

we will also highlight the various textual genres in which these interpretive reversals take place. These not only include biblical statements of theology, but legal passages and narratives as well⁴.

Second, we will investigate the *hermeneutical* justifications for these interpretive reversals. How did a particular rabbinic text defend these radical exegetical moves? In this regard, we will focus on the often decisive role that *values* play—as a criterion of interpretation—in the formation of child salvation theology. Moreover, we will expose not only *if* a rabbinic exegete draws on values, but how much *weight* he grants it. Some rabbinic texts are only prepared to use value-laden considerations to generate *new* theologies that are not embedded in biblical passages and can only be logically extrapolated from them, while other more bold rabbinic texts are prepared to grant values the power to consciously re-interpret and even supplant straightforward biblical passages. Other rabbinic texts will also be presented that either implicitly or explicitly deny the power that values play in the determination of theology, and we will attempt to show what alternatives they offer to justify these interpretive reversals as well.

The third and final critical question surrounding child-salvation theology concerns its *conceptual* justification. In short, is this theology—in both of its forms—merited or unmerited? In the Christian tradition, this issue dominates any discussion of salvation, and we can present the same dilemma concerning Jewish forms of salvation in general and rabbinic child-salvation in particular.⁵ That is, are rabbinic forms of salvation achieved because one deserves it—either by actively performing good deeds or through personally suffering and thereby paying for the sins of one’s past—or does salvation occur essentially through events that take place outside of the self—either through the medium of others or the arbitrary grace of God? Put differently, can rabbinic salvation be rationally justified or is its efficacy beyond the confines of logic? Of course, the answer may be more complex than just a yes or no response. Each salvation theology could operate in a unique way—some more merited (and rationally based) than others. Moreover, within each salvation theology, different texts may profess different points of view. While we will give a brief conceptual overview of rabbinic salvation in general, our primary goal will be to illuminate this issue in the context of child-salvation theology.

Before we begin exploring specific texts regarding child-salvation theology and its exegetical and conceptual justifications however, we need to present an overview of how the rabbis conceived of hell in general and the myriad of

⁴ Part 1 of this article will deal exclusively with how *Hazal* ground child salvation theology in Biblical theological texts. The other methods used to anchor rabbinic theology will be explored in Part 2.

⁵ See Meir Soloveichik, “Redemption and the Power of Man,” *Azure* 16 (Winter 2004), 51-76. Soloveichik denies the existence of unmerited salvation in the Jewish tradition. This paper will challenge this read of the rabbinic tradition.

ways in which humans—and in particular Jews—can achieve salvation from its flames.

II. Salvation from Hell: Overview

Although numerous Jewish apologists have tried to deny it, rabbinic literature makes thousands of references, albeit in an unsystematic fashion, to *Gehinom* (hell), a fiery place where people are tortured for sins committed during their lifetime.⁶ Some texts vaguely state that people who live “average religious lives” receive a twelve-month sentence in *Gehinom* to cleanse them of their sins, while the truly wicked are destined for eternal damnation.⁷ Other texts, however, are more exact and reserve *Gehinom* for those whose sins outweigh his/her merits.⁸ There are also hundreds of rabbinic texts that cite one specific sin as sufficient cause for one to “inherit” the fires of *Gehinom*. Yet given the radical nature of these later voices, it is hard to know whether these texts should be taken literally, or whether they function as hyperbolic exhortations whose goal is to ensure compliance with a specific law.

Although the majority of rabbinic texts mentioning *Gehinom* are preoccupied with either listing those who are destined to go there, debating the duration of one’s stay, or even with supplying actual images of what *Gehinom* looks like, a fair number of rabbinic texts concentrate on presenting methods for one’s deliverance from hell. These rabbinic salvation texts can be divided into two categories.⁹ The first group describes people solely saved through their own merit; for example: those performing certain religious rituals,¹⁰ embodying proper faith,¹¹ or observing proper ethical behavior.¹² The second group delineates people saved from sources outside of themselves. These include: salvation through the medium of patriarchs,¹³ family members (parents¹⁴ and children), being born into a certain religious group (ex. being a Jew),¹⁵ experiencing suffering,¹⁶ or

⁶ See D. Cohn-Sherbock, *Rabbinic Perspectives on the New Testament* (New York: Mellen Press, 1990), p. 1 who cites many modern Jewish apologists who attempt to deny the important role that *Gehinom* plays in the rabbinic tradition.

⁷ *Tosefta Sanhedrin* 13:3-5.

⁸ *Masekhet Semakhot of Rabbi Hiyah* (1:6), *JT Pe’ah* 1:1.

⁹ As just mentioned regarding what actions brings a person to hell, here too, one can question the literalness of many of these statements. Our approach in this paper will be to take them seriously.

¹⁰ Such as keeping the Sabbath (*Shabbat* 118a), offering sacrifices (*Gen. Rabah* 44:2), fasting (*Bava Metzia* 85a), and maintaining the laws of family purity (*Otzar Midrashim* pg. 398).

¹¹ Through prayer (*Berakhot* 15b), repentance (*Ecc. Rabah* 7:21), and belief in God and Abraham his servant (*Otzar Midrashim* “Avraham Avinu”).

¹² Such as visiting the sick (*Nedarim* 40a), giving charity (*Gitin* 7a), or refraining from slander (*Midrash Tehilim* (ed. Buber, n. 52)).

¹³ e.g. *Song of Songs Rabah Parshah* 8.

¹⁴ e.g. *Sotah* 10b.

¹⁵ e.g. *Num. Rabah* 2:13.

¹⁶ *Bava Batra* 10a; *Song of Songs Rabah* 2:3; *Eruvin* 41b; *Yevamot* 102b; *Lev. Rabah* 32:1;

through *mitzvot* being performed on them by others such as circumcision¹⁷ or burial in the Land of Israel.¹⁸ While each of these categories deserves research in their own right, our focus in this article will be on explicating one of these methods from the latter group—that of child salvation.¹⁹

III. Child-Salvation Theology

Rabbinic texts describe two types of children who “save” their parents. The first are young children who die while they are still young, and the second are righteous children who, through their good deeds, cause their parents to escape *Gehinom*. The primary rabbinic work that presents us with an anthology of voices with regard to child salvation is the *Mishnat Rabbi Eliezer*.²⁰ In chapter five of this work, an anonymous voice draws a distinction between these two forms of salvation. Whereas salvation through the death of a child only saves that child’s parents, righteous children can retroactively save their ancestors for up to four generations:²¹

So too the saving of adult [righteous] children is greater than the saving of the minor children [who die young]. For the saving of the adult [righteous] children saves until three or four generations, but the saving of the minor children [who die young] only saves the actual father alone.²²

In order to properly explicate these two forms of child salvation, we will

Pesikta Zutrata, *Shemot* 21.

¹⁷ e.g. *Eruvin* 19a; *Midrash Tanhuma* section 6.

¹⁸ *Pesikta Rabati Parshah* 1; *Yalkut Shimoni*, Psalms 874.

¹⁹ We should also note that sometimes this “saving” is depicted by rabbinic texts as a method to guard against *entering* hell, while other texts describe it as an escape *out of* hell.

²⁰ Most scholars maintain that *Mishnat Rabbi Eliezer* was composed during the 8th c. in Eretz Yisrael. It does, however, preserve (as in our case) precious older *Tanaitic* material that has no analogues in the rest of the rabbinic corpus. The *midrash* is most well-known for its first two chapters, in which the 32 hermeneutical principles to explicate *Agadah* are listed. Sa’adiah Gaon was first to cite this *midrash* in the 10th c. The *midrash* was first published using multiple manuscripts obtained in Yemen in 1933 by Hillel Gershom Enelow, a brilliant scholar, writer, and prominent Reform Rabbi. The *midrash* was reprinted twice in the last 5 years by different Orthodox printing presses and, while both recent editions rely heavily on Enelow’s first printing and on his capacious notes, neither of them cites Rabbi Enelow by name. For more on this *midrash* see H.G. Enelow, “The Midrash of Thirty-Two Rules of Interpretation,” *Jewish Quarterly Review* 23:4 (1933), 357-367.

²¹ Other rabbinic texts, though, that profess a righteous-child salvation theology do not make this claim.

²² H.G. Enelow, *Mishnat Rabbi Eliezer* (New York: Bloch Publishing, 1933), p. 95. This section of the *midrash* was erroneously cited as forming part of *Midrash Hashkem* in *Otzar Midrashim*, ed. JD Eisenstein (New York: Jewish Writers Guild Cooperative Press, 1915), p. 138. For more on this mistake, see Enelow, *Mishnat Rabbi Eliezer*, p. 95, notes to line 3.

examine the proof-texts provided by these rabbinic voices. This approach will not only isolate the various interpretive and hermeneutical justifications, but will also, at times, help us unravel the conceptual justifications as well. For in what proof-text a rabbinic interpreter chooses to anchor his theology, often influences or is reflective of a specific understanding of that theology.

As we have mentioned, although some rabbinic texts creatively anchor their afterlife theologies using re-interpretation and extrapolation from *theological* passages found in *Tanakh*—even if on the surface they have nothing to do with issues pertaining to the next world—many voices find biblical support in *non-theological* genres altogether. These include biblical legal passages and narratives, as well as early rabbinic laws and sayings. Thus, in these latter instances, the author of a specific afterlife theology not only has the challenge of linking seemingly non-afterlife subjects to the afterlife, but also of making seemingly non-theological texts somehow relevant to theology. We will start our study by looking at proof texts culled from theologically based biblical passages, and then turn our attention to the non-theologically based ones, and then finally to the rabbinic texts.

1. Based on Biblical Theology: The Shift From Inherited Guilt to Child-Salvation

Inherited Guilt: Background

Four rabbinic texts extract a child-salvation theology from biblical passages that, on a simple read, maintain a theology that children will be *punished* for the sins of parents. Before embarking on an analysis of these rabbinic voices, however, we need to explicate the theology of inherited guilt as it appears in *Tanakh*. In Exodus 34:6-7, God, as a consequence of Israel's sin of the Golden Calf, articulates His attribute formulary to Moses as a method of obtaining Divine mercy. The passages state:

6) The Lord passed before him and proclaimed: “The Lord! The Lord! A God compassionate and gracious, slow to anger, abounding in kindness and faithfulness, 7) extending kindness to the thousandth generation, forgiving iniquity, transgression and sin; yet He does not remit all punishment, but visits the iniquity of parents upon children and children's children, upon the third and fourth generations.”²³

In these verses, God declares His kindness and mercy with his attendant compassionate qualities that characterize his providence. The perplexing element of the attribute formulary is the notion that “[God] visits the iniquity of parents upon children” (v. 7). This theological doctrine of divine wrath and

²³ All biblical translations, except where otherwise noted, are taken from *JPS Hebrew-English Tanakh* (Philadelphia: Jewish Publication Society, Philadelphia, 1999).

harsh punishment does not square with God's other attributes which accentuate His mercy. Yochanan Muffs, due to the aforementioned consideration, as well as from other biblical texts, argues that this passage is really an expression of God's mercy—not wrath. For him, the import of the verse is not that children *also* suffer for the sins of their parents, but that God does not punish sinners immediately. Instead, God compassionately delays punishment until the time of their children or grandchildren.²⁴

Although Exodus 34 presents trans-generational punishment as a symbol of God's forgiving quality by delaying punishment, Exodus 20:5-6 reflects a different approach to the theology, as seen by its context:

5) You shall not bow down to them or serve them. For I the Lord your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and upon the fourth generations of those who reject Me, 6) but showing kindness to the thousandth generation of those who love Me and keep My commandments.²⁵

Here, the passage appears in the context of the Decalogue, and the doctrine of inherited guilt is used as a motivating and even threatening device to exhort Israel into complying with the prohibition of idolatry by stressing the awful consequences of sin. Not only will sinners suffer for their transgressions, but their progeny will be punished as well. The purport of “visiting the guilt of the parents upon the children” (v.5) is seen here—as opposed to Exodus 34:7—not as *delaying* punishment, but as an *extension* of guilt and responsibility. Though later prophets, most notably Ezekiel and Jeremiah, forcefully and explicitly reject the concept of inherited guilt, whether in its extended or delayed form, some remnants of this older tradition still manage to find their way into prophetic texts.²⁶

A. Righteous–Child Salvation Replaces Inherited Guilt

Many rabbinic texts have sought, in different ways, to solve the ethical and literary (relating to both context and consistency) problems that inhere in these passages.²⁷ The first anonymous voice in the *Mishnat Rabbi Eliezer* solves both

²⁴ Yochanan Muffs, *Love and Joy: Law, Language and Religion in Ancient Israel* (Cambridge: Harvard University Press, 1992), 16-22.

²⁵ The same formulation appears in the text of Deut. 5:9.

²⁶ One such example is Jer. 32:18 which states: “And who recompenseth the iniquity of the fathers into the bosom of their children.”

²⁷ See *Mekhilta de-Rabbi Yishmael*, ed. Horowitz—Rabin (Jerusalem: Shalem Press, 1998), p. 226, *Ba-Hodesh*, #7; *Midrash Tanaim*, ed. Hoffman (Berlin: Poppelier Press, 1908), p. 160; *Mekhilta de-Rabbi Shimon ben Yohai*, ed. Epstein and Melamed (Jerusalem: Gates of Mercy Press, 1979), p. 148, #20; *Midrash Tanhuma*, (Jerusalem: Levin Epstein Press, 1962), p. 114, #19; *Makot* 24a; *Num. Rabah*, (Jerusalem: Vagshal Publishing, 2001), p. 479, #33. Also see S. Schechter, *Aspects of Rabbinic Theology* (New York: Schocken Books, 1961), 185-189.

of these challenges by re-interpreting and transforming the meaning of these passages from espousing a theology of inherited guilt into one promoting child-salvation. He writes:

And where do we know that saving adults occurs until the fourth generation? As it says ‘visiting the guilt of parents upon the children’ (*poked avon avot*) (Ex. 20:5). You cannot say that if the father was a wicked man and the children were righteous that He (God) inflicts the wickedness of the father on them because this does not comport with [God’s] attribute of Justice (*midat ha-Din*). You can also not say that he (the child) is inflicted with his [parents’] obligation because this doesn’t comport with [God’s] attribute of Mercy (*midat ha-Rahamim*). So what is [God’s] attribute of Mercy? He (God) suspends [the sins of] the father until four generations. If one of the children is found to be righteous then the father is saved. If none of the children are found to be righteous than everyone gets punished according to what he deserves. You may say that “Visiting the iniquity of the parents upon the children” is a language of anger. Go and study the thirteen principles of mercy (Ex. 34): ‘Lord, Oh Lord, God of mercy etc’. So even when He says ‘*poked avon avot*’ it has language of mercy—that He suspends [the sins of] the fathers for four generations—that if one of the generations is righteous it saves [the father] from the judgment of hell. Furthermore, at the time that Moses our teacher came and requested mercy, what did he say? (Num. 14:12-18) ‘And now...’—and if (*poked*) is language of anger—he wouldn’t have said this.²⁸

This remarkable *midrash* openly declares its re-interpretation to be driven, primarily, by moral sensibilities. The author denies a literal read of Exodus 20 since vicarious guilt is neither merciful nor just, and God, who governs the world through these values, would never command that children be punished for the sins of parents. Moreover, this *midrash* argues that the doctrine of inherited guilt would never have been listed in the context of Exodus 34, which contains a list of God’s compassionate qualities.²⁹

The first voice of the *Mishnat Rabbi Eliezer* text, therefore, re-interprets the passage to mean that if a person sins and is worthy of death, his meritorious children or grandchildren (up to four generations) can save him from hell. The *midrash* explicates the phrase: “visiting the guilt of the parents upon the

²⁸ *Mishnat Rabbi Eliezer*, p. 95.

²⁹ See Y. Muffs, *Love and Joy*, 16-22, who makes the same point. Interestingly, both Y. Muffs and the author of *Mishnat Rabbi Eliezer*, although living hundreds of years apart, use Numbers 14 to confirm their theses.

children” to mean that the parents’ sins could be atoned for by the children, and not—the way it is usually understood—that the children will suffer for the sins of the parents. Instead of parents harming their children (according to a literal read of Exodus 20), this *midrash* declares—through its bold re-interpretation—that righteous children (and grandchildren) can rescue their parents (and grandparents) from the pains of hell.

B. Righteous–Child Salvation Extrapolated from Inherited Guilt – Two Versions

Version 1:

Rabbi Joshua, the second voice in the *Mishnat Rabbi Eliezer* text, also derives a theology of righteous–child salvation from Exodus 20, but accomplishes this task through a different exegetical technique:

Rabbi Joshua says: what attribute is greater – attribute of the good or attribute of punishment? And if [regarding] the attribute of punishment, which is less, the children are drawn after the fathers in the sin of the fathers, then [regarding] the attribute of goodness, which is greater, should it not be the case that fathers are drawn after the children in the world to come?³⁰

Whereas the first anonymous voice of *Mishnat Rabbi Eliezer* radically re-interprets Exodus 20 and thereby replaces a theology of inherited guilt with a theology of righteous–child salvation, Rabbi Joshua maintains the straightforward read of Exodus 20, thereby adopting a theology of inherited guilt. He uses, however, this theology to build a case through an *a fortiori* argument (*kal ve-homer*) for righteous–child salvation. He argues that if God *punishes* family members for the sins of other family members (inherited guilt) then He should certainly (given that God’s attribute of “goodness” outweighs His attribute of “punishment”) *reward* family members for the righteous actions of other family members (righteous–child salvation). In short, in order to justify righteous–child salvation, the first voice of *Mishnat Rabbi Eliezer* re-interprets Exodus 20, while Rabbi Joshua (the second voice) merely extrapolates from it.

We should note though, that by emphasizing God’s benevolent qualities, both voices ultimately use value-laden considerations, not formal exegetical ones, as the decisive factor in their interpretations.³¹ Yet, the key difference between them is that Rabbi Joshua’s more moderate justification, using extrapolation and not substitution, does not undermine the simple read of Exodus 20 which reflects God’s wrath. We can suggest two reasons why Rabbi Joshua adopts this less radical approach: either Rabbi Joshua does not share the assumption that inherited guilt is unjust, and therefore does not feel compelled to re-interpret,

³⁰ *Mishnat Rabbi Eliezer*, p. 97

³¹ I see Rabbi Joshua’s *a fortiori* argument as based on the value of God’s goodness.

or, more plausibly, he agrees that inherited guilt is unjust and is compelled to re-interpret, but is unable to do so because he gives value-laden considerations less weight as factors of interpretation. Rabbi Joshua, according to the second possibility, may be prepared to use values as a criterion of interpretation so long as it does not supplant the logical read of the biblical verse.

Yet, putting aside this crucial hermeneutical difference, both voices share an interpretive commonality: they both exploit a theology that professes punishment and transform it into its inverse—a theology of salvation! Moreover, these two voices not only share a similar hermeneutical approach, but they both maintain an *unmerited* conceptual approach to righteous–child salvation. The *merited* approach to righteous–child salvation would argue that the parents of a righteous child are saved because they (the parents) played a critical role in educating the child. Thus, righteous–child salvation theology would be both rational and equitable, for the deeds performed by a child would be directly connected with the actions of the parents. Since the parents taught their child right from wrong, they can take credit for their child’s virtuous behavior and thereby merit salvation. A medieval Jewish text, *Sefer Hasidim* (13th c. Germany), explicitly adopts this approach:

But thus said the Holy One, blessed be He: A son merits his father, for example, where the father sins and gives his child to learn Torah, and to do good deeds. Since through the father the son merited, the son merits the father, and if the father commands the children to do [good] things after their death, behold when the son does them it is as if the father does them.³²

This rational explanation would not fit according to the two previous rabbinic voices due to the potential generational distance (up to four generations) between the saver and the one who is being saved. How could the actions of someone living four generations earlier meaningfully influence the actions of later descendants? These rabbinic voices would most likely agree with the unmerited approach, which would argue that the father or grandparents are not deserving of salvation based on their own actions. This approach would either claim that the theology of righteous–child salvation is an inscrutable mystery, a gift from God to the *child* for the child’s good behavior, or is based on the principle of extension, articulated below by the influential medieval Talmudist, R. Solomon Ibn Aderet, known as Rashba (Spain 14th c):

The child is a part of the father in flesh: The flesh, sinews and bones... And when a person dies, the Holy One blessed be He takes what is His, and leaves to the father and mother their portion, as it says: “*And the dust returns to the earth as it was; and the spirit returns to God who gave it*” (Ecc. 12:7). And therefore,

³² *Sefer Hasidim Siman* 1171 (Margoliot)

[the] reward of this world is physical—fathers are extended to their children... And that [is]—because the son—since his body alone is part of the father’s and not his soul, as we have said, nevertheless behold he is extended (or born) from the father. And therefore, the son is obligated in the honor of his father and his fear, and the father is not commanded so like the son. For the one extended (born) is always obligated to the extender (bearer)—even though he is born automatically, involuntary [to his actions]—and not voluntary [to his will]. And therefore, when he gives birth to a righteous son, [a] worshipper of God, he [too] appears as if, from his offspring, he is worshipping God... But the father, why shall he be a merit to the soul for the son? The father is not part of the son, and is not born from him—not in body and not in soul. If so, what benefit will the father merit for the son?³³

Rashba claims that children are the physical extensions of their parents and thus, when the children do righteous actions, it is as if their parents are performing those very same actions. This perspective, Rashba claims, explains why the parents’ righteous deeds do not save the child. Children are extensions of their parents since they only exist *on account of* their parents. Parents, however, do not owe their existence to their children, and therefore are not viewed as extensions of them.³⁴

Version 2:

Rabbi Joshua (as cited in *Mishnat Rabbi Eliezer*) is not the only rabbinic voice to logically deduce child-salvation theology by building an *a fortiori* argument from a theology of inherited guilt. A text from *Ecclesiastes Rabah* (4:1) does so as well, but with crucial differences:

BUT I RETURNED AND CONSIDERED ALL THE OPPRESSIONS THAT ARE DONE UNDER THE SUN (4:1)...
 R. Judah says: It refers to the children who are buried early in life through the sins of their fathers in this world. In the Hereafter they will range themselves with the band of the righteous, while their fathers will be ranged with the band of the wicked. They will speak before Him (God) [saying]: ‘Lord

³³ Responsa of Solomon Ibn Aderet 5:49

³⁴ There are a couple of practical differences between the approach of *Sefer Hasidim* and Rashba. First, what would happen in a situation where the child was adopted? According to the *Sefer Hasidim*, this child would still save the parent, whereas according to Rashba—he would not. The second practical difference would be in a situation where the child became righteous without the influence or education of the parent. *Sefer Hasidim* would argue that the child doesn’t save the parent, but Rashba would argue that he still does.

of the Universe, did we not die early only because of the sins of our fathers? Let our fathers come over to us through our merits.' He replies to them: 'Your fathers sinned also after your [death], and their wrongdoings accuse them.'

R. Judah bar Ilai said in the name of R. Joshua b. Levi: At that time, Elijah (may he be remembered for good) will be there to suggest a defense. He will say to the children: 'Speak before Him (God) [thus]: "Lord of the Universe, which Attribute of Thine predominates, that of Grace or Punishment? Surely the Attribute of Grace is great and that of Punishment small, yet we died through the sins of our fathers. If then the Attribute of Grace exceeds the other, how much more so should our fathers come over to us!" Therefore He (God) says to them: 'Well have you pleaded; let them come over to you,' as it is written: "*And they shall live with their children, and shall return*" (Zech. 10:9), which means that they returned from the descent to *Gehinom* and were rescued through the merit of their children. Therefore every man is under the obligation to teach his son Torah that he may rescue him from *Gehinom*.

According to Rabbi Judah, when the author of Ecclesiastes speaks of "all the oppressions that are done under the sun" (4:1), he refers to children who die young because of the sins of their parents. They are "oppressed" not only because they have lost their lives due to no fault of their own, but also because they "have no comforter" (*ibid.*) since their fathers are joined with the wicked in hell and the young children (since they never sinned as adults) are counted among the righteous in heaven. Their oppression continues, argues Rabbi Judah, when the children, basing themselves on a death-of-child salvation theology, request that their parents be transferred to heaven. God refuses to grant them their wish since the death of young children only atones for sins committed before the moment of death, and not after.³⁵

Rabbi Judah b. Ilai (in the name of Rabbi Joshua b. Levi), who is the second rabbinic voice in this text, then states that Elijah the Prophet will teach these children how to marshal a successful argument that will influence God's seemingly obstinate attitude. Elijah suggests that the children shift their strategy: do not plead for parental salvation due to their own untimely death, but rather

³⁵ I am reading "merit" in this context as "through our deaths." The other way to read this text is that the children were asking to be saved because of righteous-child salvation, and the "merit" refers to the fact that the children never sinned. According to this read, God "misunderstands" and responds as if the children were making a claim of death-of-child theology. The second implication of this alternate read would be that Elijah's contribution, according to Rabbi Judah b. Ilai (second voice in the text), is more stylistic than substantive. There is a tactical shift (evoking God's mercy) rather than a substantive one (shifting salvation theologies).

because of their “righteous” status. The specific argument for righteous–child salvation that the children make with the help of Elijah parallels the *a fortiori* argument articulated by Rabbi Joshua above in the *Mishnat Rabbi Eliezer* text. That is, if God punishes children for the sins of parents (vicarious guilt), then certainly—since God’s good attributes surpass his attribute of punishment—God should save parents when their children are deemed “righteous” (vicarious merit). Ultimately, God, according to Rabbi Judah b. Ilai, accepts this argument and the parents are reunited with their children in heaven.

Although Rabbi Joshua in the *Mishnat Rabbi Eliezer* text and Rabbi Judah b. Ilai through the voice of Elijah adopt the same *exegetical* basis for righteous–child salvation theology (i.e. extrapolating from inherited guilt), they maintain radically different *hermeneutical* assumptions. For Rabbi Joshua, as we have noted, rabbinic scholars can use value-laden considerations as factors in their interpretations of specific biblical passages so long as they do not supplant the straightforward meaning of the text.³⁶ On the other hand, through his depiction of the give-and-take between God and these “righteous” children, Rabbi Judah b. Ilai implicitly argues that humans *cannot* use value-based interpretations of biblical texts without the consent of God who is the author of these biblical texts. In this respect, Rabbi Joshua can be seen as more *radical* than his rabbinic counterpart, for he grants more weight to ideological or value-based interpretations and thus greater flexibility to rabbinic exegetes who no longer need to justify their interpretations through formal hermeneutical rules or divine confirmation.

Yet in two respects, Rabbi Judah b. Ilai can be seen as being even more radical than Rabbi Joshua. First, he bestows greater power to humans who can “convince” God to adopt a certain theology of salvation that He (God) was not committed to initially. Rabbi Judah b. Ilai thus sees humanity as playing critical roles in shaping the way God judges people in the next world. In short, whereas Rabbi Joshua grants humans *interpretive* strength in relation to Scripture, Rabbi Judah b. Ilai bestows upon humanity immense *persuasive* strength in relation to God.

The second radical implication for Rabbi Judah b. Ilai focuses not on humanity’s ability to affect God’s governance of the world, but rather on our understanding of the open-ended nature of *Tanakh*. Initially, according to Rabbi Judah b. Ilai, the Torah did not profess a theology of righteous–child salvation. Later however, after the logical arguments of these “oppressed children” were made, the Torah came to be interpreted as supporting righteous–child salvation theology. The implication, then, is that the Torah can be interpreted in many different ways and—more importantly—its interpretation could evolve over time.

We should also note that the *Ecclesiastes Rabah* text chooses to dramatize

³⁶ As we pointed out, the first voice of *Mishnat Rabbi Eliezer* went even further than this view and allowed values to even undermine the straightforward read of Exodus 20.

the persuasive power of humanity in a highly personal manner. The challenge to God does not come from a detached rabbinic scholar who confronts God's seemingly inconsistent theology, but from *actual children* who suffer for their parents' sins! The protest to God's justice system comes precisely from the very victims of that system. Thus, ironically, this text depicts "righteous" children who die young due to inherited guilt as the ones who establish, with God's ultimate consent, the very theology of righteous-child salvation!

Moreover, the uniqueness of this *Ecclesiastes Rabah* text stems not only from its hermeneutical justification—i.e. the *a fortiori* argument marshaled by suffering children, combined with God's revelatory confirmation—but also from its implied conceptual broadening of the term "righteous." The term may no longer only be limited to those children who *act* righteously, but may even be applied to those children who die *without sin*. Since these children may be viewed as having left the world without having had the opportunity to transgress the will of God (i.e. they died too young to commit a sin or even before the age of 13) they can be considered "righteous." This extension in *Ecclesiastes Rabah* implies then, that like the first voice of *Mishnat Rabbi Eliezer* and Rabbi Joshua, righteous-child salvation is unmerited. In this case, we cannot point to the parents' positive influence as the cause of their children's "righteous" status.

We can also speculate, therefore, that the last line of the *Ecclesiastes Rabah* text which reads: "therefore every man is under the obligation to teach his son Torah that he may rescue him from *Gehinom*," was added by another rabbinic voice. Two reasons can substantiate this theory. The first is that there is a disjunction between this line, which emphasizes the need for *actual* righteous behavior on the part of the child (Torah study), and the rest of the *Ecclesiastes Rabah* text, which, as we have just noted, only requires a formal definition of "righteousness" that would include young children who never studied Torah. The second comes from a *Yalkut Shimoni* text which parallels the *Ecclesiastes Rabah* one, but does not contain this last line.³⁷

C. Inherited Guilt Becomes Death-of-Child Salvation

The *Mishnat Rabbi Eliezer* voices and the *Ecclesiastes Rabah* text are not the only texts to anchor a theology of child-salvation in a biblical passage professing inherited guilt. Rabbi Simeon b. Yohai, as quoted by an anonymous elder in *Bavli Berakhot* 5b, does so as well:

A Tanna recited before R. Johanan the following: If a man

³⁷ See *Yalkut Shimoni, Ecclesiastes* #969. We should note that it is unclear whether this last line of *Ecc. Rabah* (4:1) maintains that teaching one's child Torah is the sole way to achieve righteous-child salvation and, thus, advocates a meritorious based view of this theology, or whether it is a statement of advice and expresses just one way for the child to achieve righteousness. If we assume that the later approach is correct, then this voice would not subscribe to a meritorious view of righteous child salvation theology.

busies himself in the study of the Torah or in acts of charity or buries his children, all his sins are forgiven him. R. Johanan said to him: I grant you Torah and acts of charity, for it is written: “*By mercy and truth iniquity is expiated.*” (Prov. 16:6) “Mercy” is acts of charity, for it is said: He that followeth after righteousness and mercy findeth life, prosperity and honour. “Truth” is Torah, for it is said: Buy the truth and sell it not. But how do you know [what you say about] the one who buries his children? A certain Elder [thereupon] recited to him in the name of R. Simeon b. Yohai: It is concluded from the analogy in the use of the word “iniquity”. Here it is written: By mercy and truth iniquity is expiated. And elsewhere it is written: “*And who recompenseth the iniquity of the fathers into the bosom of their children.*” (Jer. 32:18)

The anonymous tanna of this pericope posits a view that if one studies Torah, does acts of charity, or buries his children then all of his sins will be forgiven. Thus, implicitly, being free of sin, he/she would be spared from any form of punishment in the afterlife. Rabbi Johanan assumes that the proof-text for all of these teachings is Proverbs 16:6, “By mercy and truth iniquity is expiated.” After explaining how one can derive the first two expiatory acts from this passage, Rabbi Johanan questions where the anonymous tanna adduced the last of his claims, i.e. death-of-child salvation theology. At that moment, an anonymous elder in the name of Rabbi Simeon b. Yohai resolved the difficulty by use of a “*gezeirah shaveh*” (often translated as “analogy”). This interpretive rule allows details from one context to be transferred to another context when the same word is used in both places. In our case, the elder (in the name of R. Simeon b. Yohai) points out that the word “iniquity” appears in both Jeremiah 32:18 and Proverbs 16:6, and therefore some content from one passage can be transferred to the other. Jeremiah 32:18 states that sins of the fathers are “paid” onto the children. From this context alone we could only know that “recompenseth” means punishment alone, and perhaps the sins of the fathers have not completely been absolved through the death of their children. Yet, because the word “iniquity” in Proverbs 16:6 is found in the context of atonement, we can posit that the “recompenseth” in Jeremiah 32:18, where the word “iniquity” also appears, includes not only punishment, but atonement (and salvation) as well.

This rabbinic text (*Berakhot* 5b), like the last three we have explicated, anchors its interpretive justification for child salvation in an exegetical inversion! It too exploits a theology of (inherited) *punishment* to build a case for (child) *salvation*. Yet, the *Berakhot* 5b text is hermeneutically unique. For according to all of the texts we have seen up until now, values are appropriated with varying

degrees of interpretive weight as criterion of interpretation.³⁸ Rabbi Simeon b. Yohai, on the other hand, refrains from drawing on values to transform inherited guilt into child salvation, and instead relies on a formal hermeneutical rule of *gezeirah shaveh*. One can conjecture that Rabbi Simeon b. Yohai sought to justify this theology without relying on value-laden interpretive maneuvers.

Although *Berakhot* 5b deviates from the other texts by drawing on formal criterion and not values, in another respect it parallels the view of Rabbi Judah b. Ilai as cited in *Ecclesiastes Rabah*. Both argue that child-salvation theology doesn't derive from exegetically replacing passages that seemingly deal with inherited guilt (view of first anonymous voice in *Mishnat Rabbi Eliezer*), nor through building an abstract *a fortiori* argument from inherited guilt (Rabbi Joshua), but instead stems from an *actual* case of inherited guilt. Yet even given this commonality, these two texts diverge in one key respect in addition to the issues of values: whereas Rabbi Simeon b. Yohai professes a theology of *death-of-child* salvation, Rabbi Judah b. Ilai (as well as the two rabbinic voices in *Mishnat Rabbi Eliezer*) affirms a theology of *righteous-child* salvation.

To summarize: all of our rabbinic texts exegetically transform the biblical theology of inherited guilt to marshal a case for child-salvation theology. For the first voice in *Mishnat Rabbi Eliezer*, child-salvation theology *displaces* inherited punishment; for Rabbi Joshua and Rabbi Judah b. Ilai (*Ecc. Rabah* 4:1), child-salvation theology *builds* upon inherited punishment; for the elder (in the name of Rabbi Simeon b. Yohai), child-salvation theology is an automatic *byproduct* of inherited punishment. Yet, as we have noted, the commonality between all of these approaches is to exegetically invert texts about punishment to profess a theology of salvation.

³⁸ Supplanting a straightforward read of Exodus 20, the first voice in *Mishnat Rabbi Eliezer* grants value considerations extreme power; Rabbi Joshua (second voice in *Mishnat Rabbi Eliezer*) is less radical and only draws on values when building a new theology; and Rabbi Judah bar Ilai (*Ecc. Rabah* 4:1) imbues values with minimal power—for it requires the confirmation of God before its interpretation can be established.

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

Introduction

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

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

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

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

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

Current Crisis in the United States

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

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

³ *Ibid.*

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

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

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

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

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

⁵ Soering

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

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

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

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

⁷ Soering

⁸ *Ibid.*

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

¹⁰ Soering

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

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

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

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

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

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

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Soering.

over the age of 45 re-offend.¹⁸

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

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

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

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

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

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

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

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

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

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

cessed 5 July 2007).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³¹ Sullivan

deviant, failures, and worthless.³²

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

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

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

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

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

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

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

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

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

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

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

Biblical Times

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

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

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

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

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

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

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

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

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

³⁷ "Kamah eved, kamah rav."

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