.”).

⁹¹ THE NEW OXFORD ANNOTATED BIBLE WITH THE APOCRYPHA: REVISED STANDARD VERSION, *Matthew* 5:38-40 (Michael Cogan ed., 3d ed. 2001) (“You have heard that it was said, ‘An eye for an eye and a tooth for a tooth.’ But I say to you, Do not resist an evildoer. But if any one strikes you on the right cheek, turn to him the other also”); see Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim’s Desire for Vengeance as Justification for Punishment*, 50 WAYNE L. REV. 1115, 1159 (2004) (“[T]he concepts of justice and retribution are recognized in the Old Testament of the Bible, while in the New Testament, the virtues of redemption and forgiveness are extolled.”). But see ELLIOT N. DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 181 (1988) (“The words and the context indicate that this is advice to individuals; it is not clear that Jesus would organize a

But how does one determine what the phrase “eye for an eye” really means? This is not unlike the situation one faces whenever engaging in statutory construction. Should one hew closely to the “plain meaning” of the text—which here suggests literal like-kind retaliation? Or should one look to the legislative history (whatever that would mean in the context of theocratic law) or other extrinsic evidence to aid in interpretation?

This Article asserts that because the society in which the Hebrew Bible originated, and for whom it was originally intended, looked outside the text’s “plain meaning” to discern what the law “was,” so should we. Although one might counter that any such “original” interpretation is not conclusive or binding on our understanding of the Bible today, only the most ardent post-modernist would contend that it is irrelevant.

1. Issues in Interpreting the Hebrew Bible Generally

According to Jewish tradition, Moses received the Torah—the first five books of the Hebrew Bible⁹²—from God at Mount Sinai in 1313 B.C.E.⁹³ Although many are familiar with this claim, fewer are aware that the Jewish tradition holds that Moses also received from God a more detailed Oral Law,⁹⁴ which was then passed down from teacher to student for generations. Between about 200 and 500 C.E., major portions of this oral tradition were reduced to writing in what is now known as the Talmud.⁹⁵

society on this basis.”).

⁹² The English names of the first five books are Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. “Torah” (literally, “teaching” or “instruction”) is sometimes also used to refer to the complete Hebrew Bible, or to all the teachings of the Jewish legal tradition. See Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 816 n.13 (1993). As used herein, “Torah” will refer to the first five books of the Hebrew bible unless indicated otherwise.

⁹³ See JLI, *supra* note 6.

⁹⁴ See Rabbi Moses ben Maimon (RaMBaM), MISHNAH TORAH [“Repetition of the Torah”] (Rabbi Eliyahu Touger trans., 1989) *Hilchot Yesodei HaTorah* [“The Laws [which are] the Foundations of the Torah”] 12 [hereinafter RAMBAM] (“The mitzvot given to Moses at Mount Sinai were all given together with their explanations, as implied by *Exodus* 24:12: ‘And I will give you the tables of stone, the Torah, and the mitzvahs.’ ‘The Torah’ refers to the written law; ‘the mitzvah’ to its explanation. God commanded us to fulfill the Torah according to the instructions of ‘the mitzvah.’ ‘The mitzvah’ is called the Oral Law.”) (footnotes omitted). Rambam, also known as Maimonides, was the great twelfth-century Jewish commentator, and the Mishnah Torah was his effort to organize and systematize the Oral Law. All references to the Rambam’s Mishnah Torah herein will be to the section name, chapter, and paragraph number, and page number.

⁹⁵ See JLI, *supra* note 6. Two different versions of the Talmud were compiled, one in Jerusalem and a more comprehensive one in Babylonia. See Stone, *supra* note 92, at 816 n.13. This Article will refer exclusively to the Babylonian Talmud.

The relationship between the written Torah and the Oral Law is a rich and complex one. One might analogize the written Torah to a lecture outline, and the Oral Law to the lecture itself. The outline is a shorthand, not intended to be read—and perhaps not coherent if read— independent of the oral presentation. Indeed, if the Oral Law appears to contradict or vary from the written Torah, then, according to the traditional Jewish view, “it is the former that governs.”⁹⁶ The Oral Law is not a secondary source whose purpose is to illuminate a primary text. It is the primary source.

That the Jewish tradition does not embrace a literal interpretation of the written Torah is not surprising, given that the Torah is not a text that lends itself to any “plain meaning.” First, the Torah is written in Hebrew, a language that inherently allows for ambiguities regarding sentence structure, verb conjugation, and so on.⁹⁷ Second, the biblical variant of Hebrew contains additional ambiguities that are not present in modern Hebrew.⁹⁸ Third, Torah scrolls are written with no punctuation or vowels; lack of punctuation can create opportunities for ambiguity in any language, but the meaning of Hebrew words is particularly prone to change depending on changes in vowelization.⁹⁹

Thus, when one reads the Torah, one is necessarily accessing a highly ambiguous text. Unfortunately, translations of the Bible into other languages “often resolve rather than preserve ambiguities, and thus favor one interpretation over another.”¹⁰⁰ The linguistic problem rapidly becomes a substantive one, because one cannot coherently understand either the philosophy of Jewish law or the dictates of Jewish practice—known as *halacha* (literally, “the way” or “path”)—without turning to the Oral Law.¹⁰¹

⁹⁶ Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on “Eye for an Eye” and the Death Penalty*, 1998 UTAH L. REV. 505, 510.

⁹⁷ For example, Hebrew has only one imperfect verb tense for unaccomplished activity. Thus, the word *yizkor*, from the infinitive *lizkor* (“to remember”) could mean “he will remember” (future indicative), “that he remembers” (subjunctive), “may he remember” (optative), or “he shall remember!” (cohortative). LUBA UVELELER & NORMAN M. BRONZNICK, *HA YESOD: FUNDAMENTALS OF HEBREW* 92 (1998).

⁹⁸ For example, the Hebrew letter *vav*, when attached as a prefix, usually means “and.” However, in Biblical Hebrew, when the *vav* is attached to a verb in the perfect tense, it often—but not always—converts the verb to the imperfect tense, or vice versa. Thus, if *yikra* means “he will call,” *v'yikra* could mean either “and he will call” or “and he called.” See ETHYL SIMON, IRENE RESNIKOFF & LINDA MOTZKIN, *THE FIRST HEBREW PRIMER* 167 (3d ed. EKS Publishing Co. 1992).

⁹⁹ Rosenberg & Rosenberg, *supra* note 96, at 512. For example, both the words *lil'mod* (“to learn”) and *l'la'med* (“to teach”) are spelled with the Hebrew letters *lahmed-lahmed-mem-daled*, L-L-M-D. The only difference between the two words is vowelization, which one must derive from context.

¹⁰⁰ *Id.* (citing HARRY M. ORLINSKY, *ESSAYS IN BIBLICAL CULTURE AND BIBLE TRANSLATION* 349-53 (1974)).

¹⁰¹ *Id.* at 513.

2. Interpreting “An Eye for an Eye” in Jewish Law

These challenges to interpreting the Torah directly impact the modern (mis)interpretation of the phrase “eye for an eye.” As one prominent contemporary biblical scholar has stated: “Few are the verses of the Bible which have been so frequently and glaringly misunderstood.”¹⁰² In Jewish law, the phrase in fact refers to monetary compensation for the value of the lost eye (in terms of pain and suffering, medical bills, lost earnings, and mental suffering),¹⁰³ not literal retributive maiming.¹⁰⁴

The arguments supporting this monetary compensation interpretation are numerous and varied. First, note that the words “eye for an eye” are ambiguous enough to permit the inference of compensation. If one wanted to lay down a rule of literal maiming, as distinguished from compensation, one could have done so far more explicitly. This is precisely what was done in Hammurabi’s Code of ancient Babylonia:¹⁰⁵

If a man put out the eye of another man, his eye shall be put out. If he break another man’s bone, his bone shall be broken. . . . If he put out the eye of a man’s slave, or break the bone of a man’s slave, he shall pay one-half of its value.¹⁰⁶

Second, the phrase first appears in a section of the Torah dealing exclusively with how victims of an injury are to be compensated by a tortfeasor.¹⁰⁷ Third, the Torah often prioritizes making restitution to the victim over punishing the offender; putting out the eye of the wrongdoer does not benefit the victim in any tangible sense.¹⁰⁸ Fourth, the only forms of judicially imposed corporal punishment provided for by the Torah are capital punishment and lashes, not maiming.¹⁰⁹ Fifth, given

¹⁰² NEHAMA LEIBOWITZ, *STUDIES IN VAYIKRA (LEVITICUS) 245* (Aryeh Newman trans., 1983).

¹⁰³ THE MISHNAH (Maor Wallach Press, Edward Levin trans., 1994), *Seder Nezikin* [“Order of Damages”], BAVA KAMMA [“First Gate”] 8:1. The Mishnah is a terse recitation of rules that form the backbone of the Talmud, upon which the lengthier Gemara provides discussion and debate. All references to the Mishnah will be to the section, chapter, mishnah (“teaching”) and page number.

¹⁰⁴ Rosenberg & Rosenberg, *supra* note 96, at 525.

¹⁰⁵ *Id.* at 514 n.33 (citing 2 THE BABYLONIAN LAWS 77 (G.R. Driver & John C. Miles eds. & trans., Oxford 1960)).s

¹⁰⁶ CODE OF HAMMURABI, *Laws 196-97, 199* (L. W. King., trans.), available at The Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/medieval/hamframe.htm> (last visited Sept. 12, 2006).

¹⁰⁷ Fishman, *supra* note 88, at 415 (citing *Exodus* 21:18-27).

¹⁰⁸ Rosenberg & Rosenberg, *supra* note 96, at 526.

¹⁰⁹ SCHERMAN, *supra* note 86, commentary to *Exodus* 21:24. Each capital crime in Jewish law carries one of only four specific methods of execution: stoning, burning, decapitation, and strangulation. BABYLONIAN TALMUD, *Seder Nezikin* [Order of Damages], TRACTATE SANHEDRIN [“High Court”] folio 49b (ArtScroll Series/Schottenstein ed., 2002) (all references herein to the Talmud will be to the tractate and folio number of this edition).

how the “*tachat*” in “*ayin tachat ayin*” (the Hebrew for “eye for eye”) is used in other places in the Torah, the use of this word suggests compensation, not literal blinding.¹¹⁰ Sixth, the Talmud offers a number of additional textual and logical proofs, too detailed to examine here, directed specifically to show that “eye for an eye” requires only compensation.¹¹¹

If the Torah does not literally demand an eye for an eye, why does it use language that implies it does? One explanation rests on the distinction between the punishment the offender deserves, and the punishment that courts are authorized to impose:

[I]n the Heavenly scales, the perpetrator *deserves* to lose his own eye—and for this reason he cannot find atonement for his sin merely by making the required monetary payments; he must also beg his victim’s forgiveness—but the human courts have no authority to do more than require the responsible party to make monetary restitution.¹¹²

Thus, “an eye for eye” is an instance where the “plain meaning” of the text of the Torah will lead one to the opposite conclusion from what the *halacha* actually mandates.

Even if a modern reader were not persuaded by these arguments, the fact remains that this is the understanding that the Torah’s primary audience—Torah observant Jews—always had of “eye for an eye.”¹¹³ Moreover, not only does no instance of exacting such physical retribution appear anywhere within the Hebrew Bible,¹¹⁴ but apparently “there is no instance in Jewish history of its literal application *ever* having been carried out.”¹¹⁵

¹¹⁰ Rosenberg & Rosenberg, *supra* note 96, at 527 n.105 (citing LEIBOWITZ, *supra* note 102, at 252-53).

¹¹¹ *Id.* at 528-35. The Talmud also records arguments that support a literal interpretation of the verse. *See id.* at 529-35. However, the Talmud “often raises seemingly weak contentions as a means of clarifying for future generations that these arguments have already been duly considered and rejected . . .” *Id.* at 536.

¹¹² SCHERMAN, *supra* note 86, commentary to *Exodus* 21:24 (citing Rambam and other commentators).

¹¹³ *See* Fishman, *supra* note 88, at 415 (“This is how the rabbis have always understood and applied this passage.”); SCHERMAN, *supra* note 86, commentary to *Leviticus* 24:17-22 (“The unlearned maintain that it [“an eye for an eye”] is originally meant literally, but was later reinterpreted by the Sages to mean monetary compensation. This is wrong. The Torah never required anything other than monetary damages. In addition to the Oral Tradition from Sinai, the Talmud proves on logical grounds and through Scriptural exegesis that the verses cannot be understood in any other way.”).

¹¹⁴ Fishman, *supra* note 88, at 415 n.59.

¹¹⁵ Rosenberg & Rosenberg, *supra* note 96, at 514 n.35 (emphasis added).

3. The Role of the Death Penalty in Jewish Law

a. The Popular Perception

The Hebrew Bible is also believed to endorse retribution because it ostensibly embraces capital punishment. After all, the Torah states not only “eye for eye,” but also “life for life,” and states further: “And a man—if he strikes mortally any human life, he shall be put to death.”¹¹⁶ In contrast to the situation where one merely puts out another’s eye, the Torah *forbids* accepting a monetary penalty from a murderer: “You shall not accept ransom for the life of a killer who is worthy of death, for he shall surely be put to death.”¹¹⁷ This seems to suggest that, even if the Torah does not permit maiming a criminal who merely injures, it not only sanctions but mandates executing those who kill.

Prosecutors have relied on such passages to justify the imposition of the death penalty, and courts have upheld this practice.¹¹⁸ For example, in *Hayes v. Lockhart*,¹¹⁹ the Eighth Circuit held that, during closing argument in a capital murder case, the prosecutor did not violate the defendant’s rights by citing *Exodus* 21:12: “He that strikes a man and he dies shall surely be put to death.”¹²⁰ However, the dissent in *Hayes* noted that such “selective quoting” from the Hebrew Bible was “not only incendiary, but misleading,” since in reality, “ancient Jewish law abhors the death penalty.”¹²¹

b. The Reality in Jewish Law

Although the dissent in *Hayes* may have overstated the matter a bit,¹²² it is true that Jewish law reflects a striking reluctance to apply the

¹¹⁶ See *Exodus* 21:23-25; *Deuteronomy* 19:18-21; *Leviticus* 24:17.

¹¹⁷ *Numbers* 35:31.

¹¹⁸ See *supra* note 87.

¹¹⁹ 852 F.2d 339, *vacated and remanded on other grounds*, 491 U.S. 902 (1989).

¹²⁰ *Hayes*, 852 F.2d at 356 (Bright, C.J., dissenting).

¹²¹ *Id.* at 356 n.8 (Bright, C.J., dissenting) (citing Gerald J. Blidstein, *Capital Punishment—The Classic Jewish Discussion*, in CONTEMPORARY JEWISH ETHICS 310 (Menachem Marc Kellner ed., Sanhedrin Press 1978); see Rosenberg & Rosenberg, *supra* note 96, at 513 (“[A] cursory reading of the Torah suggests rigid rules of personal behavior, any deviation from which is punishable by death, consequently feeding the notion of a savage and pitiless God, rather than one who is ‘merciful and gracious, long-suffering, and abundant in goodness and truth.’ [However,] the Oral Law not only reconciles these ostensibly conflicting portraits, but . . . it also renders capital punishment a rarity . . .”).

¹²² See Samuel J. Levine, *Capital Punishment in Jewish Law and its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY’S L.J. 1037, 1040 (1998) (discussing the complexity of the Jewish legal view on capital punishment; “Judge Bright’s emphasis on the need to consult the work of Jewish legal scholars is instructive, but his brief discussion of the issue is incomplete.”).

death penalty. Although the written Torah mentions numerous offenses (thirty-six, to be precise) that subject an offender to the death penalty,¹²³ there are so many evidentiary hurdles to a Jewish court carrying out a sentence of capital punishment as to render executions a rarity.¹²⁴

For a court to execute a defendant, two competent witnesses¹²⁵ must have warned him—immediately before he committed a crime—that his intended act was forbidden and would subject him to the death penalty.¹²⁶ The suspect had to verbally acknowledge receipt of the warning,¹²⁷ and then commit the act in full view of both witnesses.¹²⁸ At the trial itself, neither circumstantial evidence¹²⁹ nor confessions—no matter how voluntary—could be admitted against the defendant.¹³⁰ Witnesses were subject to extensive sequestered¹³¹ judicial interrogation,¹³² and if there were discrepancies between their testimony—even minor ones—their testimony could be excluded.¹³³

¹²³ RAMBAM, *supra* note 94, *Sefer Shoftim* [“Book of Judges”], *Hilchot Sanhedrin v’Haonshin Hameshurim Lahem* [“Laws of Courts and the Penalties Placed Under Their Jurisdiction”] 15:10-13, at 116.

¹²⁴ See Rosenberg & Rosenberg, *supra* note 96, at 516-17; Arnold N. Enker, *Aspects of Interaction Between the Torah Law, the King’s Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1139 (1991); Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 PACE L. REV. 535, 546 (1991). See generally HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW 208-16 (Ktav Publishing 1984) (discussing procedural safeguards).

¹²⁵ See Numbers 35:30; Deuteronomy 17:6, 19:15 (requiring two witnesses); MISHNAH, SANHEDRIN 3:1-5, at 29-39 (establishing as incompetent to testify certain wrongdoers and relatives in monetary suits); see *id.*, 4:1-3 (discussing differences between monetary and capital cases, and mentioning no differences regarding witness competency). This evidentiary requirement of two witnesses is so difficult to meet that it alone would preclude conviction in most cases. Although one could argue that the evidentiary hurdles imposed by the Oral Law were concocted to temper the untenable harshness of the written Torah, it should be noted that this requirement comes straight from the text of the Torah itself.

¹²⁶ BABYLONIAN TALMUD, TRACTATE SANHEDRIN 80b (discussing warning requirement); see RAMBAM, *supra* note 94, *Laws of Courts* 12:2, at 92-93 (as long as witness requirement met, others may provide the warning).

¹²⁷ BABYLONIAN TALMUD, TRACTATE SANHEDRIN 81b (discussing requirement of explicit acknowledgment of warning by suspect).

¹²⁸ For an explication of the requirement that the witnesses be actual eyewitnesses, see *id.*, TRACTATE SANHEDRIN 37b.

¹²⁹ See *id.*, TRACTATE SANHEDRIN 37a-37b; Irene M. Rosenberg & Yale L. Rosenberg, “Perhaps What Ye Say Is Based Only on Conjecture”—Circumstantial Evidence, Then and Now, 31 HOUS. L. REV. 1371, 1371-90 (1995).

¹³⁰ Irene M. Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 1017-41 (1988); AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 114-15 (1970).

¹³¹ MISHNAH, SANHEDRIN 5:4, at 65.

¹³² *Id.*, SANHEDRIN 5:1-2, 4, at 58-62, 65-66.

¹³³ *Id.*, SANHEDRIN 5:3, at 62-64; RAMBAM, *supra* note 94, *Book of Judges, Hilchot Eduot* [“The Laws of Witnesses”], ch. 2, at 210-14.

Procedural safeguards also served to make capital punishment extremely difficult to inflict.¹³⁴ Capital cases were tried by a court of twenty-three judges¹³⁵ who were known for integrity and compassion.¹³⁶ Younger judges rendered their votes first, so as not to be intimidated by the views of more senior judges.¹³⁷ Once a judge announced that he would acquit the defendant, he could not change his vote, but a judge could reverse a vote for conviction.¹³⁸ The judges could acquit after a single day of deliberation, but they had to deliberate overnight before rendering a guilty verdict, and had to try to find any possible basis for acquittal.¹³⁹ Even after conviction, Jewish law required court officials to create numerous opportunities for a judge, third parties, or the defendant himself to offer additional legal or factual grounds for acquittal.¹⁴⁰ Conversely, erroneous acquittals were generally not subject to challenge.¹⁴¹

So extensive were these systemic barriers to judicially-implemented execution, that there is a famous dispute in a Mishnah regarding whether a “murderous *Sanhedrin* [high court]” was one that carried out an execution once every seven years, or once every seventy years.¹⁴² Rabbi Tarfon and Rabbi Akiva (one of the most respected Jewish sages in history) contended that if they had been on a *Sanhedrin*, no one would ever have been put to death. Rabbi Shimon ben Gamliel, however, noted that Rabbis Tarfon and Akiva would have “increased shedders of blood in Israel” by their excessive passivity.¹⁴³

The very existence of such a four-way Mishnaic dispute illustrates that the attitude toward capital punishment in Jewish law is far from monolithic. However, the notoriety of the debate regarding the propriety of executing one person every seven or seventy years demonstrates a greater reluctance to apply the death penalty than is exhibited in the United States today. The Jewish population in ancient Israel was about two and a half million,¹⁴⁴ or roughly 1/100th of the

¹³⁴ See COHN, *supra* note 124, at 208-16 (discussing procedural safeguards).

¹³⁵ MISHNAH, SANHEDRIN 1:4, at 9-10.

¹³⁶ RAMBAM, *supra* note 94, *Laws of Courts* 2:1-14, at 20-30; MISHNAH, SANHEDRIN 4:2, at 50.

¹³⁷ MISHNAH, SANHEDRIN 4:2, at 50.

¹³⁸ *Id.*, SANHEDRIN 4:1, at 46-49, 5:5, 67-69.

¹³⁹ *Id.*

¹⁴⁰ *Id.*, SANHEDRIN 6:1, at 70-72.

¹⁴¹ *Id.*, SANHEDRIN 4:1, at 46-49. This discussion of the evidentiary and procedural restrictions does not even include substantive restrictions: limitations on who is even considered to have committed a homicide for purposes of exposing them to the death penalty. See Rosenberg & Rosenberg, *supra* note 96, at 515-16.

¹⁴² MISHNAH, MAKKOT 1:10, at 19-20.

¹⁴³ *Id.*, MAKKOT 1:10, at 19-20.

¹⁴⁴ See 13 ENCYCLOPAEDIA JUDAICA 871-72 (1971) (estimating the Jewish population living in Palestine “shortly before the fall of Jerusalem” in 70 C.E. at “not more than 2,350,000-2,500,000”).

modern American population. So in today's terms, the rabbis would have been debating the execution of one hundred persons either every seven or seventy years—equivalent to 1.4 versus 14 persons per year. In the thirty years since the United States Supreme Court upheld the constitutionality of capital punishment,¹⁴⁵ over 1,000 people have been executed—equivalent to about thirty-three per year.¹⁴⁶ Thus, the United States executes offenders either twice as often or more than twenty times as often as would have a “bloody Sanhedrin” in ancient Israel.

c. Understanding the Limited Role of the Death Penalty
in Jewish Law

Although some of the evidentiary and procedural requirements can be justified by a grave concern of erroneously convicting the innocent, many are so extreme that they make it virtually impossible to convict not only the factually innocent, but also the factually guilty as well.¹⁴⁷ A number of explanations for this have been offered.

First, Jewish law provides for capital punishment not for the purpose of actually executing anyone, but merely to demonstrate Judaism's abhorrence of capital crimes—offenses that the society deems worthy of death.¹⁴⁸ Keeping capital crimes “on the books” served a pedagogical function by sending a message about what conduct was considered unacceptable.¹⁴⁹ Much like “an eye for an eye” makes a systemic statement about the punishment that the offender deserves, but does not dictate that this is the punishment he will receive,¹⁵⁰ so too does the Torah make a statement about what crimes make people deserving of death, without mandating that they be killed.

Second, the rabbis understood that the goal of general deterrence would be served more effectively by using the ultimate penalty sparingly than by using it frequently and thereby cheapening human life in the eyes of the people.¹⁵¹ Indeed, a recent comprehensive review of economic and sociological studies concluded that use of the death penalty tends to create a “brutalization effect” which actually increases

¹⁴⁵ See *Gregg v. Georgia*, 428 U.S. 153, 169, 187 (1976) (plurality opinion).

¹⁴⁶ Kenneth Boyd—the 1000th person to be executed in the United States since the Supreme Court's opinion in *Gregg v. Georgia*—was executed on December 2, 2005 in North Carolina. See 1000 Executions, <http://www.1000executions.org> (last visited Sept. 12, 2006).

¹⁴⁷ Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the Maharal of Prague*, 90 MICH. L. REV. 604, 618 (1991)].

¹⁴⁸ Kenneth Shuster, *Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods*, 19 NOVA L. REV. 965, 975 (1995) (citing HERBERT L.A. HART, LAW LIBERTY, AND MORALITY 65 (1963)).

¹⁴⁹ Enker, *supra* note 124, at 1145.

¹⁵⁰ See *supra* text accompanying note 112.

¹⁵¹ Shuster, *supra* note 148, at 976 n.72 (citing sources).

crime rates, and that this effect is only outweighed by a deterrent effect if the society is willing to execute a sufficiently large number of people.¹⁵² Assuming Jewish society was not willing to execute large numbers of people, the most effective course for deterrence purposes was to curtail or eliminate the use the death penalty.¹⁵³

Third, given the fallibility of human factfinders and the irreversibility of capital punishment, the fear of executing the innocent was so great that the social cost of acquitting even the guilty was deemed an acceptable price.¹⁵⁴

Fourth, there was little concern about human courts letting guilty parties go free, because God would ultimately render perfect justice upon everyone. The requirements of warning and acknowledgment, multiple witnesses, etc., were there to help ensure that only those who were deliberately acting in defiance of God's will would be executed.¹⁵⁵ "If these requirements yield the result that most violators of God's law will not be punished by human courts, so be it."¹⁵⁶ God would take care of it in the end.

Indeed, in Jewish law, God's divine punishment is not merely a "backstop" to the human criminal justice system; it is one of the punishments explicitly provided for. *Halacha* establishes a variety of offenses for which a defendant who is not subject to death by human courts is subject to *karet* (literally, "cutting off")—early death at the hand of God, which entailed having one's soul "cut off" from God and the Jewish people.¹⁵⁷ Such a penalty may seem absolutely toothless in a secular society. But within a society of devout believers, *karet* was deemed to be such an unimaginably terrible penalty that, when the rabbis later instituted flogging as a substitute, they were motivated by mercy.¹⁵⁸

Another set of explanations takes the opposite approach: Jewish law could afford to have such excessive limitations on the death penalty

¹⁵² Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 204-06 (2005).

¹⁵³ Interestingly, the Talmud notes that in the years prior to the destruction of the Second Temple in Jerusalem in seventy A.D. (which cemented the collapse of the Jews' control of Israel), capital offenses proliferated, and so the Sanhedrin, recognizing that it could no longer judge these cases properly, "moved from its location near the Temple in order to negate its own authority to adjudicate capital cases." See Levine, *supra* note 122, at 1049 (citing BABYLONIAN TALMUD, TRACTATE AVODA ZARA 8b).

¹⁵⁴ Shuster, *supra* note 148, at 975-76; see Fishman, *supra* note 88, at 416.

¹⁵⁵ Enker, *supra* note 124, at 1144.

¹⁵⁶ *Id.*; see COHN, *supra* note 124, at 32; Rosenberg & Rosenberg, *supra* note 147, at 620.

¹⁵⁷ COHN, *supra* note 124, at 32; see RAMBAM, *supra* note 94, *Laws of Courts* 19:1-2, at 138-42 (listing thirty-nine transgressions which are punishable by *karet*, "death by the hand of heaven").

¹⁵⁸ COHN, *supra* note 124, at 32; RAMBAM, *supra* note 94, *Laws of Courts* 19:1-2, at 138-42 (listing transgressions which are punishable by *karet*, but for which the courts may impose lashes).

not because of a reluctance to execute criminals, but because the limitations themselves were not actually enforced.

First, *halacha* provided courts with “exigency powers” to deviate from the detailed substantive, procedural and evidentiary rules in order to punish a defendant who posed a threat to society and who, although in all likelihood guilty, could not be executed under those rules due to some technicality.¹⁵⁹ Thus, the Talmud states that a murderer who was not liable to judicial execution by one of the four biblically sanctioned methods, because he refused to acknowledge the witnesses’ warning, could nevertheless be subjected to fasting followed by force-feeding, which would eventually result in his death.¹⁶⁰ This was not deemed judicial execution, but rather an extra-judicial act that indirectly led to the offender’s death.

Second, *halacha* also provided that the king, under his authority to provide for the general welfare of the people, could convict and execute dangerous criminals.¹⁶¹ Thus, if the judicial courts could or would not execute a defendant due to the failure to meet some judicial requirement, the king’s courts might still punish him free from such procedural or evidentiary constraints.¹⁶²

It is not clear how wide was the sweep of these supplementary powers. According to one view, exercise of these “exigent” powers was intended to be, and was in fact, reserved for exigencies, and thus these powers were only narrow exceptions to the general rule.¹⁶³ According to another view, however, either the courts or the king could legitimately exercise broad authority independent of the detailed judicial procedures.¹⁶⁴

Under the latter view, such broad authority was justified because the law given to the Israelites when they entered into their covenant with God at Sinai supplemented, rather than supplanted, Noahide Law. The Noahide Laws were rules by which all humanity were bound to abide, given before there was a Sinaitic covenant and thus before there was any distinction between Jews and non-Jews.¹⁶⁵ One of the Noahide

¹⁵⁹ Enker, *supra* note 124, at 1141; see RAMBAM, *supra* note 94, *Book of Damages, Hilchot Rotze'ach Ush'mirat Nefesh* [“The Laws of Murder and of Protection of Human Life”] 2:4, at 512.

¹⁶⁰ See *infra* text accompanying notes 228-30.

¹⁶¹ COHN, *supra* note 124, at 30.

¹⁶² Enker, *supra* note 124, at 1141-43; see RAMBAM, *supra* note 94, *Laws of Murder* 2:4, at 512; *id.*, *Book of Judges, Hilchot M'lachim u'Milchamoteihem* [“The Laws of Kings and their Wars”] 3:10 at 5:24.

¹⁶³ COHN, *supra* note 124, at 31.

¹⁶⁴ See generally Enker, *supra* note 124.

¹⁶⁵ According to the Talmud, the seven Noahide laws—the prohibitions against (1) idolatry, (2) cursing God, (3) murder, (4) sexual transgressions (incest and adultery), (5) theft, (6) eating flesh from a live animal; and (7) the requirement to establish laws and courts—were given by God to Adam. BABYLONIAN TALMUD, TRACTATE SANHEDRIN 56a. Maimonides maintains that the only the six of these were given to Adam, and that the prohibition against eating a limb from a

requirements was the establishment of laws and courts of justice, in order to maintain a peaceful society.¹⁶⁶ Under this view, even after the Jews entered into the Sinaitic covenant, and in doing so accepted special obligations of holiness inherent in that covenant, they “did not relieve themselves of the minimum universal obligations that bind all mankind.”¹⁶⁷ It was only the “special dimension of the religious life that is judged exclusively in the Jewish religious courts” according to the “special rules” provided for in Jewish law.¹⁶⁸ But for matters affecting mankind’s relationship with man, and not merely mankind’s relationship with God, Jewish authorities were obligated to administer a pragmatic criminal justice system that would actually convict and punish the factually guilty in order to preserve social order.¹⁶⁹

If such a “dual-track” system was in fact employed (it is hard to know empirically if it was), burdensome limitations on convicting the guilty under the Sinaitic code presented no societal difficulty, because that code was “backed up” by the more realistic Noahide laws. There would thus be no need to explain how a society could govern itself by an impractical body of laws, because it did not in fact so govern itself.

Although we do not know how often ancient Israelite society actually carried out executions, we do know that there is a wealth of literature indicating that there was at least a great ambivalence toward the death penalty, if not an actual abhorrence of it. What can be said with confidence is that Jewish law is less supportive of the ultimate punishment than popular perception would suggest.

B. *What Role for Retribution?*

Although the preceding discussion of both “an eye for an eye” and the death penalty in Jewish law has sought to demonstrate that retribution plays a smaller role than many would assume, this is not to say that retribution plays no role at all. There is clearly a moral imperative in the Bible that wrongdoing be punished: where a Biblical punishment is substantively and procedurally authorized, its imposition is not only permitted, but required.¹⁷⁰ Moreover, a central Jewish

live animal was given to Noah only after mankind was first permitted to eat meat at all following the Flood. RAMBAM, *supra* note 94, *Laws of Kings* 9:1, at 584.

¹⁶⁶ See BABYLONIAN TALMUD, TRACTATE SANHEDRIN 56a; RAMBAM, *supra* note 94, *Laws of Kings* 9:1, at 584.

¹⁶⁷ Enker, *supra* note 124, at 1148.

¹⁶⁸ *Id.*

¹⁶⁹ Schreiber, *supra* note 124, at 548.

¹⁷⁰ See Enker, *supra* note 124, at 1144.

concept is that because God's justice is perfect justice, every transgression shall be punished "measure for measure."¹⁷¹

However, Jewish law holds that human beings are incapable of exacting perfect retribution. Only an omniscient God, whose truth is absolute truth, can know exactly what each person deserves and can tailor each punishment accordingly.¹⁷² It would be inappropriate for a human system of justice to approximate perfect retribution. This is why, even though someone who puts out another's eye may "deserve" to have his own eye put out, the courts have no authority to do so, and can order only compensation.¹⁷³

Thus, while retribution plays an important role in Jewish law, it is God, not mankind, who is primarily responsible for exacting it. Because an earthly system of justice cannot do perfect justice, the Jewish criminal justice system was designed to the next best thing: help make victims whole, and help offenders atone by purging themselves of sin, so that they do not merit as much punishment in the next world.

One might counter that atonement itself is akin to a deontological concept of retribution, in that it takes into account the criminal's moral desert of punishment, and not the beneficial social consequences of punishing him. This requires a clarification: what exactly do we mean when we refer to "retribution" or "atonement"?

Despite the frequent association of retribution with vengeance and harsh penalties, retribution, in its simplest sense, refers to the idea that "[w]rongdoers should be . . . punished . . . because they deserve it."¹⁷⁴ However, "[t]he difficult task for retributivists has long been to explain how the mere fact that a person deserves punishment can justify punishing them."¹⁷⁵ One of the more cogent defenses of retribution is that the criminal, by his wrongful act, asserted his superiority over his victim; causing him to suffer symbolically restores the status of the victim, and thus essentially discharges the moral "debt" that the criminal owes the victim and society.¹⁷⁶ Under this view, even retribution is not truly deontological. It, too, is focused on a benefit to

¹⁷¹ See, e.g., Rabbi Noson Weisz, Weekly Torah Portion, Masay: Cities of Refuge, http://www.aish.com/torahportion/mayanot/Cities_of_Refuge.asp (last visited Sept. 12, 2006) ("All Divine punishments are measure for measure.").

¹⁷² Rosenberg & Rosenberg, *supra* note 147, at 620; see Samuel J. Levine, *Playing God: An Essay on Law, Philosophy and American Capital Punishment*, 31 N.M. L. REV. 277, 289 (2001) (Jewish philosophy "insists that only God possesses the wisdom to judge all of the circumstances that impact on an individual's moral guilt; the [United States Supreme] Court, in contrast, places on the capital sentencer the humanly impossible burden of determining the precise level of a defendant's moral culpability.").

¹⁷³ See *supra* text accompanying notes 111-12.

¹⁷⁴ Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1835-36 (1999).

¹⁷⁵ Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1335 (2004).

¹⁷⁶ See Garvey, *supra* note 174, at 1836-37 (citing Jean Hampton's "annulment" theory).

society, albeit a moral benefit as opposed to a practical one such as crime reduction.

In Jewish law, atonement is also associated with the payment of a “debt” to God and to his Creation. With regard to murder, the Torah states: “Bloodshed pollutes the land, and atonement cannot be made for the land on which blood has been shed, except by the blood of the one who shed it.”¹⁷⁷ And the system of ritual sacrifices at the Temple was designed to provide a sort of payment for sins, thereby purging the people of them.¹⁷⁸

But a more fundamental question must be asked: *why* does such a debt need to be paid? Surely an infinite Creator, who by definition lacks nothing,¹⁷⁹ is not diminished or harmed while a debt is outstanding.

The answer lies in the notion of sin. In Judaism, a sin is something that distances the sinner from God.¹⁸⁰ Since attaining closeness to God is the greatest possible good, and is indeed the whole purpose of mankind having been created,¹⁸¹ the purging of sin serves to benefit mankind, not God. Moreover, since every individual created by God is valuable in his own right,¹⁸² his atonement is valuable because it benefits him, regardless whether it equalizes some moral debt with a victim or with society.

This is not to say that Jewish law disregarded the victim’s interests. As the above discussion of “an eye for an eye” indicates, Judaism is heavily focused on making tangible reparations to the victim. It also provides that a person cannot atone for a sin that also constitutes a wrong to one’s fellow man until that person seeks forgiveness from his victim—seeking God’s forgiveness is not enough in such a case.¹⁸³ However, while the *means* of achieving atonement may be through repentance and reconciliation, the ultimate *purpose* of atonement is to repair the offender’s soul.

¹⁷⁷ Numbers 35:33-34.

¹⁷⁸ See Garvey, *supra* note 174, at 1807-08. See generally *Leviticus*.

¹⁷⁹ MOSHE CHAIM LUZZATTO, DERECH HASHEM [“The Way of God,”] 35 (Aryeh Kaplan trans., Feldheim Publ. 4th rev. ed. 1983) (“[I]t is impossible that some Being not exist, unbound by the laws and limitations of nature. It must be impossible that this Being . . . have any deficiency.”).

¹⁸⁰ Garvey, *supra* note 174, at 1807; Vitiello, *supra* note 34, at 1042; see LUZZATTO, *supra* note 179, at 41 (“[T]rue perfection is God’s essence. [E]very fault is merely the absence of His good and the concealment of His presence.”).

¹⁸¹ See LUZZATTO, *supra* note 179, at 37, 39 (“God alone . . . is the only true good, and therefore His beneficent desire would not be satisfied unless it could bestow that very good The purpose of all that was created was therefore to bring into existence a creature who could derive pleasure from God’s own good”).

¹⁸² See BABYLONIAN TALMUD, TRACTATE SANHEDRIN 37a (“[E]ach and every one is obligated to say, ‘For my sake was the world created.’”).

¹⁸³ See *supra* text accompanying note 112.

This “fixing” of the offender’s soul can be seen as something of a religious—and deontological—version of the secular notion of rehabilitation. Rehabilitation seeks to change the nature of the offender, so that his will to commit wrongs in the future is diminished. The ultimate purpose of reforming the criminal, however, is to reduce crime, so as to make society safer. Atonement in Judaism also seeks to change the nature of the offender’s soul, but the betterment of the offender is an end in its own right. Thus, atonement as a goal of punishment is somewhat like retribution, in that it is backward-looking and desert-based; but it is also somewhat like rehabilitation in that it seeks to better the criminal. It is, as Steven Garvey puts it, a “‘fused’ theory of punishment.”¹⁸⁴

Nevertheless, I believe there is a basis for making a distinction between retribution and atonement. Without attempting to malign retribution as an intellectual concept, it is probably safe to assume that many who would label themselves as retributivists are victim-oriented, and would object to a penological theory that places as heavy an emphasis on promoting the interests of the wrongdoer as does the Jewish theory of atonement. To the extent that atonement in Judaism sees the improvement of the criminal as an end in itself, it is dissimilar to the ideas promoted by those who would imprison criminals to “even the score,” or because they simply “deserve it.”

It is worth noting that the Jewish criminal law system also promoted pragmatic goals such as deterrence. For example, in the unlikely event that a blasphemer or idolater was actually executed, the execution was to take place publicly and the body was to be hung from a tree for the remainder of the day, to serve as a chilling warning to others.¹⁸⁵ But even when punishment served such a goal, the primary purpose of doing so was to minimize the number and severity of additional transgressions, and so to minimize the sins for which members of society must atone. Thus, the refinement of the soul of every individual in the society was the ultimate goal of Jewish criminal law.

III. CAN WE COMPARE JEWISH LAW AND AMERICAN LAW?

The examples discussed so far show that in order to understand Jewish criminal law, one must look much deeper than the simple text of the Bible. When one does so, it becomes apparent that Jewish law

¹⁸⁴ Garvey, *supra* note 174, at 1805-06 (“The atonement theory is neither purely teleological nor purely deontological—it’s a little of both. Atonement is perhaps best described as a ‘fused’ theory of punishment.”).

¹⁸⁵ *Deuteronomy* 21:22-23; see RAMBAM, *supra* note 94, *Laws of the Courts* 15:6, at 114.

contains a number of features that are surprising and even counterintuitive. One might react by saying that, if we cannot rely on the Hebrew Bible for the legal ideas we assumed we could, perhaps we cannot rely on it as a source of legal ideas at all. The next section responds to that argument.

A. *Obstacles to Comparing Jewish and American Law*

There are admittedly many features about Jewish law that do not recommend it for comparison to American law.

First, Jewish law is religious law. Although some of its rules have quite pragmatic bases—concerns over erroneous convictions, effective promotion of general deterrence, etc.—many can only be understood in religious terms.¹⁸⁶ Examples include the pre-crime warning and acknowledgement requirements (which are unnecessary and counterproductive from a purely evidentiary standpoint); the rule allowing minor discrepancies to invalidate witness testimony (such discrepancies exist even when the defendant is factually guilty); or the rule that, although confessions are not admissible at trial, once a defendant has been convicted and is about to be executed, he is urged to confess in order to repent,¹⁸⁷ so as to “underscore the rehabilitative function of *halachic* capital punishment”¹⁸⁸ (only in a system that assumes the existence of an afterlife can “rehabilitation” be considered a meaningful goal served by the death penalty). As a theocratic system, Jewish law makes no distinction between the religious and the mundane.¹⁸⁹ In the United States, by contrast, separation of church and state is one of our most fundamental constitutional principles.¹⁹⁰

Second, it is not clear the extent to which many features of the Jewish criminal justice system were ever implemented. Skeptics who deny the divinity of the Oral Law contend that it was developed—not merely recorded—by the rabbis, in large part after the expulsion of the Jews from Israel.¹⁹¹ Even without attacking the Oral Law’s authenticity, some contend that the Sinaitic judicial requirements were

¹⁸⁶ See Stone, *supra* note 92, at 821 (“[O]ne cannot fully understand Jewish law without considering the religious framework that makes Jewish law possible and renders it intelligible to its practitioners.”).

¹⁸⁷ See RAMBAM, *supra* note 94, *Laws of Courts* 13:1, at 100.

¹⁸⁸ Shuster, *supra* note 148, at 973-74.

¹⁸⁹ Moshe Silberg, *Law and Morals in Jurisprudence*, 75 HARV. L. REV. 306, 321 (1961) (“The well-known conciliatory advice: ‘Render to Caesar the things that are Caesar’s, and to God the things that are God’s’ is a novelty created in the school of Christianity. Judaism does not recognize ‘things of Caesar’ at all.”).

¹⁹⁰ See U.S. CONST. amend. I.

¹⁹¹ See, e.g., Fishman, *supra* note 88, at 409 (“In the first six centuries of the common era, the Oral Law was greatly developed and expanded in the *Mishna* and the *Talmud*.”).

so impractical that they were applied only to transgressions of the relationship between mankind and God (i.e., ritual violations), and that issues concerning the relationship between man and his fellow man (i.e., criminal and civil matters) were governed by the Noahide laws.¹⁹² Under this view, the Jewish criminal justice system laid out by the Oral Law was largely an idealized body of law that was never intended to, and never did, govern the body politic.

Third, the two legal systems are separated by thousands of years and by cultural, social, geographical, and economic differences. Jewish law first developed at least two millennia ago to apply to a largely homogenous agrarian community living in the relatively small territory of Israel. American law first developed about two centuries ago, and now operates in a technologically modern, highly diverse religious and ethnic landscape of nearly 300 million people in the geographically fourth-largest country in the world.

Fourth, the two systems start from completely different premises. Jewish law is duty-based law. This flows from the notion that it is imposed by God, ultimately enforced by God, and given to a covenantal community that willingly submits itself eternally to God's authority.¹⁹³ American law is rights-based, positivist law. It is made by man; it must be enforced by man in this world, as there is no guarantee of corrective justice in the next; and it is authoritative only so long as the majority of the populace tolerates it.

B. *Justifications for Comparing Jewish and American Law*

Despite the vast differences between Jewish and American law, there are several reasons why it is worthwhile to compare such apples and oranges.

1. Shared History

American law developed from English common law, and the common law viewed Biblical law as authoritative.¹⁹⁴ In the thirteenth century, Henrici de Bracton, one of the early architects of the common law, stated: "God is the author of justice, for justice is in the Creator,

¹⁹² See *supra* text accompanying notes 164-69; Enker, *supra* note 124, at 1138-39.

¹⁹³ Silberg, *supra* note 189, at 322-23; Stone, *supra* note 92, at 889.

¹⁹⁴ See Jeffrey Brauch & Robert Woods, *Faith, Learning and Justice in Alan Dershowitz's The Genesis of Justice: Toward a Proper Understanding of the Relationship Between the Bible and Modern Justice*, 36 VAL. U. L. REV. 1, 47 (2001) ("The common law's greatest judges and scholars expressly grounded their legal analysis in biblical thinking.").

and accordingly right and law have the same signification”¹⁹⁵ Over five hundred years later, this view still prevailed. Wrote Sir William Blackstone:

This law of nature, being co-eval with mankind and dictated by God himself, is of courses superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this¹⁹⁶

Blackstone was one of the single biggest influences on the early development of American law.¹⁹⁷ When the Founding Fathers constructed their new nation, they looked both directly to Biblical law, and to a common law tradition which itself relied heavily on Biblical law, as their guideposts.¹⁹⁸

We can see that the Bible lent at least two key concepts to American legal and political philosophy. The first is the notion that all persons should be treated equally under the law.¹⁹⁹ Thus, in *Deuteronomy* 1:16-17, judges are instructed: “Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both small and great alike.”²⁰⁰ The second is the idea that only limited authority should be delegated to any human institution (because of our fallibility as finite beings).²⁰¹ Indeed, the Bible asserts that only limited authority *has* in fact been granted to such institutions—even kings are bound to follow God’s laws.²⁰² Our system of checks and balances, and indeed the very notion of a constitutional government, is based on a premise of “rule of law” that is a secular counterpart to these explicitly religious ideas.

Specific features of our legal system can also be found in or are derived from analogs in Jewish law, including the distinctions between murder and manslaughter; the presumption of innocence; the privilege against self-incrimination; the requirement of notice; the right to a

¹⁹⁵ *Id.* at 47 n.220 (citing HENRICI DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS 13 (1990)).

¹⁹⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41 (Univ. of Chi. Press 1979) (1765).

¹⁹⁷ See Brauch & Woods, *supra* note 194, at 48-49 n.225 (citing Douglas H. Cook, *Sir William Blackstone: A Life and Legacy Set Apart for God’s Work*, 13 REGENT U. L. REV. 169, 176-77 (2000)).

¹⁹⁸ See, e.g., Saul Touster, *The View from the Hilltop*, 33 BUFF. L. REV. 571, 572-75, 578 (1984) (discussing Puritan reliance on the Hebrew Bible in creating their new civic order).

¹⁹⁹ Brauch & Woods, *supra* note 194, at 50-51.

²⁰⁰ *Id.* at 51 (citing *Deuteronomy* 1:16-17). Cf. BRACON, *supra* note 195, at 39 (“But the king himself ought not to be subject to man, but subject to God and to the law, for the law makes the king.”) (cited in Brauch & Woods, *supra* note 194, at 53-54).

²⁰¹ Brauch & Woods, *supra* note 194, at 52-53.

²⁰² *Id.* at 52; see *Deuteronomy* 17:15, 19-20 (a king must not become “haughty over his brethren,” but must fear God, study the Torah, and follow its commandments).

speedy trial; and the prohibitions against double jeopardy and ex post facto laws.²⁰³

Given that Biblical law has had such an important impact on modern law, a comparison is apt. It is worth understanding where our legal system came from to help us analyze how it became what it is today, and where it should go in the future.²⁰⁴

2. Common Goals

Although Jewish and American law begin from different premises about the source of authority (God versus the people), on a pragmatic level, both seek “to set normative standards of conduct that everyone is required to obey.”²⁰⁵

One must of course discount for the religious, historical, and cultural differences, but this does not mean one should forgo the comparison altogether.²⁰⁶ Any system that establishes standards of conduct, penalties for violating those standards, and procedures for determining whether and to what extent such violations have occurred, is worth making a comparison to.²⁰⁷ But if nothing else, it is worth making the comparison to see in what ways and to what extent features of another legal system should *not* be borrowed by our own, or would have to be modified to be of any use to us.²⁰⁸

²⁰³ Rosenberg & Rosenberg, *supra* note 147, at 615; *see* COHN, *supra* note 124, at 213-14 (discussing privilege against self-incrimination); BABYLONIAN TALMUD, TRACTATE KETUBOT 30a-30b (discussing prohibition against multiple punishments); COHN, *supra* note 124, at 229 (discussing how warning requirements served to give defendant notice that his act was criminal and to prevent retrospective criminal legislation); Brauch & Woods, *supra* note 194, at 58 (discussing presumption of innocence and speedy trial); Fishman, *supra* note 88, at 418 (discussing Biblical distinctions between classes of homicide based on mens rea).

²⁰⁴ *See, e.g.*, Richard H. Hiers, *Biblical Social Welfare Legislation: Protected Classes and Provisions for Persons in Need*, 17 J.L. & RELIGION 49, 53 (2002) (“[T]o the degree that values embedded in modern Western law and public policy derive from biblical sources, it may be important to recognize how such values come to expression in biblical tradition, particularly, in biblical law.”); Craig A. Stern, *Torah and Murder: The Cities of Refuge and Anglo-American Law*, 35 VAL. U. L. REV. 461, 463-64 (2001) (“[K]nowledge of the biblical law of murder helps render our own law more intelligible, helps explain its principles and development.”).

²⁰⁵ Rosenberg & Rosenberg, *supra* note 147, at 615.

²⁰⁶ *See id.* (“That American law does not accept an omniscient and omnipotent God as the ultimate enforcer or backstop does not, however, preclude comparison of the two legal systems.”).

²⁰⁷ *See id.* (“[M]oral and ethical beliefs, which surely pervade our society, may provide a roughly equivalent deterrent to wrongdoing and an underpinning for the notion that evil is its own retribution.”).

²⁰⁸ *Cf.* Stone, *supra* note 92, at 822 (“[A] fuller exploration of the religious concepts that underlie Jewish law can deepen awareness of the differences as well as the similarities between religious and secular legal systems and thus highlight the range of concepts that should be considered if we desire to understand secular legal institutions through religious categories.”); Hiers, *supra* note 204, at 52-53 (“[B]iblical law was intended to govern the conduct of [God’s]

Indeed, even if Jewish criminal law was merely an idealistic form of law²⁰⁹ that was never applied in practice, we can still study it and learn from it.²¹⁰ Real-life systems of law—or systems in any field—can and do look to ideals to inform what goals they should be pursuing, and then modify those ideals to accommodate pragmatic necessities. Examining a possibly idealistic legal system like Jewish law may aid us in a self-critical analysis regarding the goals our legal system is or should be striving to achieve, and of the means of achieving them.

3. Modern Invocation of the Bible

The most important reason why a comparison is warranted is that the Bible is still being invoked to justify certain political and legal positions in modern America.²¹¹ Although there is a principle of separation of church and state in this country, where exactly that line lies continues to be a matter of considerable debate. Regardless of Supreme Court rulings on the constitutional issues, religious beliefs that permeate society will, in the aggregate, undoubtedly influence government officials, legislators, judges, juries, and lawyers in the fulfillment of their roles, as well as how the public reacts to them. In recent polls, ninety-five percent of Americans said they believe in God,²¹² and sixty-three percent said they believe that the Bible is literally true and the word of God.²¹³ Given these statistics, it is not surprising that prosecutors are invoking “an eye for an eye” in death penalty sentencing phases, or that “law and order” advocates are

people in ancient Israel, not a modern, pluralistic, democratic society. Moreover, modern circumstances are considerably different from those in biblical times. . . . On the other hand, the human condition has not changed so much that contemporary inter-personal and social concerns are completely different from those of persons living in the biblical period which ended barely a hundred generations ago.”)

²⁰⁹ Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157, 1194 (1991) (“[Biblical law] judges the people in accordance with that which is ideally just in itself, whether or not this suits the needs of society [Its] procedural system is part and parcel of a legal structure rooted in ethical ideals of loyalty, devotion and the desire to become like God. It is an ideal or divine form of justice.”) (quotation omitted).

²¹⁰ Stone, *supra* note 92, at 822 (even if the model of Jewish law being analyzed does not correspond to historical reality, “the conceptual model is compelling, both for the writer and her audience, precisely because it seems to reflect an actual, living legal system.”).

²¹¹ See *supra* notes 86-91. See generally Daniel G. Ashburn, *Appealing to a Higher Authority? Jewish Law in Judicial Opinions*, 71 U. DET. MERCY L. REV. 295 (1994); see *id.* at 296 n.4 (citing Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U. L. REV. 187 (1991) (compiling Biblical citations in American cases)).

²¹² See Richard Morin, *On Politics: Do Americans Believe in God*, WASH. POST, Apr. 24, 2000, <http://www.washingtonpost.com/wp-srv/politics/polls/wat/archive/wat042400.htm> (citing ABC News poll).

²¹³ See Scott Rasmussen, *63% Believe Bible Literally True*, RASMUSSEN REPORTS, Apr. 23, 2005, <http://www.rasmussenreports.com/2005/Bible.htm>.

invoking this and other passages from the Bible to justify building more prisons, criminalizing more activity and imposing harsher sentences.

If the Bible is being treated as authoritative by some, and that treatment is actually having an impact on the way our criminal justice system operates, then it is certainly fair game to ask: what should our understanding of the Bible be? This Article attempts to describe the traditional Jewish understanding of the Hebrew Bible—namely, that it is not to be read literally without reference to the Oral Law. Once reference is made to the Oral Law, the Bible ceases to be a source text for harsh retributivism in criminal justice.

This does not mean that one has to accept the Jewish interpretation of the Hebrew Bible as definitive. Indeed, one does not even have to accept the view that the Bible was a product of divine revelation or inspiration.²¹⁴ But to the extent that the Bible is being treated as authoritative, it is proper to examine how it was interpreted by the society that produced it and that was the primary audience for whom it was intended.

IV. INCARCERATION IN JEWISH LAW

So far, we have identified the link between retributivism and the increased reliance on prisons. We then challenged the link between the Jewish law and retribution. This Part now examines the role of prisons in Jewish law. It demonstrates that prisons are not a prominent feature in Jewish law, and that Jewish law's alternatives to prison are designed to promote rehabilitation, restitution and atonement, not retribution.

A. *Prison in Jewish Law*

Jewish criminal law provided for a variety of forms of punishment—including capital punishment, flogging, fines, atonement offerings, and *karet* (spiritual death)—but prisons as we know them are “nowhere to be found in traditional Torah-based Jewish law.”²¹⁵ This is not to say that there is no mention of prisons in the Hebrew Bible. But in the relatively rare instances in which they do appear, they are either

²¹⁴ Cf. Rosenberg & Rosenberg, *supra* note 96, at 540 (“In matters of religion, if one thing is clear, it is that ultimate truth is hard to come by, and that no one has a lock on it [But] our positions are based at least in part on an ancient oral tradition that, depending on one’s religious perspective, is either of divine origin or that embodies the collective wisdom of many, many generations of Sages.”).

²¹⁵ Rabbi Sholom D. Lipskar, *A Torah Perspective on Incarceration as a Modality of Punishment and Rehabilitation*, Aug. 4, 1996, <http://jlaw.com/Articles/PrisonerRights.html>.

not sanctioned by Jewish law, serve some function other than as a modality of punishment, or are tolerated as a second-best alternative to other forms of punishment.

1. Prisons Not Sanctioned by Jewish Law

The narratives of the Hebrew Bible relate a few isolated instances where people are placed in prisons as a punishment for alleged crimes. When Joseph, after having been sold into slavery to the Egyptians, spurned the advances of his wife's master, she falsely accused him of assaulting her, and he was imprisoned in Pharaoh's dungeon.²¹⁶ Likewise, when Jeremiah prophesized unfavorably, officers of the king, ostensibly because they suspected him of defecting to the Chaldeans, imprisoned him in a dungeon in one of the officer's homes.²¹⁷ Neither of these instances, however, shows that Jewish law endorses imprisonment. Joseph was imprisoned by Egypt, a non-Jewish society,²¹⁸ and Jeremiah was imprisoned without trial, without factual basis, and in contravention of Jewish judicial procedure. Thus, the mere fact that Bible narratives refer to prisons does not mean that Jewish law sanctioned their use.

2. Prison as a Means to Enforce Other Punishments

Incarceration was used in Jewish law to detain the accused pending trial or a convicted defendant pending sentencing. Where a potentially capital crime was committed, the offender could be imprisoned until the court could determine if a case could be made, or which form of penalty was appropriate.²¹⁹ Although this pre-trial or pre-sentencing detention

²¹⁶ See *Genesis* 39:1-20, 41:9-14.

²¹⁷ *Jeremiah* 37:6-17.

²¹⁸ Joseph was also thrown into a pit by his brothers. See *Genesis* 37:23-24. And later, when he rose to the position of Viceroy of Egypt, he detained some of his brothers in a jail. *Genesis* 42:14-20. However, Joseph's brothers "incarcerated" him in the pit for the purpose of killing him, not to punish him with confinement. See *Genesis* 37:18-22. Thus, this is really an example of prison being used to enforce other punishments. See *infra* Part IV.A.2-3. And when Joseph imprisoned his brothers, he did so under his authority as an Egyptian official, not according to Jewish law. *Genesis* 42:14-17. Moreover, Joseph imprisoned them not to punish them for being spies, but to hold them pending a determination of whether they were in fact spies. *Genesis* 42:14-20. Thus, this was analogous to using jail as a pre-trial detention center, not as a mode of punishment. See *infra* Part IV.A.2.

²¹⁹ See BABYLONIAN TALMUD, TRACTATE SANHEDRIN 78b (discussing that where an assailant strikes a victim and it is not clear whether the victim will live or die, the assailant is imprisoned until the victim either dies (in which case the assailant is executed) or recovers (in which case the assailant is liable for a monetary penalty)); see also *Numbers* 15:32-36 (relating incident wherein a man who had violated the Sabbath was placed "in custody [because it was not

served to incapacitate, its purpose was not to punish, but to detain the offender until an appropriate punishment could be determined.²²⁰

Prison also served as a civil coercion mechanism. Imprisonment could be used as a method to compel compliance with a court order to divorce a woman to whom it was impermissible to marry,²²¹ or, according to some sources, to pay a debt.²²² Here, again, although coercive confinement served to inflict unpleasantness on the prisoner, the *purpose* of the imprisonment was not to punish him for criminal conduct, but rather to induce him to comply with a pre-existing court order which itself delineated the appropriate judicial response to his conduct.

In very limited circumstances, incarceration could be used as a means to carry out an execution. The Talmud²²³ discusses the case of someone who commits the same crime punishable by *karet*—premature death at the hands of God—three times. By willfully committing the same offense on three separate occasions,²²⁴ the offender has demonstrated that he has not repented, and in fact desires a premature death.²²⁵ After the third transgression, the offender is placed in a cramped cell precisely his height, so that there is no room to stretch out or lie down.²²⁶ He is fed scant amounts of bread and water so that his stomach shrinks, and he is then fed barley—which expands inside the

clear] what should be done to him;” once the court determined he was liable for execution by stoning, the sentence was carried out); *Leviticus* 24:10-16 (man who committed blasphemy was “put in custody, until the decision of the LORD should be made clear to them”; Moses then determined him liable to death). The purpose of the detention is to make sure the assailant does not flee pending determination of his sentence. BABYLONIAN TALMUD, TRACTATE SANHEDRIN 78b nn.5-6.

²²⁰ Bail was not an option to the pre-trial detainee, both because he was considered a flight risk, and because, given the possibility that he may have committed the crime, it would be unbecoming to have him walking free before trial. According to the view that the suspected offender did not merit to walk free, the detention could, in a limited sense, be considered a punishment. See Harary, *supra* note 22, at 2-3.

²²¹ See *id.* at 3 (citing Rashi commentary to BABYLONIAN TALMUD, TRACTATE PESACHIM 90a).

²²² Harary, *supra* note 22, at 3-4 (discussing disputes between Jewish commentators as to whether imprisonment can be used to force someone to pay a debt). Apparently, even those commentators who would allow imprisonment would generally only do so where the debtor incurred the debt in bad faith or fraudulently claimed insolvency, and not for those who legitimately find themselves in financial straits. See *id.*

²²³ BABYLONIAN TALMUD, TRACTATE SANHEDRIN 81b.

²²⁴ It must be the same crime all three times. If the offender merely commits three different acts that subject him to *karet*, he is deemed to be merely incapable of controlling his urges, and not someone who acts willfully in defiance of divine judgment. See *id.*, TRACTATE SANHEDRIN 81b.

²²⁵ *Id.* at 81b nn.5-6. The rabbis were authorized to absolve someone of the penalty of *karet* by administering flogging. See *supra* note 158. However, the offender only became exempt through the flogging if he repented. By repeating the transgression, he indicates he never truly repented. *Id.* at 81b n.5.

²²⁶ *Id.* at 81b n.20.

stomach—until his stomach bursts and he dies.²²⁷ Similarly, one who kills another but is not liable to execution, either because of certain technicalities unrelated to his factual guilt,²²⁸ or because he is sophisticated in criminal laws and knows how to avoid liability—for example, by refusing to explicitly acknowledge the witnesses’ warning²²⁹—may also be subjected to this procedure.²³⁰

In both of these cases, the court is not authorized to execute the offender according to the *halachic* judicial formalities, yet it is clear that the offender deserves to die. Since the court cannot execute him directly, it uses incarceration to kill him indirectly. However, like the use of imprisonment as a means of compelling compliance with a court order to divorce or pay a debt, prison is used only as a means to carry out another penalty. Strapping the offender to a chair, bed, or wall, as opposed to confining him in a cell, and implementing the forced barley diet would have the same effect.

3. Prison as a Lesser Alternative Punishment

Rambam, in his classic codification of Jewish law, the *Mishnah Torah*, discusses several instances where prison may be used in lieu of a more serious punishment.

First, if the king declines to have a murderer killed (which he could do under his royal authority to protect the public welfare),²³¹ he may nevertheless have him “beaten with severe blows—so that he is on the verge of death—imprisoned, deprived and afflicted with all types of

²²⁷ See *id.* at 81b nn.3, 34. This could be viewed as a millennia-old instance of a “three strikes” law. But only serious offenses can serve as predicate offenses under Jewish law; in many modern three strikes laws, relatively petty crimes can count. See *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding against disproportionality challenge a sentence of twenty-five years to life under California’s Three Strike’s Law, where the three convictions were for transportation of marijuana and two petty thefts). Furthermore, because Jewish law requires that the identical offense be committed three times, it diminishes the chance that a third strike will occur. See BABYLONIAN TALMUD, TRACTATE SANHEDRIN 81b. Under modern statutes, widely disparate offenses can count as strikes.

²²⁸ The Gemara discussed as examples cases where there are two witnesses but the witnesses observe the transgression from different places and do not observe each other; or where they contradict each other on details that are not central to their testimony about observing the transgression. BABYLONIAN TALMUD, TRACTATE SANHEDRIN 81b nn.29, 31. These relaxations of the evidentiary rules do not override the requirement that a defendant can be executed only upon the testimony of two witnesses. The testimony of one witness is always insufficient. *Id.* at 81b n.29.

²²⁹ *Id.* at 81b n.30.

²³⁰ *Id.*; see RAMBAM, *supra* note 94, *Laws of Murder* 4:8, at 532. According to the Rambam, homicide is the only one of the thirty-six capital offenses for which the offender may be killed if less than all of the numerous evidentiary requirements are met. See *supra* note 123.

²³¹ See *supra* text accompanying note 160.

discomfort”²³² But this is weak evidence that Jewish law endorses prisons. The source for Rambam’s position is questionable—nothing in the Torah or the Oral Law itself mentions such authority. Perhaps since imprisonment is permitted as a lesser punishment where execution itself is already permitted, it is intended as a form of clemency.²³³ Moreover, Rambam is discussing the king’s authority to punish, which, as mentioned above, is independent of the courts’ authority to punish, and is not in accordance with the Sinaitic ideal of judicial procedure.²³⁴

Rambam also discusses a case where one or more murderers sentenced to execution become intermingled among one or more murderers who are not liable for execution, and those liable for execution cannot be identified. Rambam states that the entire group should be imprisoned, since all are potentially dangerous to society, and this contains that threat while avoiding the risk that an individual not subject to the death penalty is executed.²³⁵ But again, here prison is not the prescribed form of punishment for the crime; rather, it is a second-best alternative when individually tailored punishments are not practicable.²³⁶ Moreover, the factual scenario is so unusual that the ruling is not likely to have much practical application.

4. Use of Prisons During the Diaspora

Some Jewish communities during the Diaspora—the period following the Roman expulsion of the Jews from Israel in 70 C.E.—did sanction a broader use of prison as a form of punishment than was prescribed under the Torah-based judicial criminal justice system. During this period, the Jews no longer had an autonomous government (at least until the establishment of the modern state of Israel in 1948), and accordingly, a Torah-based judicial system could not be enforced. But a number of host countries did, to varying degrees, grant Jewish communities living within their borders a limited form of self-rule. Some of these communities permitted prison as a form of criminal punishment.

²³² RAMBAM, *supra* note 94, *Laws of Murder* 2:4-5, at 512.

²³³ *Id.* at 513-14 n.9 (noting that “the commentaries have had difficulty pointing to the Rambam’s source”).

²³⁴ See *supra* text accompanying note 160.

²³⁵ RAMBAM, *supra* note 94, *Laws of Murder* 4:7, at 530.

²³⁶ Rambam does not address that imprisonment may be *more* serious than the punishment that murderers not liable to execution would have otherwise received. Because they are all referred to as “murderers,” we are presumably dealing with a situation where they are most likely known to be factually guilty, but cannot be proven to be so due to some technicality. Apparently, the concern about erroneous imprisonment in this situation is not as great as the concern about erroneous execution.

Two rationales were invoked to justify the use of prison in these circumstances. The first reason given was to deter crime and keep society safe, under the directive in *Deuteronomy* to “eradicate the evil from your midst”²³⁷ that applies above and apart from the enforcement of specific Torah criminal justice procedures. The second reason was to maintain good relations with the host society, under the dictate *dina demalkuta dina* (Aramaic for “the law of the land is the law”).²³⁸

But even in these circumstances, there were important Jewish authorities that refused to permit the use of prisons.²³⁹ Moreover, although the leaders who instituted these procedures may have been authorized to establish prisons, there was no disputing that this was a departure from the ideal.

Although prisons are not prominent in Jewish law, there are at least two notable examples of restrictive confinement in Jewish law. The first is cities of refuge, to which accidental killers would be sent. The second is involuntary servitude, which could be used as a penalty for theft. These alternatives to imprisonment reveal the Jewish view of the purposes of restrictive confinement. But a disclaimer is in order. Some of the specific practices regarding these punishments may seem incomprehensible or distasteful to the modern reader living in a secular society. I will attempt to explain, albeit superficially, the rationale behind some of these. But more importantly, the reader should remember that the purpose of discussing these Biblical punishments is not to advocate adoption of, or criticize the use of, particular details of the Biblical legal system. Rather, the purpose is to distill—even after having accounted for the cultural and historical differences—core principles still relevant in our time.

²³⁷ *Deuteronomy* 13:6, 17:7, 19:19, 21:21; see Lipskar, *supra* note 215, at n.23.

²³⁸ See BABYLONIAN TALMUD, TRACTATE BAVA BATRA [“Third Gate”] 54b n.8; Lipskar, *supra* note 215, at n.23.

²³⁹ See Lipskar, *supra* note 215, at n.23. This principle does not *require* the community to adopt practices of the host nation, but arguably permits it to do so (assuming doing so not violate other *halachot*). Since prisons are not expressly forbidden by *halahca*, a Diaspora Jewish community may, but need not, institute its own prison system. But to the extent the community is not autonomous, *dina demalkuta dina* requires Jews to abide by the laws and of, and submit to the justice system of, the host nation. Thus, for example, observant Jews in the United States are *halachically* bound to respect the authority American criminal justice and penal system.

B. *Cities of Refuge*

1. Which Killers Were Sent to Cities of Refuge

a. Homicide Classifications in Jewish Law

Much like modern law, Jewish law distinguishes between different grades of homicide, and provides for different punishments for each grade. The Torah distinguishes between intentional killers—who are liable to execution by the court²⁴⁰—and unintentional killers, who are not. It then further differentiates between three categories of unintentional killers.²⁴¹

First is the inadvertent or negligent²⁴² killer. He is exiled to a city of refuge²⁴³ in order to atone for the harm he has caused.²⁴⁴ The city of refuge serves as a haven for the negligent killer, and his time in exile provides him atonement.²⁴⁵ As long as he remains there, he is immune from retribution at the hands of the *go-al ha'dam*, or “blood redeemer”—usually the nearest relative of the slain victim.²⁴⁶ But if the killer is found outside the city of refuge, the blood redeemer may kill him without liability.²⁴⁷ Because leaving the city of refuge exposes the killer to the possibility of death, he is effectively confined there by threat, if not by physical restraints. Assuming a killer is judged liable to exile, he is required to remain in the city of refuge until the death of the *Kohen Gadol*, the High Priest.²⁴⁸ At this point, the slayer is deemed to have gained atonement and may return home.²⁴⁹ He is now considered

²⁴⁰ RAMBAM, *supra* note 94, *Laws of Murder* 1:1, at 502. This assumes, of course, that the various procedural and evidentiary requirements are met.

²⁴¹ *Id.*, *Laws of Murder* 6:1, at 544.

²⁴² BABYLONIAN TALMUD, TRACTATE MAKKOS 7a n.3. I use the term “negligent” here with extreme caution. The applicable Hebrew term is *sh'gaga*, which is usually translated as “inadvertent” or “accidental” or “by mistake.” Implicit in the term is the idea that the individual has some level of culpability or accountability for failing to prevent the damage that resulted from his action, even if he did not act with intent. Thus, while the threshold for saying that someone has violated a “duty of care” (if that term can be applied in the context of Jewish criminal law) is far lower than what we would require before holding someone criminally liable in our modern system, “negligence,” although far from ideal, is the term that most closely approximates the same functional concept.

²⁴³ *Airey miklat*, or “cities of refuge,” are alluded to in the Torah in *Exodus* 21:12-13, *Numbers* 35:9-34, and *Deuteronomy* 4:41-43 and 19:1-13; as well as in the book of *Joshua* 20:1-9.

²⁴⁴ BABYLONIAN TALMUD, TRACTATE MAKKOS 7a n.3; RAMBAM, *supra* note 94, *Laws of Murder* 5:1, at 536.

²⁴⁵ See BABYLONIAN TALMUD, TRACTATE MAKKOS 2b n.7.

²⁴⁶ RAMBAM, *supra* note 94, *Laws of Murder* 1:2-3, at 502.

²⁴⁷ *Id.*, *Laws of Murder* 5:8-11, at 540-42.

²⁴⁸ *Id.*, *Laws of Murder* 5:1, at 536; BABYLONIAN TALMUD, TRACTATE MAKKOT 11a.

²⁴⁸ RAMBAM, *supra* note 94, *Laws of Murder* 6:3, at 544-46.

²⁴⁹ See *Numbers* 35:25, 28.

an ordinary citizen, and if the blood redeemer kills him, the blood redeemer is liable to be executed.²⁵⁰

Second is the killer who acts “unintentionally [but] whose acts resemble those willfully perpetrated”²⁵¹—i.e., who acts with gross negligence or recklessness.²⁵² He is not liable to execution because he did not act intentionally; but his crime is too severe to be atoned for through exile in a city of refuge. Accordingly, he suffers no punishment at the hands of the court, and is subject to death at the hands of the blood redeemer wherever he finds him.²⁵³

Third is the killer “whose acts resemble those caused by forces beyond [his] control”—i.e., he acts with virtually no culpability because the killing is a freak accident that no amount of reasonable care could prevent. He is not punished at all. Because such a killer is deemed not liable, if the blood redeemer slays him he is liable for execution, just as if he had executed any other innocent person.²⁵⁴

Thus, Jewish law essentially distinguishes between intentional, reckless, negligent, and non-culpable killings. Intentional killers are subject to the most severe penalty, execution. Reckless killers are considered highly culpable, albeit less culpable than intentional killers; they are subject to the risk of execution at the hands of the blood redeemer, but their death is not guaranteed, as it is with intentional killers. Negligent killers are not liable to death, so long as they submit to the punishment of exile in a city of refuge. And non-culpable killers are not liable for any criminal penalty whatsoever.

b. American Law Compared

The Jewish law classification of homicides, of course, looks much like our own. Under a typical modern statutory scheme, intentional killings are considered murder, and are subject to the most severe penalties—the longest prison sentences or execution; reckless killings are also often considered to be murder, but may be treated somewhat less severely; unintentional but negligent homicides (often called involuntary manslaughter) may still be criminal, although the penalties are often much less harsh; and those whose culpability in causing death does not even rise to the level of negligence are not punished criminally at all.²⁵⁵

²⁵⁰ RAMBAM, *supra* note 94, *Laws of Murder* 7:13, at 560.

²⁵¹ *Id.*, *Laws of Murder* 6:4, at 546.

²⁵² BABYLONIAN TALMUD, TRACTATE MAKKOS 7a n.3.

²⁵³ RAMBAM, *supra* note 94, *Laws of Murder* 6:4-5, at 546.

²⁵⁴ *Id.*, *Laws of Murder* 6:3, at 544-46.

²⁵⁵ *See, e.g.*, MODEL PENAL CODE §§ 210.2 to 2.10-4, 6.06 (1985) (killings committed purposefully, knowingly, or recklessly with extreme indifference to human life are considered

Jewish law, like American law, makes the level of culpability a significant factor in deciding what punishment is warranted. Jewish law recognized a dividing line between those who were beyond rehabilitating in this world, and who thus needed to die to achieve atonement, and those who could be reformed through some lesser means of punishment, such as exile in a city of refuge. It is also telling that the primary purpose of exile (the closest Biblical analog to the modern institution of prisons) was reformation of the soul (the closest religious analog to the modern concept of rehabilitation).

But there are noteworthy differences. In Jewish law, one who causes the death of another through ordinary negligence is exiled.²⁵⁶ But, in modern American law, something more than ordinary negligence—“gross negligence”—is usually required to trigger criminal liability.²⁵⁷ Furthermore, the ostensible purpose of sending the accidental killer to a city of refuge is atonement.²⁵⁸ If atonement is a religious concept akin to rehabilitation—the “correction” of the offender’s soul²⁵⁹—how can we say that someone who did not intentionally cause harm (indeed, did not even *consciously* disregard a risk of harm) is in need of rehabilitation?²⁶⁰

Again, the rationale for punishing the negligent killer, and for viewing him as in need of atonement, can only be understood in the context of religious law. According to Jewish philosophy, there are no

murder, and are first degree felonies (punished by the longest prison sentences or by death); killings committed recklessly are manslaughter, and are second degree felonies; killings committed negligently are negligent homicide and are third degree felonies (punished least severely); CAL. PENAL CODE §§ 187-189, 192 (West 2002) (“willful, deliberate, and premeditated killing[s]” are first degree murder; killings committed with an “abandoned and malignant heart” are second degree murder; negligent killings are involuntary manslaughter). The biggest deviation from this scheme in modern criminal statutory systems is felony murder, which punishes even unintentional killings committed during the commission of certain felonies as if they were intentional. See MODEL PENAL CODE § 210.2(1)(b); CAL. PENAL CODE § 189.

²⁵⁶ Rambam describes the killer who is exiled to the city of refuge as one who “kills unintentionally, without at all knowing [that this will be the consequence of his actions.]” RAMBAM, *supra* note 94, *Laws of Murder* 6:1, at 544.

²⁵⁷ See, e.g., *State v. Williams*, 484 P.2d 1167, 1171 (Wash. Ct. App. 1971) (“[A]t common law, in the case of involuntary manslaughter, the breach had to amount to more than mere ordinary or simple negligence—gross negligence was essential.”); MODEL PENAL CODE § 2.02(2)(d) (actor is criminally negligent where he “should be aware of a *substantial* and *unjustifiable* risk . . . [such that his] failure to perceive it . . . involves a *gross deviation* from the standard of care that a reasonable person would observe in the actor’s situation”) (emphasis added). In *Williams* itself, the defendants were found guilty based on an ordinary negligence standard akin to that usually applied in civil cases. However, this represents the minority rule, and is no longer followed in Washington itself. See WASH. REV. CODE ANN. § 9A.08.010 (West 1975).

²⁵⁸ See BABYLONIAN TALMUD, TRACTATE MAKKOT 2b n.7.

²⁵⁹ See *supra* text accompanying note 180-184.

²⁶⁰ See MODEL PENAL CODE, § 210.4 cmt., at 86 (1980) (“The moral argument [against criminalizing negligent conduct] is that the legitimacy of criminal condemnation is premised upon personal accountability of the sort that is usually and properly measured by an estimate of the actor’s willingness consciously to violate clearly established societal norms.”).

true accidents.²⁶¹ The physical word is a manifestation of the spiritual world. An accidental mishap in the physical world necessarily reflects some disruption in the spiritual:

A person can only sin even accidentally if he can imagine himself being able to exist as separate from God. . . . [W]hoever is insensitive to the Divine Image in others must also lack any awareness of this attribute in himself and leads to the conclusion that the murderer must have lost the awareness of his own spirituality long before he confronted the situation that resulted in his crime.²⁶²

The “accidental” killer, although he did not consciously disregard a risk in the instant he caused the victim’s death, is still culpable because it is only by virtue of his sin that God would lead him to a situation where he would cause another’s death.²⁶³ It is the sin that led the killer to commit the “accident” for which he must atone.²⁶⁴

There is, of course, no analog to this in American law. Human actions are considered to be the result solely of humans’ will, not God’s. Accordingly, people are punished criminally based on the consequences they intend or on the risks they disregarded or should have regarded, not on their level of “sin.”

Another feature that defies comparison is the rule in Jewish law that a killer remains exiled until the death of the High Priest. There is no apparent connection between the lifespan of one individual and the appropriate duration of punishment of another. This rule, too, can only be understood on a spiritual level.²⁶⁵ One explanation for it is that since

²⁶¹ See RAMBAM, *supra* note 94, *Laws of Murder* 5:1, at 536 n.1 (“Although the killing came about as a result of an accident, Judaism maintains that there are no total accidents. Instead, what occurred is a sign from above that the killer has a certain dimension of evil hidden within his soul that must be cleansed.”).

²⁶² Weisz, *supra* note 171.

²⁶³ See BABYLONIAN TALMUD, TRACTATE MAKKOT 10b n.7 (discussing R. Shimon ben Lakish’s explanation that “it is not God who *causes* him to sin; rather, it is his previous wickedness that went unpunished . . . that prompts God to arrange matters so that the sin *comes into his hand*.”) (emphasis in original). (citing *Exodus* 21:13).

²⁶⁴ Yet another mystical explanation for exiling the accidental killer that Israel itself requires atonement:

The killing of another person defiles the land. Whether the victim’s life is taken intentionally or inadvertently, the land is defiled. Since the land cannot suffer the presence of a person who spilt the blood of another, the accidental murderer is exiled to the city of refuge, symbolizing a temporary migration from the land.

Rav Yonatan Grossman, *The Inadvertent Murderer and the Cities of Refuge* (David Silverberg trans.), YESHIVAT HAR ETZION’S ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH, July 6, 1999, <http://yucs.org/~cypess/parsha/yhe/43-masei-parsha59.txt>.

²⁶⁵ See Rabbi Ari Weiss, *Parshiot Matot/Masie: Our Prison System Should Learn from the Cities of Refuge*, HEBREW INST. OF RIVERDALE, July 16-17, 2004, http://www.hir.org/a_weekly_gallery/7.16.04-weekly.html (“Since the cases of manslaughter may differ widely, some entirely removed from any foreseeable possibility, some close to carelessness, the time of banishment also differs widely This is divine justice. God, who alone knows, bears witness and dispenses justice as due to each inadvertent killer. In other words, the length of penalty differs in each case. Only God knows the deeper intention of each ‘inadvertent’ killer.”)

the High Priest causes the *shechinah*, or Divine Presence, to rest upon the land, and the killer removes the Divine Presence by shortening the lives of others, it would be unfitting for the killer to remain free while the High Priest lives.²⁶⁶ Other commentators state that the rule is actually a punishment for the High Priest himself. Since it was his duty to pray that Israel would not commit the sin of murder, inadvertent killings show he neglected that duty. Thus, the killers' terms of exile were tied to the High Priest's lifespan so that they would pray for his death, since he failed to prevent their victims' death through his own prayer.²⁶⁷ While these explanations for the duration of the sentence may hold sway in a religious context, they could never serve as justifications in a secular society.

While it may be neither feasible nor desirable for our secular legal system to borrow from Jewish law's rubric of how to measure offenders' culpability, or how long to punish them, we can still learn lessons from the cities of refuge. Given that the primary goal of exile in the cities of refuge was reformation of the offender, we can examine the *conditions* of the cities of refuge to see how Jewish law viewed the best way to accomplish this goal.

2. Conditions in the Cities of Refuge

a. Fostering Exposure to Positive Influences

All cities of refuge were Levite cities—cities of priests.²⁶⁸ Given that the purpose of sending the manslayer to exile was reformation of the offender,²⁶⁹ cities of priests were an ideal environment for him:

The fact that he was responsible for the death of another person requires him to closely inspect his spiritual standing. . . . The [cities of refuge] not only provide physical protection from the avenger of blood but also serve as a spiritual rehabilitation center for the murderer.²⁷⁰

Not only were killers sent to live among priests, but the cities of refuge could not be dominated by a criminal population who drowned

(quotation omitted).

²⁶⁶ BABYLONIAN TALMUD, TRACTATE MAKKOT 11a n.18.

²⁶⁷ *Id.* at n.33

²⁶⁸ RAMBAM, *supra* note 94, *Laws of Murder* 8:9, at 564; *see Numbers* 35:6-7 (forty-eight Levite cities are to be designated as cities of refuge).

²⁶⁹ *See supra* note 245; Weiss, *supra* note 265 (“[T]he whole character that has been imprinted upon this retention in the city of asylum is expiation: to redeem himself from the burden of the guilt feeling which weighs heavily upon him.”) (quoting Rabbi Samson Raphael Hirsch).

²⁷⁰ *See* Efraim Levine, *Torah Insights on the Weekly Parsha: Masei 5764*, HADRASH VE-HAIYN, n.d., <http://www.shemayisrael.co.il/parsha/eylevine/5764masei.htm>.

out the influence of the “good eggs.” Rather, killers could not make up a majority of the inhabitants.²⁷¹ A city also could not serve as a city of refuge if it lacked elders²⁷²—distinguished leaders who could educate and serve as role models to the city’s residents.

Just as the presence of spiritual role models²⁷³ helps make the city of refuge a “spiritual rehabilitation center,” the presence of positive role models can help make American prisons function as rehabilitation centers as well. Most prisoners today lack such role models; they are exposed primarily to fellow criminals and to prison staff who are usually either indifferent or hostile to them.²⁷⁴ Studies have shown that, in the absence of close supervision by adult role models, juvenile corrections programs are not only ineffective, but actually serve to increase deviant behavior.²⁷⁵ Adults may not be as impressionable as juveniles, but whom they associate with cannot help but influence them.

b. Limiting Exposure to Negative Influences

The laws regarding who *cannot* go to a city of refuge also serve to make the time of confinement conducive to reformation.

Although all killers may flee to a city of refuge pending trial,²⁷⁶ once a trial has been conducted, only the negligent killer may return to the city of refuge:²⁷⁷ the intentional killer is executed, and the sin of the reckless killer is considered too severe to be atoned for by exile.²⁷⁸ The net result of these rules is to segregate killers according to their differing levels of mens rea. Negligent killers in a city of refuge might end up associating with other negligent killers who have been exiled there, but no one within this pool of negligent killers will associate with any intentional or reckless killers.

Empirical studies have confirmed the beneficial effect on recidivism rates of segregating less serious criminals from more serious

²⁷¹ See RAMBAM, *supra* note 94, *Laws of Murder* 7:6, at 556.

²⁷² *See id.*

²⁷³ This is not to suggest that the city was comprised only of Levites and manslayers. Ordinary Israelite citizens could live in these cities as well. *See id.*, *Laws of Murder* 8:8, at 564.

²⁷⁴ See PETER W. LOW, JOHN C. JEFFRIES, JR. & RICHARD J. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* 27 (2d ed. 1986) (referencing prevalent claim in “recent criminological literature, that prisons breed crime by exposing otherwise unlikely recidivists to criminal role models and underworld contacts”) (cited in Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149 n.95 (1990)); Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 464-65 (1993) (describing prevalence of guard-on-inmate violence, and citing instances).

²⁷⁵ Hughes, *supra* note 82, at 178.

²⁷⁶ RAMBAM, *supra* note 94, *Laws of Murder* 5:7, at 540.

²⁷⁷ *Id.*

²⁷⁸ *See supra* notes 251-53.

ones. According to one study, low risk offenders “‘show a shift in procriminal attitudes and behavior upon exposure to higher-risk offenders in institutions.’ Low-risk offenders placed in institutions ended up with higher re-incarceration rates than similar low-risk offenders who were placed in halfway houses.”²⁷⁹ John Martinson, the author of the study originally cited by retributivists for the view that “nothing works” when it comes to rehabilitation, later refined his position and argued that the success of rehabilitative programs depends on distinguishing offenders who are amenable to rehabilitation from those who are not.²⁸⁰ Jewish law was already making such distinctions at least two thousand years ago.

c. Humane Environment

Not only was a manslayer’s exile designed so that the people he encountered would facilitate his rehabilitation, but the physical surroundings themselves helped maintain a sense of dignity and foster his spiritual growth. Cities of refuge were required to possess all the basic needs for the slayer,²⁸¹ including a source of water and marketplaces for provisions.²⁸² If a city of refuge did not have a natural water supply, it was a public responsibility to provide it with one.²⁸³ The trading of weapons, or of activity that might lead to the introduction of weapons, was forbidden.²⁸⁴

In our prisons, by contrast, prisoners often face degrading living conditions. Overcrowding and a general atmosphere of brutality both between inmates and staff and among inmates prevail.²⁸⁵ These

²⁷⁹ Vitiello, *supra* note 34, at 1036 (quoting James Bonta & Laurence L. Motiuk, *The Diversion of Incarcerated Offenders to Correctional Halfway Houses*, 24 J. RES. CRIME & DELINQ. 302, 312 (1987)).

²⁸⁰ See *supra* note 46; Vitiello, *supra* note 34, at 1034-35 (citing James Q. Wilson, “What Works?” *Revisited: New Findings on Criminal Rehabilitation*, 61 PUB. INT. 10 (1980)); see also Hughes, *supra* note 82, at 178 (citing studies showing that “high-risk youth are particularly likely to reinforce one another’s deviant behavior when they are grouped together for intervention”).

²⁸¹ RAMBAM, *supra* note 94, *Laws of Murder* 7:2, at 554 (interpreting verse in *Deuteronomy* to suggest that “[everything] necessary for his [the exiled slayer’s] life must be provided for him.”).

²⁸² *Id.*, *Laws of Murder* 8:8, at 564; see BABYLONIAN TALMUD, TRACTATE MAKKOT 10a.

²⁸³ RAMBAM, *supra* note 94, *Laws of Murder* 8:8, at 564; see BABYLONIAN TALMUD, TRACTATE MAKKOT 10a n.16. The courts also had the obligation to establish and maintain roads leading to the cities of refuge. See *infra* text accompanying notes 314-18. That the places of refuge were, in a sense, “public works” is significant. Southern prisons from the Civil War until the Civil Rights era operated under a convict-leasing system, where private entrepreneurs had a financial incentive to extract as much labor value out of prisoners as possible, while expending the least amount possible on food, clothing, shelter and medicine. See Rubin, *supra* note 20, at 356-59. Government-funded and operated prisons have less of an incentive to exploit inmates economically.

²⁸⁴ RAMBAM, *supra* note 94, *Laws of Murder* 8:8, at 564 & 565 n.15.

²⁸⁵ See, e.g., Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the Sexualization of*

conditions create stress, fear, and anger, promote anti-social and violent behavior,²⁸⁶ and inhibit what potential for rehabilitation might otherwise exist.²⁸⁷ According to Michel Foucault, given the isolation, boredom, and violence, “the prison cannot fail to produce delinquents.”²⁸⁸ Even scholars who identify positive deterrent effects of unpleasant prison conditions acknowledge that these benefits may be more than offset by the dehumanizing environs’ tendency to inhibit reassimilation of the offender into society.²⁸⁹

d. Facilitating Community Reintegration and Identity-Building

Although the manslayer was removed from his former community, he was not isolated from the community within the city of refuge itself. Consider the following fascinating rule:

When a killer was exiled to a city of refuge, and the inhabitants of the city desire to show him honor, he should tell them, “I am a killer.” If they say, “[We desire to honor you] regardless,” he may accept the honor from them.²⁹⁰

This suggests several things. First, the inhabitants of the city of refuge could interact with the manslayer such that they would be aware of his conduct. Second, the manslayer could be engaged in socially beneficial activity—useful work, charitable deeds, etc.—for which the residents would wish to honor him. Third, he would have to state that he was a killer, indicating that the inhabitants may not otherwise have known that fact; he is not necessarily “branded” as a killer during his confinement. Fourth, even his status as a killer would not necessarily result in total ostracization, as the inhabitants might choose to honor him despite knowing that he has killed.

The possibility that a criminal might not only overcome the stigma of his crime, but even be recognized for distinction, is an important factor in his rehabilitation. “Most important for controlling crime . . . is

Power in Prison, 10 GEO. MASON U. CIV. RTS. L.J. 291, 307 n.59 (2000) (prison guards “have been known to pay prisoners, called ‘enforcers,’ to rape and beat other prisoners”); Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313 (1983).

²⁸⁶ See *infra* note 325. See generally Sheldon Ekland-Olson, *Crowding, Social Control, and Prison Violence: Evidence from the Post-Ruiz Years in Texas*, 20 LAW & SOC’Y REV. 389 (1986) (discussing crowding and social control theories of prison violence).

²⁸⁷ See Low, *supra* note 71, at 25-26, 28.

²⁸⁸ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 266 (Alan Sheridan trans., Pantheon Books 1977).

²⁸⁹ See Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 320, 322 (2003).

²⁹⁰ RAMBAM, *supra* note 94, *Laws of Murder* 7:6, at 557; BABYLONIAN TALMUD, TRACTATE MAKKOT 12b.

that shameful expressions of disapproval of criminal or deviant acts be ‘followed by efforts to reintegrate the offender back into the community of law-abiding or respectable citizens’²⁹¹

Our prison system often does precisely the opposite. Prisoners are given few opportunities to earn the respect of the outside community, because they rarely interact with it. This is understandable, given the security risks. But given that most prisoners—especially those convicted of less serious crimes—will be returning to society sooner or later,²⁹² the risk may be worth it. If re-exposing them to elements of the outside world makes them less likely to re-offend upon release, it may reduce the overall threat the prisoner presents to society.²⁹³

Indeed, many of today’s prisoners are not only deprived of opportunities for distinction, but every effort is made to make them literally indistinguishable:

Prisons are . . . institutions of depersonalization and dehumanization. This is due to the prisons’ emphasis on uniformity Life inside the penitentiary is very routine and can be numbingly monotonous. Prisoners are known as often by their numbers as by their names. Commonly adopted expressions of individuality such as dress and hairstyles . . . are limited²⁹⁴

By destroying their sense of self-identity, prisons make it that much more difficult for inmates to develop the strength of character to resist the pressures to reoffend when, as is usually the case, they return to society.²⁹⁵ Although there are valid security and prison management

²⁹¹ Eric P. Baumer et al., *Crime Shame, and Recidivism: The Case of Iceland*, 42 BRIT. J. CRIMINOLOGY 40, 42 (2002) (quoting JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 100 (Cambridge Univ. Press 1989)); see also Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward a Community-Focused Theory and Practice*, 36 COLUM. HUM. RTS. L. REV. 241, 256-57 (2004) (“Because they [an offender’s community service experiences] also promote dignity in ways that are generally not possible through participation in treatment or punishment, such experiences may also lead to a change in self-image and behavior regardless of the community response.”).

²⁹² See Celichowski, *supra* note 61, at 261 (“[T]he vast majority of those imprisoned will be returned to society, often living again among those they victimized. . . . It is important that those who are paroled experience cleansing themselves for the desired cleansing [of incarceration] to have lasting effects.”).

²⁹³ See Baumer, *supra* note 291, at 42 (“In the absence of such reconciliation efforts, shaming becomes stigmatizing or disintegrative; the criminal label becomes a master status for offenders, who are then likely to be cut off from mainstream social relationships and attracted to criminal subcultures, both of which may increase the likelihood that they will continue their involvement in crime.”). Apparently, *any* interaction with the outside may be beneficial: decades of studies have shown that prisoner visitation encourages “rehabilitation, reduce[s] behavior problems, and significantly increase[s] a prisoner’s chance for success on parole.” Marsha M. Yasuda, *Taking a Step Back: The United States Supreme Court’s Ruling in Overton v. Bazzetta*, 37 LOY. L.A. L. REV. 1831, 1843 (2004) (quotation omitted).

²⁹⁴ Celichowski, *supra* note 61, at 259.

²⁹⁵ Cf. Richard S. Gebelein, *Delaware Leads the Nation: Rehabilitation in a Law and Order Society; A System Responds to Punitive Rhetoric*, 7 DEL. L. REV. 1, 27 (2004) (“Using prison time as an opportunity to address addiction is clearly superior to using it solely for incapacitation.

reasons for the totalitarian approach, there are alternatives. Delaware, for example, has enjoyed great success reducing recidivism of drug offenders²⁹⁶ by using their time in prison to reintegrate them through “therapeutic communities,” which are focused not merely on addiction but on a holistic approach to identity-building and social interaction. “The therapeutic community focuses upon the ‘resocialization’ of the individual and uses the program’s entire community, including staff and residents, as active components of treatment.”²⁹⁷ Similarly, one medium-security federal prison in Pennsylvania that adopted a philosophy of treating inmates humanely and incentivizing them to engage in pro-social behavior has yielded dramatic reductions in violence rates—while actually reducing administrative costs.²⁹⁸ Common sense suggests that using the period of incarceration as a “training ground” for coping upon release will yield more positive social behavior upon release.

e. Vocational Rehabilitation

The manslayer was to be gainfully employed within the city of refuge. The cities of refuge had to be larger than small villages, so that it would not be too difficult for a newcomer such as the slayer to earn a living.²⁹⁹ Obviously, there would be no concern with his ability to earn a living if it was not anticipated that he would do so. Similarly, although the manslayer need not pay his landlord rent in one of the six cities of refuge designated by Moses and Aaron, he would have to pay rent in any of the forty-two other Levite cities.³⁰⁰ The obligation to pay rent is a moot point unless he is gainfully employed.

Modern studies have shown that vocational training for inmates is crucial both to helping them develop the skills they will need to be productive citizens when they return to society, and to helping them develop the motivation to want to become such citizens in the first

Returning the worst offenders to the community with structure in their lives provides an enormous gain for the community.”); see Celichowski, *supra* note 61, at 262 (“Without rehabilitation—both as a deliberate policy and as a locus of public as well as personal investment—prisons may serve only to break people down and leave them crippled, if not destroyed, before they are released.”).

²⁹⁶ Gebelein, *supra* note 295, at 14 (felony rearrest rate for those who completed the rehabilitative program was less than ten percent, compared to thirty percent for those who entered but did not complete the program and more than thirty-five percent for those who did not enter the program).

²⁹⁷ *Id.* at 17.

²⁹⁸ See Low, *supra* note 71, at 26-27 (discussing McKean Federal Correctional Institution).

²⁹⁹ See RAMBAM, *supra* note 94, *Laws of Murder* 8:8, at 564-65 & nn.12-13; BABYLONIAN TALMUD, TRACTATE MAKKOT 10a.

³⁰⁰ RAMBAM, *supra* note 94, *Laws of Murder* 8:10, at 564-66.

place.³⁰¹ Unfortunately, this is what many modern American prisons are lacking, and such opportunities have grown even more scarce since the retribution movement has taken hold.³⁰²

f. Educational Rehabilitation

According to the Oral Law, if a Torah scholar commits manslaughter and is exiled to a city of refuge, his teacher is to go with him.³⁰³ Interpreting the passage in *Deuteronomy* that states that a manslayer shall flee to the city of refuge “and he shall live,”³⁰⁴ the rabbis concluded that “the life of one who possesses knowledge without Torah study is considered to be death.”³⁰⁵ Thus, the manslayer is not left to merely while away his time in exile in a meaningless existence. Indeed, not only is the offender’s education not interrupted by his confinement, his focus on learning can be that much more intense and concentrated while in the city of refuge.

Modern studies emphasize the importance of education during incarceration as an element of rehabilitation. Indeed, opportunities for social reintegration, vocational rehabilitation and education have all been cited as key components in some of the more empirically successful correctional and rehabilitative programs.³⁰⁶

Our society would not tolerate requiring a teacher who had committed no crime to accompany his student to prison. There are rationales for the rule: that the teacher himself needs to atone for some spiritual fault that must have somehow contributed to the offender’s killing;³⁰⁷ or that the teacher would be so absorbed in studying Torah that he would not mind leaving his community in order to continue his studies with his student. But these explanations do not make the rule

³⁰¹ See, e.g., Baumer, *supra* note 291, at 46 (discussing Iceland, whose crime rates are far lower than ours, and in whose prisons, “wherever practical, opportunities to pursue secondary education are made available and encouraged . . . every attempt is made to keep prisoners involved with their family and community and to prepare them for meaningful employment, lest they be drawn into a criminal subculture with all of its attendant ills.”)

³⁰² See, e.g., Editorial, *Imprisonment Inequities*, BOSTON GLOBE, Mar. 3, 1990, at 18 (once incarcerated, prisoner has little hope of developing skills); see also *supra* text accompanying notes 65-66 (discussing reduction of inmate vocational training programs).

³⁰³ RAMBAM, *supra* note 94, *Laws of Murder* 7:1, at 554.

³⁰⁴ *Deuteronomy* 19:5.

³⁰⁵ RAMBAM, *supra* note 94, *Laws of Murder* 7:1, at 554-55 n.1; BABYLONIAN TALMUD, TRACTATE MAKKOT 10a.

³⁰⁶ See Baumer et al., *supra* note 291; Hughes, *supra* note 82, at 172-73 (discussing Choices for Youth and the Dome Project, two New York juvenile rehabilitation programs that boast recidivism rates as low as five and fifteen percent, respectively); *id.* at 168-69 (noting that community-based juvenile treatment programs had recidivism rates ten to twenty points lower than confinement facilities).

³⁰⁷ RAMBAM, *supra* note 94, *Laws of Murder*, at 554.

palatable to us. Nevertheless, we must once again be careful not to ignore the important lesson regarding the importance of rehabilitation in punishment, even if we eschew the particular manifestation of the principle.

g. Shielding Offenders from Violence

The enforcement mechanism of the cities of refuge was not iron bars or electrified fences, but simply the knowledge that if the killer leaves the city, he may be slain by the blood redeemer. An obvious initial question is: why does the Torah sanction this form of seeming vigilante justice?

The simple answer is a practical one: the blood redeemer was a quasi-state agent. Ancient Israelite society had no formal police force, no corrections officers, and no court executioners.³⁰⁸ If a criminal defendant was sentenced to death by the court, the blood redeemer carried out the execution on the court's behalf.³⁰⁹ That the blood redeemer was acting in an official capacity, and not merely to avenge a private wrong, is further evidenced by the fact that the Torah explicitly forbade the blood redeemer from accepting a ransom from the killer in lieu of his exile.³¹⁰ Moreover, since the city of refuge was not designed to physically restrain the manslayer, and had no personnel designated to enforce his captivity, a credible threat of death upon leaving (like the revenge of the victim's relative) may have been necessary to induce him to remain.³¹¹

But the blood redeemer did not go unchecked. Numerous protective measures minimized the chance that the blood redeemer would kill the slayer on his way to a city of refuge. This made sense, given that any killer traveling to a city of refuge was either seeking

³⁰⁸ Fishman, *supra* note 88, at 419.

³⁰⁹ RAMBAM, *supra* note 94, *Laws of Murder* 5:7, at 540 ("If [the killer] is condemned to execution, he should be executed, as [Deuteronomy 19:12] continues: 'And they shall give him to the hand of the blood redeemer.'"); see also *Numbers* 35:18-21 (containing similar language). If the victim had no relative to execute the killer on his behalf, the judges of the court were responsible for executing the defendant. RAMBAM, *supra* note 94, *Laws of Murder* 1:2, at 502.

³¹⁰ *Numbers* 35:32; see Fishman, *supra* note 88, at 420. After all, if the blood redeemer's right to vengeance was a private one, no one would have standing to complain if the family was satisfied by monetary compensation.

³¹¹ Another explanation is as follows. By remaining in the city of refuge, the killer acknowledges that he needs to atone for the sin that led to his killing. But if he disregards his sentence and intentionally departs from the city, he is denying that he is in need of atonement, and is essentially defying both the court and God—not to mention disrespecting family of the victim. At this point, he may be deemed so dangerous, both physically and spiritually, that his death is perhaps not undeserved. One might draw a secular analogy to one who, while serving a short sentence for a relatively minor crime, escapes from prison, and upon recapture is punished far more severely for the attempted escape than for the original crime.

asylum pending trial (and thus the court had not yet decided whether he was liable to death); or else had already been sentenced to exile following a trial (and thus the court had affirmatively judged him not liable to death). To reduce the likelihood that someone not sentenced to die would be killed, the six original cities of refuge³¹² were spaced roughly equally throughout the land, so that no slayer would need to travel too far to reach any of them.³¹³ In order to further facilitate rapid passage to the cities of refuge, the court was obligated to construct roads leading to each of them.³¹⁴ The roads were to be twice as wide as regular roads.³¹⁵ They were to be direct paths, without detours, and free of obstacles.³¹⁶ The court was to inspect the roads annually and repair any defects.³¹⁷ Signs stating "Refuge, Refuge," were to be posted at intersections to ensure that slayers would know the proper path.³¹⁸ Once the court adjudged a defendant liable to exile, he was escorted back to the city of refuge by two Torah sages, because they would have the wisdom to choose words that would calm down the blood redeemer, and because he would be reluctant to act violently out of respect for them.³¹⁹

The slayer's safety was further assured once inside the city of refuge. The blood redeemer was subject to execution if he killed the slayer within the city of refuge.³²⁰ Despite this prohibition, additional measures guarded against the risk that a blood redeemer might nevertheless try to attack the slayer within the city. Cities of refuge could not be large cities, such that the blood redeemer would have reason to frequent the place, and could blend in with the crowd while he sought his prey.³²¹ They had to be near populated areas, and populous enough themselves, to defend against multiple blood redeemers should they attempt a mass attack on slayers within the city.³²² Hunting and trapping were prohibited in the cities of refuge, since this could lead to the sale of weapons, which might be purchased by the blood redeemer. This ensured that, if the blood redeemer wanted to use a weapon within

³¹² See *Numbers* 35:9-14; *Deuteronomy* 4:41-43; *Joshua* 20:7-9; RAMBAM, *supra* note 94, *Laws of Murder* 8:2, at 560; see also *supra* note 268.

³¹³ RAMBAM, *supra* note 94, *Laws of Murder* 8:7, at 564; see BABYLONIAN TALMUD, TRACTATE MAKKOT 9b.

³¹⁴ RAMBAM, *supra* note 94, *Laws of Murder* 8:5, at 562.

³¹⁵ *Id.*, *Laws of Murder* 8:5, at 562, 563 n.9.

³¹⁶ *Id.*, *Laws of Murder* 8:5, at 562.

³¹⁷ *Id.*, *Laws of Murder* 8:6, at 564.

³¹⁸ *Id.*, *Laws of Murder* 8:5, at 562.

³¹⁹ *Id.*, *Laws of Murder* 5:8, at 540-42, 541 n.24.

³²⁰ *Id.*, *Laws of Murder* 5:11, at 542.

³²¹ *Id.*, *Laws of Murder* 8:8, at 564 n.10.

³²² *Id.*, *Laws of Murder* 8:8, at 564, 565 n.14.

the city, he would be forced to bring his own, which would be detected upon his entry into the city gates.³²³

In the American penal system, victims' relatives do not usually pose a threat to a convict's physical safety (excluding perhaps participants in retaliatory gang warfare); but his fellow inmate often do.³²⁴ As Judge Frank Easterbrook succinctly put it, "Prisons are dangerous places."³²⁵ Indeed, a quarter-century ago, the executive branch of the federal government conceded the dangerousness of prisons in a brief before the Supreme Court: "In light of prison conditions that even now prevail in the United States, it would be the rare inmate who could not convince himself that continued incarceration would be harmful to his health or safety."³²⁶ Inmates also face the threat of sexual violence. Although accurate statistics on prison rape are difficult to obtain, given victims' reluctance to self-identify,³²⁷ a 2001 Human Rights Watch report concluded that the problem was "much more pervasive than correctional authorities acknowledge."³²⁸

Obviously, immersing offenders in violence does nothing to make them less violent when they return to society, and likely has the opposite effect. Moreover, if inmates must be at a constant state of attention to guard against assaults, they will have less time, attention, or willingness to devote themselves to more productive endeavors.

We have thus seen that the primary purpose of the cities of refuge was to provide atonement and rehabilitation for the slayer, and that its features were well suited toward promoting those goals.

C. *Involuntary Servitude*

1. Servitude as a Sanctioned Form of Punishment in Jewish Law

The Torah provides that a thief is obligated to make restitution to his victim in the amount of the thing stolen, and in addition must pay a

³²³ *Id.*, *Laws of Murder* 8:8, at 564, 565 n.15; BABYLONIAN TALMUD, TRACTATE MAKKOT 10a nn. 19, 21.

³²⁴ See James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527, 533 n.41 (2004) (citing sources discussing violent nature of American prisons); James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101, 104-05 (1985) (discussing rates of homicide, assault, and rape in prison).

³²⁵ *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991) (Easterbrook, J.).

³²⁶ *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting) (quoting Brief for United States at 27).

³²⁷ See James E. Robertson, *The Prison Rape Elimination Act of 2003: A Primer*, CRIM. L. BULL., May 2004.

³²⁸ See HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS § VII (2001), <http://www.hrw.org/reports/2001/prison/report7.html>.

penalty (usually equal to the amount stolen).³²⁹ If the thief cannot pay the penalty, it becomes a debt he owes to his victim. But if he cannot pay the principal value of the goods stolen, he is sold as an *eved*—translated as “slave” or “servant”³³⁰—and lives in his master’s home for a period of six years.³³¹ It was hoped that by dwelling in the home of a law-abiding family, the thief would learn from his master’s positive example, and reform his character so as not to steal in the future.³³² Thus, the two primary purposes of this form of punishment were to make restitution to the victim and to rehabilitate the offender.³³³

The selling of a thief into slavery is a form of punishment only loosely related to prison. The *eved* or slave is not confined to a separate facility designated for the purpose of housing criminals, as prisoners are. Nevertheless, as a necessary incident of his obligation to serve his master, the thief’s right of unrestricted movement was abridged. Given that prisons were not generally employed under the Jewish criminal justice system, servitude, like the cities of refuge, is one of the closest analog to prison.

Of course, any proposal to “sell” someone into the service of another private individual would neither be embraced nor tolerated in the United States today. The very word “slavery” is, thankfully, anathema. However, the “slavery” into which the Jewish thief was sold was “more like indentured servitude for a term of years than slavery.”³³⁴ Not that one even needs to make this distinction in order to defend servitude as a mode of criminal punishment. The Thirteenth Amendment specifically permits the use of slavery and involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted.”³³⁵ Indeed, challenges to “chain gangs” and to other aspects of the post-Civil War plantation model of Southern prisons were

³²⁹ RAMBAM, *supra* note 94, *Sefer Nezikin, Hilchot Geneivah* [“Laws of Theft”] 3:11, at 180; *see Exodus* 22:8.

³³⁰ The laws discussed herein concern the *eved ivri*, or Hebrew slave. There were separate laws for the *eved canaani*, the non-Jewish slave, primarily regarding the length of service and not the minimum requirements for humane treatment. *See COHN, supra* note 124, at 56-63; David M. Cobin, *Freedom Beyond the United States: A Brief Look at the Jewish Law of Manumission*, 70 CHI.-KENT L. REV. 1339, 1339 (1995). For a discussion of laws regarding non-Jewish slaves specifically, *see Cobin, supra*, at 1341-48.

³³¹ *Exodus* 22:2; RAMBAM, *supra* note 94, *Laws of Theft* 3:12, at 180; *Id.*, *Sefer Kinyan* [“The Book of Acquisition”], *Hilchot Avadim* [“The Laws of Slaves”] 2:2, at 652.

³³² RAMBAM, *supra* note 94, *Laws of Slaves*, at 644 n.4. Accordingly, a thief sold by the court could be sold only to a Jew, so as to make sure he would live in a home influenced by Torah values. *See id.*, *Laws of Slaves* 1:3, at 644.

³³³ Subjecting a criminal to servitude obviously serves the goal of deterrence as well. However, as discussed above, *see supra* text accompanying notes 20-21, any unpleasant experience serves to deter, and so this does not tell us which modality of punishment is appropriate.

³³⁴ Cobin, *supra* note 330, at 1348.

³³⁵ U.S. CONST. amend. XIII.

sustained under the Eighth Amendment's ban on cruel and unusual punishment, not on Thirteenth Amendment grounds.³³⁶ It is quite common for prisons today to require prisoners to do work in order to maintain the institution.³³⁷ Thus, the question is not whether it is permissible to punish criminals by requiring them to do work, but rather what type of work will it be, and under what conditions will it take place.

2. The Relative Humaneness of Jewish Servitude

It is difficult to suggest that any form of servitude could be "humane." Nevertheless, from a comparative standpoint, Jewish thieves sold into slavery were treated more humanely than many modern American prison inmates.

Jewish law explicitly acknowledged that the thief's "self-image is depressed because of his being sold,"³³⁸ and accordingly imposed a variety of obligations on the owner designed to preserve his dignity. The thief was to be treated "as a hired laborer," and could not be made to "perform debasing tasks that are relegated only for servants."³³⁹ He was not to be made to perform tasks that were beyond his physical strength.³⁴⁰ His family was permitted to live with him, and although the master was obligated to provide for the sustenance of his slave's wife and family, the master was not entitled to the proceeds of any work they performed.³⁴¹

Although the slave was required to "conduct himself as a servant with regard to those tasks he performed,"³⁴² the master was not allowed to hold himself above his *eved*:

A master is obligated to treat any Hebrew servant or maid servant as his equal with regard to food, drink, clothing and living quarters [The master] should not eat bread from fine flour while [the servant] eats bread from coarse flour. [The master] should not drink aged wine while [the servant] drinks fresh wine. [The master] should not sleep on cushions while [the servant] sleeps on straw.³⁴³

³³⁶ Rubin, *supra* note 20, at 359.

³³⁷ *Id.* at 359-60.

³³⁸ RAMBAM, *supra* note 94, *Laws of Slaves* 1:7, at 648.

³³⁹ *Id.*, *Laws of Slaves* 1:7, at 648.

³⁴⁰ COHN, *supra* note 124, at 59 (citing *Ben Sira* 33:28-29).

³⁴¹ RAMBAM, *supra* note 94, *Laws of Slaves* 3:2, at 660.

³⁴² *Id.*, *Laws of Slaves* 1:9, at 650.

³⁴³ *Id.*

Indeed, the Sages suggested that the slave was to be treated as *more* than equal, saying: “Whoever purchases a Hebrew servant purchases a master for himself.”³⁴⁴

These myriad burdens that Jewish law places on the owner of a slave were intended to counteract the exploitative tendencies inherent in the relationship. They were designed to help ensure that the slave’s physical needs will be met, and that his psyche will not be unnecessarily damaged by his lowered status. In sheer economic terms, the legal requirements also make it expensive to be a slave owner, and thus discourage those who have neither the resources nor the inclination to treat a slave humanely from entering the slave-owning market.

By contrast, the incentive in modern American prisons is to house as many inmates as cheaply as possible.³⁴⁵ Not only is the prisoners’ dignity or psychological well-being not typically a priority, but one could imagine the public outcry if politicians and corrections officials devoted substantial resources or attention to those ends.³⁴⁶

3. Seemingly Objectionable Aspects of Jewish Servitude

Despite the various ways in which Jewish servitude was preferable to modern American incarceration, some features of this form of punishment would seem illogical or downright unfair to the modern sensibility.³⁴⁷

First, we may object to letting the infliction of the punishment turn on the offender’s ability to pay. Only the thief who cannot repay the value of the goods stolen is sold.³⁴⁸ By making the imposition of servitude turn on whether the thief can repay the principal, Jewish law effectively makes the servitude a form of debtor’s prison.

One possible explanation is that Jewish law values restitution to the victim more highly than it values the criminal’s liberty. Another, more generous, explanation is that the servitude serves as a sort of welfare program. In Jewish law, there were two ways a Jew could become a slave. He could be sold into slavery by the court because of his theft, as has been discussed. Or, if he was severely destitute, he

³⁴⁴ *Id.* (quoting BABYLONIAN TALMUD, TRACTATE KIDDUSHIN 20a).

³⁴⁵ See Low, *supra* note 71, at 31-35 (discussing cost-cutting measures by both public and private prisons).

³⁴⁶ See, e.g., Blumenson & Nilsen, *supra* note 66, at 74 (citing—and disputing—Senator Kay Bailey Hutchinson’s claim that providing educational grants “to ‘carjackers, armed robbers, rapists, and arsonists’ shortchanged 100,000 non-criminal students who were denied Pell Grants because of lack of funds”).

³⁴⁷ This is apart from our objections to accepting the very institution of servitude. *But see supra* notes 335-37 (servitude as a criminal punishment legally sanctioned and widely practiced in the United States today.)

³⁴⁸ See *supra* text accompanying notes 329-31.

could voluntarily sell himself into slavery in order to raise funds to provide for himself and his family.³⁴⁹ It may be that the thief who cannot repay the principal of the amount he stole is so impoverished that he was in a position to sell himself voluntarily. Since he chose to steal rather than sell himself, the court forces an involuntary sale in order to raise funds both to repay the victim and to provide sustenance to the thief and his family. In this light, even the imposition of servitude is, albeit in a paternalistic sense, humane.

A second difficulty we encounter is accepting the possibility that anyone would be willing to have a convicted criminal—a thief, no less—serve his sentence by living and working in his home, with full access to all his possessions and in close proximity to his family. Such a possibility is only fathomable in a society very different from our own. The Sinaitic code was written for a “covenantal community”—a religiously homogenous society, all of whose members were motivated by a love of and a desire to serve God.³⁵⁰ Moreover, traditional Jewish culture has always been highly communitarian—interaction with other members of society is essential to fulfilling many of a Jew’s religious obligations.³⁵¹ Thus, it is quite possible that a thief would not have come from a different culture and background, or even from a different neighborhood, than his victim. He may not have been the “other,” a presumed monster, as criminals today are usually perceived.³⁵² Rather, he would have been a member of the victim’s own community who—even if he transgressed by committing theft—had quite a lot to lose by committing additional transgressions like stealing from his owner or assaulting the owner’s family. He also would not likely have escaped, as almost any modern convict undoubtedly would, because there was not really anywhere for him to escape to. As a member of the victim’s community, escape would be tantamount to self-imposed exile.

Third, Jewish law prescribed that the thief should serve as a slave for six years,³⁵³ regardless of the value of the articles he stole. The rationale for this rule was apparently that, since hired laborers would work for a term of three years, then a slave, who was essentially an

³⁴⁹ RAMBAM, *supra* note 94, *Laws of Slaves* 1:1, at 644.

³⁵⁰ Stone, *supra* note 92, at 889; see Silberg, *supra* note 189, at 323 (“Such laws can have only one solid foundation: a common moral concept shared by all of the nation’s individuals.”).

³⁵¹ For example, Jewish law requires that Jewish men pray together in a *minyan* (a quorum of at least ten Jews), to give *tzedakah* (“charity”), and to study Torah (preferably with others), and it is considered a *mitzvah* (“commandment” or “good deed”) to invite guests for meals. See Shuster, *supra* note 148, at 985.

³⁵² See Baumer et al., *supra* note 291, at 42 (“[I]n communitarian societies offenders, victims, and other community members are deeply embedded in relationships of interdependency and mutual obligation. These conditions increase substantially the likelihood that community members will view offenders as total personalities rather than merely as criminals who should be excluded from social life.”).

³⁵³ RAMBAM, *supra* note 94, *Laws of Slaves* 2:2, at 652.

involuntary hired laborer, should work twice that amount. Although it may seem unfair that a thief who stole a trifle and one who stole valuable goods would receive the same sentence, this is no worse than mandatory minimum sentencing schemes prevalent in today's society. Thus, if it is unfair, it is unfair for the same reasons that modern law is unfair, not for reasons peculiar to Biblical law.

But the rationale for treating all instances of theft seriously, and for punishing them equally, was not a secular one. According to Jewish law, any theft was considered a serious crime—even more serious than robbery, even though the latter involves taking property by physical force. The reason for this is that the robber's brazen act indicates that he fears neither man nor God, while the thief who steals in secret suggests that he fears men *more* than he fears God.³⁵⁴ Thus, even if petty theft was not a major threat to social stability or safety, it was a serious transgression in religious terms.

In any event, there were several ways in which a slave could secure his release prior to the six-year completion date. First, the slave went free if the master died without leaving a male descendant.³⁵⁵ Second, the slave went free if the Jubilee year (which occurred every fifty years) occurred during the term of his servitude, regardless how much time remained on his sentence.³⁵⁶ Third, the master could agree to accept the pro-rated value of the remaining services due him under the slave's term, in lieu of receiving the services themselves.³⁵⁷ Fourth, the master could voluntarily manumit the slave and forgo a release payment altogether by executing a bill of release.³⁵⁸

Yet another aspect of Jewish servitude that evidences both its remarkable humaneness and its seeming unfairness simultaneously is the severance gift. Upon the completion of the thief's term of servitude, the master was obligated to provide him with a generous gift of animals and/or produce—things that would perpetuate themselves and thus yield continuous benefit.³⁵⁹ This was to provide him with financial resources so that he could begin his life anew without the temptation to steal again.³⁶⁰ To ensure that the ex-slave would use the funds for the purpose of re-establishing himself, the law provided that his severance gift could not be expropriated from him³⁶¹—a provision akin to a “spendthrift” trust for ex-convicts.

³⁵⁴ BABYLONIAN TALMUD, TRACTATE BAVA KAMMA 79b & n.15.

³⁵⁵ RAMBAM, *supra* note 94, *Laws of Slaves* 2:12, at 658.

³⁵⁶ *Id.*, *Laws of Slaves* 2:2, at 652.

³⁵⁷ RAMBAM, *supra* note 94, *Laws of Slaves* 2:7-8, at 652 & 653 nn.13, 15.

³⁵⁸ *Id.*, *Laws of Slaves* 2:11, at 656-58.

³⁵⁹ *Id.*, *Laws of Slaves* 3:12, 14 at 666, 668.

³⁶⁰ *Id.*, *Laws of Slaves* ch. 3, at 667-69 n.50.

³⁶¹ *Id.*, *Laws of Slaves* 3:15, at 670.

The mandatory severance gift is another rule that would never be accepted in our society. Millions of Americans who have committed no crime have difficulty providing for themselves and their families financially; the idea that released prisoners would be given a substantial endowment to begin their new lives (especially one paid for out of the public fisc) would cause an uproar.³⁶²

Nevertheless, the general principle that we should take concrete steps to help the criminal's transition back into society and reduce the chances that he will reoffend is a sound one. Most convicts have no more money, education or training upon their release from prison than they did upon entering it. This, combined with the difficulty of finding employment due to the stigma of their ex-convict status, makes the temptation to fall back into criminal life considerable.³⁶³ Certainly the notion of facilitating the criminal's reentry should be given consideration, given the costs of *not* doing so—higher recidivism rates, more crime, and the attendant added burdens on the police, prosecutors, and courts.

Thus, even aspects that at first seem strange or unjust may at their root be driven by humanitarian impulses. The difficulty, again, lies in translating these practices into measures that make sense in a different society and era.

Despite the challenges of translation, we can discern that Jewish law's imposition of servitude as a penalty for theft stands as another example of a restriction on liberty that primarily served the goals of restitution and rehabilitation, not retribution. Moreover, given the goal of rehabilitation, the manner of punishment was designed to maintain the dignity of the offender and assist him in successfully reentering society. If players in the modern debate over the purposes and forms of punishment want to borrow a page from the Bible, it is these goals and ideas they should be looking to.

D. *The Inconsistency Between Imprisonment and Jewish Law*

It should come as no surprise that prison is not prominent in Jewish law,³⁶⁴ because incarceration conflicts with fundamental tenets of Judaism. According to Jewish philosophy, God created everything with

³⁶² See *supra* note 346.

³⁶³ See Petersilia et al., *supra* note 81, at 109.

³⁶⁴ One of the strongest circumstantial proofs that prison was not used is that there are no detailed instructions given about *when* or *how* to apply it. Jewish Law goes into great detail regarding cities of refuge, involuntary servitude, and every other punishment, including who can and cannot be sentenced, and the location, duration, termination, and conditions of punishment. See Lipskar, *supra* note 215, at 3.

a positive purpose.³⁶⁵ This includes every individual human being—even those who commit crimes—each of whose purpose is to love and serve God.³⁶⁶ According to this view, punishments for criminal transgressions should inure to the benefit of everyone involved—the criminal, the victim, and society at large. Prison is not a very good way to benefit any of these parties.

Prison is little help, and likely a hindrance, to the criminal fulfilling his purpose. Because imprisonment isolates the criminal, it undermines his ability to function in and contribute to society. And because serving God in Judaism is a highly social endeavor,³⁶⁷ the isolation that comes with imprisonment impedes his ability to serve God. Moreover, unless there is some aspect of the prison experience that facilitates atonement or rehabilitation, it does nothing to better the criminal. On the contrary, to the extent that prison serves to make criminals more likely to commit crimes in the future (as modern statistics suggest),³⁶⁸ it increases the chances that he will further sin, face additional imprisonment, and be further impeded in his ability to serve God. One could counter that we should not be concerned with whether the criminal is able to fulfill his purpose, that he has forfeited his right to do so by committing his crime. But this would be inconsistent with the Jewish worldview that it would have been worth creating the entire universe for any one individual³⁶⁹—whether he be a criminal or not.

The victims of crime are also usually not benefited much by isolating and confining the criminal.³⁷⁰ While imprisoned, it is highly unlikely that offenders will be able to engage in fruitful labor by which they can compensate victims or their relatives. Their incarceration does perhaps satisfy victims' or their families' desire for vengeance; but the drive for personal satisfaction through vengeance is generally not considered a legitimate interest according to Judaism.³⁷¹ Moreover, since any form of enforced unpleasantness serves the goal of retribution,

³⁶⁵ BABYLONIAN TALMUD, TRACTATE SHABBOS 77b (“In all that the Holy One, blessed is He, created in His world, He did not create even one thing needlessly.”); *id.*, TRACTATE BERACHOT 60b & n.47 (all things and events, even the seemingly negative or purposeless, are to be seen as having been brought about for good by God).

³⁶⁶ *See, e.g.*, *Deuteronomy* 11:13.

³⁶⁷ *See supra* note 351.

³⁶⁸ *See supra* text accompanying notes 81-83.

³⁶⁹ BABYLONIAN TALMUD, TRACTATE SANHEDRIN 37a.

³⁷⁰ *Cf.* Bazemore & Stinchcomb, *supra* note 291, at 254 (“[D]espite the perception that serving a sentence ‘pays a debt to society,’ doing time does nothing to address the harm caused by offenders and the need to restore the trust that others had in them.”). Criminals who pose a continuing threat to their victims (e.g., stalkers) are a major exception. But Jewish law does recognize the need to confine dangerous individuals. *See supra* text accompanying notes 159-62, 223-30.

³⁷¹ *See, e.g.*, *Leviticus* 19:17-18 (“You shall not hate your brother in your heart You shall not take revenge and you shall not bear a grudge”). Regarding the blood-redeemer’s right to vengeance, see *supra* notes 312-23.

vengeance does not explain why prison should be the preferred method of inflicting pain over any other method.

As for society, imprisonment does provide a social benefit by incapacitating the criminal, although only so long as he is incarcerated. However, if prison makes criminals more likely to commit crimes in the future, this is obviously a detriment, not a benefit. Prison does potentially benefit society by deterring prisoners or others from committing crime, although the empirical evidence on this is questionable.³⁷² In any event, the benefits to society of imprisonment must be weighed against its costs, and against the costs and benefits of alternatives. Studies suggest that alternatives to prison have had better success in reducing recidivism rates, and at a lower cost—in terms of direct outlays, not to mention the avoided costs of futures crimes committed by, and of the arrests, processing and confining of, would-be recidivists.³⁷³ Thus, the notion that prison is an institution that provides an overall benefit to society is questionable at best.

By contrast, Jewish law alternatives to prison serve, to the extent possible, to benefit the criminal, the victim and society.

As for criminals, spending time working and learning in a city of priests provides atonement and rehabilitation for the negligent killer. Similarly, the six years that a thief spends working in the home of a stable family gives him positive role models to emulate. And both punishments permit the offender to interact with society and to engage in productive work and study.

As for victims, having the negligent killer spend time in a city of refuge admittedly cannot benefit the dead; but then again, no punishment could ever directly benefit the victim of a homicide. At least as regards theft, however, the thief's servitude does provide tangible restitution for his victim.

As for society, the threat of death at the hands of the blood redeemer keeps the negligent killer confined to the city of refuge, thus removing him from his native community. The thief's involuntary

³⁷² See *supra* text accompanying note 80 (no demonstrable connection between increased use of prisons and decreased crime). Most prisoners commit additional crimes upon their release. According to the Bureau of Justice Statistics, 67.5% of inmates released in fifteen states in 1994 were rearrested for a felony or serious misdemeanor within three years, 46.9% were reconvicted, and 25.4% were resentedenced to prison for a new crime. U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Offender Statistics, <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Sept. 12, 2006).

³⁷³ See *supra* text accompanying notes 296-98. For example, in contrast to the \$90,000 per year New York spends to house a youth in a juvenile detention center, it costs only two percent of that—\$1,800 per year—to place a child in a community-based alternative-to-detention program. See Hughes, *supra* note 82, at 159. Not only is this far less expensive, but the lower recidivism rates among youths in the alternative program—ten to twenty percentage points lower—provide savings in terms of future crimes prevented, and avoided costs of arresting, processing and confining recidivists. *Id.* at 168-69.

servitude does not necessarily incapacitate him, although it is not clear how big of a concern incapacitation would be in his case. To the extent that these punishments only provide limited incapacitation benefits, this drawback may be more than offset by the reduction in recidivism that results from their strong emphasis on rehabilitation.

Thus, the punishments of Jewish criminal justice system are tailored to serve the purposes of that system. It is difficult to say the same of our own.

CONCLUSION

This Article does not suggest that we adopt specific punishments prescribed by Jewish law, such as cities of refuge or involuntary servitude. Jewish law is God-based law, written for a God-based society. Its punishments, and the rules for how to apply them, do not have practical application in a modern, secular society. (Indeed, it is not clear if they had practical application even in ancient Israel.) But the punishments in Jewish law evidence that system's view of the appropriate purposes of punishment, and of the ways to advance those purposes. On that front, several core ideas stand out.

First, although there is a prevailing perception that Jewish law focused on retribution, our examination of the punishments that Jewish law instituted in lieu of incarceration reveals that rehabilitation and restitution were its priorities. To the extent that modern advocates of retribution invoke "Old Testament justice" to support the increased use of incarceration, they are relying on an incomplete and misleading view of Jewish law. If one wants to contend that the legal system embodied by the Hebrew Bible is so different from our own, in both its premises and operation, that no useful comparison whatsoever can be made of it, so be it. But if one does choose to examine it, one cannot deny that undue emphasis has been placed on the role of retribution.

Second, despite the possibility that Jewish law was not applied in practice, it embodied highly practical and sensible ideas about when rehabilitation was appropriate. Jewish law made a distinction between those criminals who were beyond rehabilitating in this world, and those that were not.³⁷⁴ For those whose crimes were so heinous there could be no atonement in this world, or who posed an intractable threat to society because of their repetition of serious crimes, Jewish law made incapacitation a priority, and authorized courts or the king to either

³⁷⁴ Cf. Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511 (1982) (discussing potential of identifying those criminals least amenable to rehabilitation for reducing crime at a lower cost than mass incarceration).

execute them or possibly imprison them indefinitely.³⁷⁵ But lower level criminals—like negligent killers or thieves—would, in all likelihood, be returning to society. Both society and the offender would benefit from imposing punishments that improved these criminals' chances for successful reentry into society. The punishments imposed by Jewish law reflected this fact.

Our current approach, by contrast, is to not only lock up the “lifers,” but to make more low-level criminal subject to imprisonment for longer periods of time, with little attention paid to what will happen to them once they get out. Thus, we may be giving up on far too many offenders, and doing far too little to help those on whom we are not giving up. Even if we were unwilling to do more to help prisoners for the prisoners' sake, we should at least consider whether doing so is worthwhile for the sake of the protection of society. Given the fact that our current prisons make people more—not less—likely to commit crime, and given the ballooning costs of building and maintaining these prisons, it makes sense to look at legal systems that offer alternatives regarding how to deal with those offenders who will reenter society. In short, Jewish law shows us that we can prioritize rehabilitation without necessarily being “soft on crime.”

Third, even if the particular practices of Jewish law are impracticable in our own time, the policies underlying those practices are not. Cities of refuge incorporated notions of surrounding criminals with good influences and removing them from bad ones; of giving them a humane environment in which to serve their time; of allowing them to have community interaction and rebuild their identities following their wrongdoing; of giving them an opportunity to engage in productive work and to further their educations; and of protecting their physical safety so that these other goals could be achieved unimpeded. Similarly, the servitude imposed upon thieves was designed in such a way to ensure that the slave's dignity was not needlessly impaired, and that he had both the psychological and practical wherewithal to avoid repeating his mistake.

We could not replace prisons with cities of refuge or private servitude, but we could adopt measures that embody the rehabilitative and restitutive principles on which those punishments were based. Measures such as increasing vocational and educational training, mentoring, and community service for prisoners, and increased reliance on intermediate forms of confinement for lower level offenders, may be

³⁷⁵ Cf. Celichowski, *supra* note 61, at 268 (“[I]t cannot be ignored that some criminals, by virtue of the heinous nature of their crimes and/or their psychological or moral incapacity (e.g., violent sociopaths), are either beyond rehabilitation, or their freedom places the rest of society at an unacceptable risk.”).

a way of “translating” those Jewish law practices into our modern world.

The tenets on which the Jewish criminal system is based do not dictate that we scrap the prison system altogether. Jewish law seems to see some value in restrictive confinement. However, the value lies not in the fact of confinement itself, but in how we take advantage of that time to impact the person confined.

It may well be that, in order for a period of separation and confinement to be effective in preventing an offender from committing more crimes upon release, it would have to look so different from prisons as we know them today as to not even be called “prison” in the first place. But if reliance on the Bible leads to adoption of measures that prioritize the dignity of individuals and result in the reduction of crime—as opposed to our spiraling cycle of incarceration, more crime, more prisons, and yet more incarcerations—that would not be such a bad thing. Whether one cares about being true to the meaning of the Bible, or about making our own society safer, it is time we discard our outdated notions of what “Old Testament justice” means.