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DOES RELIGION HAVE A ROLE IN CRIMINAL SENTENCING?

*Jack B. Weinstein**

Sentencing, that is to say punishment, is perhaps the most difficult task of a trial court judge. It turns on the judge's heart and life experience. It reveals the human face of the law. Without empathy between judge and defendant, sentencing lacks humanity. It becomes a form of robotism.

Deuteronomy declares that if a person be adjudged wicked, the judge may order him beaten, but by no more than forty stripes, because above that number "thy brother should seem vile unto thee."¹ That is to say, a more severe beating would denigrate the dignity of a fellow human being. The judge must remember that the person before the court is entitled to respect, no matter how vile his or her acts.

The effect of religion on sentencing in the United States has been subtle, discreet, and indirect.² This is in keeping with the first phrase of the First Amendment of our Constitution, which embodies

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¹ Deuteronomy 25:3.

² See Jack B. Weinstein & Christopher Wimmer, *Sentencing in the United States*, (forthcoming in Israel 2007) (discussing the history of sentencing in the United States).

a concept that is critical to the welfare of everyone in this great country—the government shall make no law “respecting an establishment of religion.”³ This means, at least, that specific sectarian beliefs cannot be imposed on all of us through our secular system of criminal law.⁴ It does not mean that our individual and more general religious backgrounds will not affect our vision of what the criminal law, and particularly punishment, should be.

The attempts to impose Islamic law, Sharia, that we see in some countries today, or ancient Jewish law, would be rejected in the United States, as well as in Israel where Jewish law has a constitutional influence. However, religiously-based attitudes do influence the criminal law in our diverse society.

There is a constant struggle in our country to balance secularism and sectarianism. Our individual respect for the religious views of others and the discipline to try not to impose our own beliefs, directly or indirectly, onto others are central elements of American democracy and its laws.

As would be expected in a Jewish literature that began over three thousand years ago—during a time of tribal wars and paganism, kingly and priestly rule, rabbinic control, medieval philosophy, modern diverse influences in Israel, and the diaspora—almost every theory and practice of punishment can be found in such writings. They begin with punishment to appease God⁵ and end with the

³ U.S. CONST. amend. I.

⁴ *See id.*

⁵ Haim Hermann Cohn, Isaac Levitats & Menachem Elon, *Punishment*, in 16 *ENCYCLOPEDIA JUDAICA* 734-40 (Fred Skolnik & Michael Berenbaum eds., 2d ed. 2007) [hereinafter *Punishment*].

rehabilitated offender being welcomed back into society.⁶

The ancient Jewish procedural restrictions on the death penalty probably influenced Justice Arthur J. Goldberg when he spoke up in 1963, after years in which the Supreme Court had done almost nothing to reform the highly unsatisfactory state of capital jurisprudence. In a published dissent from the denial of certiorari in *Rudolph v. Alabama*,⁷ Justice Goldberg presented a series of constitutional issues he thought were “relevant and worthy of argument and consideration” on capital punishment.⁸ Justice Goldberg and his law clerk, Alan Dershowitz, who is now a professor at Harvard Law School, probably believed that the then-current death penalty practice was unsatisfactory. Justice Goldberg’s dissent exposed the problem (without referring to religious views), which ultimately led the Supreme Court to impose tight procedural and substantive limits on capital punishment and to its effective outlawing in states like New York.⁹

Personally, I oppose capital punishment.¹⁰ This view is based

⁶ *Id.*; see also *The Code of Maimonides, Law of Sanhedrin 17:7-9*, translated in THE CODE OF MAIMONIDES: THE BOOK OF JUDGES 49-50 (Julian Oberman et al. eds., Abraham M. Hershman trans., New Haven and London: Yale University Press 1977) [hereinafter *Maimonides, Law of Sanhedrin*] (explaining that “once the offender has received the penalty of flogging, he is restored to his former status” and is not to be degraded but considered again as a brother).

⁷ *Rudolph v. Alabama*, 375 U.S. 889, 889 (1963) (Goldberg, J., dissenting) (joined by Justices Douglas and Brennan, Justice Goldberg would have “consider[ed] whether the Eighth and Fourteenth[th] Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.”).

⁸ *Id.* at 889 (Goldberg, J., dissenting).

⁹ See *id.*; see generally *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam) (“[T]he imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”).

¹⁰ See, e.g., Jack B. Weinstein, *Death Penalty: The Torah and Today*, 224 N.Y. L.J. 37 (2000).

on my experiences as a practitioner, as a teacher of criminal law, and as a judge. I am appalled by the cruelty of United States' sentences.¹¹ But, I cannot dispute the conclusion of the distinguished Rabbi Yaakov Kermaier:

It cannot be said that the Torah would demand capital punishment today, but it would seem to allow it. If circumstances suggest that capital punishment is being administered unjustly or unreliably—a question that is hotly debated—Judaism would oppose such abuses. In open-and-shut cases of murder, however, capital punishment today is consistent with if not required by Jewish law.¹²

This year I have three female law clerks. One is orthodox Jewish, one is Christian and one is Muslim. I put to them the question: Can you briefly describe the effect of the Old Testament, the New Testament, and the Koran, respectively, on your view of sentencing? The Jewish clerk wrote:

Although Jewish Law approves of the death penalty in principle, its infrequency is attributable to the meticulous application of stringent rules regarding the admissibility and sufficiency of evidence. These procedural safeguards are so extensive that the Talmudic sage Rabbi Elazar ben Azariah referred to a Jewish court, the Sanhedrin, which dispensed a capital sentence only once in seventy years as a “bloody court.”¹³ Even today, a Jewish juror who complies

¹¹ *Id.*

¹² Fifth Avenue Synagogue, *Killing Killers: Capital Punishment in Jewish Law* (2007), <http://5as.org/content/default.asp?artid=208>.

¹³ Alex Kozinski, *Sanhedrin II*, NEW REPUBLIC, Sept. 13, 1993, at 16 (“[T]he Talmud tells us, a Sanhedrin that upheld an execution in seven years or even in *seventy* years was scorned as a bloody court.”).

with the requirement of Deuteronomy 17:6 could refuse to sentence a man to death without the testimony of two witnesses.¹⁴

The stringencies with which Judaism approaches punishment reflects a commitment to human dignity and the preservation of even a criminal's rights during the course of punishment.

"According to Jewish law, a death sentence must be carried out with the minimum of suffering and without offense to the" defendant's honor.¹⁵ "This is based on the Biblical verse in" Leviticus 19:18, " 'Love your fellow as yourself,' and the rule is 'Choose for him a humane death.' "¹⁶ In Judaism "we declare that even a condemned felon is your 'fellow.' "¹⁷

She concluded:

An American Judicial system which approached sentencing with the same degree of respect for human life would breed a system that is even more even-handed and just.

My Christian clerk declared:

The New Testament teaches that the nature of God is to be merciful and that we are all agents of his grace. The ethic expressed in the New Testament is one of tolerance and reconciliation, even with one's enemies. Christians should aim to bring good from evil. The overarching principle set out by Jesus in the New Testament is one of rehabilitative justice. Jesus

¹⁴ See *Deuteronomy* 17:6 ("[H]e must not be put to death on the testimony of a single witness.").

¹⁵ PPA 4/82 *State of Israel v. Tamir* [1983] IsrSC 37(3) 201.

¹⁶ *Id.*; see also *Leviticus* 19:18; The Babylonian Talmud, *Tractate Sanhedrin* 45a (Rabbi I. Epstein ed., Jacob Shachter trans., New ed., The Soncino Press 1987) [hereinafter *Tractate Sanhedrin*].

¹⁷ *Tamir*, IsrSC 37(3) at 201.

himself associated with people considered to be sinners. What people had done in the past was not of importance; the most important thing was that people changed their ways. Jesus said: "I came not to call the righteous, but sinners."¹⁸ As Jesus was concerned with rehabilitating sinners, so too should sentencing be concerned with rehabilitating those who break the law. The focus should, in the end, be on correcting the underlying conditions that cause individuals to end up in the criminal justice system and to assist those individuals in returning to society as productive citizens.

My Muslim clerk noted:

Sentencing under Islamic law provides a greater role to the victim than mere exhortation. For example, the sentence of death typically imposed for murder may be commuted if the victim's family agrees to accept a payment of money (known in Arabic as "*diyah*") in lieu of the murderer's life.

This structure is typical of Islamic punishment: a strict sentence is imposed, which victims alone have the power to soften. I agree with the underlying premise, which is that the most legitimate and enduring source of leniency is forgiveness by those who have been wronged. Like judges in the United States' system, victims are guided in their sentencing role by certain legislative principles set out in the Qur'an, which urge understanding and forbearance. For example, the Qur'an states that the recompense of an evil deed is the like thereof, but whoever forgives and amends shall have his reward from God.¹⁹

¹⁸ *Matthew* 9:13.

¹⁹ *Surah* 24:40, translated in *THE NOBLE QUR'AN* 729 (Muhammad Taqi-ud-Din Al-Hilali & Muhammad Muhsin Khan trans., 4th ed. 1994).

Her summary was:

I believe a sentencing procedure in which victims are actively encouraged by government to support leniency in cases where their conscience dictated it could put a permanent end to some of the constant debates about the necessity of punishment, rather than the merits of leniency that surround our current system.

Interestingly, the Muslim approach represents the newest change in American sentencing. Under recent amendments to federal law, victims have a right to be heard during sentencing and restitution for economic losses must be provided.²⁰ In death penalty cases the families of victims testify on the issue of capital punishment.²¹ The net effect of restorative justice may well be more sympathy for the victim and higher sentences.²²

Sentencing is a central subject in Talmudic law. Four of the eleven chapters in Tractate Sanhedrin (the sixth, seventh, ninth, and tenth), and all three chapters of the following Tractate Makot (literally lashes), deal with issues of sentencing and punishment.²³ Much more is interspersed throughout the remaining thirty-three

²⁰ 18 U.S.C.A. § 3771(a)(4) (West Supp. 2007); *id.* § 3771(a)(6). *See generally* Justice for All Act of 2004, H.R. 5107, 108th Cong. (2004) (enhancing protection for victims of federal crimes, supplying federal resources to state and local governments, and providing safeguards to prevent wrongful convictions and executions).

²¹ 18 U.S.C.A. § 3771(b)(1) (West Supp. 2007).

²² Discussions on "Restorative Justice" may be found on a variety of websites. *See, e.g.,* Answers.com, Restorative Justice, <http://www.answers.com/restorative+justice&r=67>; *see also* MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1 2007) ("Restorative-justice principles are mentioned in a growing number of contemporary sentencing codes.").

²³ *See generally* Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading and Strangulation*, 41 CRIM. L. BULL. 1, 2 (2005).

tractates of the Babylonian Talmud.

My Jewish law clerk properly emphasized the general divergence in Talmudic law between sentencing theory and practice, although she did not note that Hebrew kings were entitled to pronounce a death sentence without safeguards.²⁴ In theory, capital sentences and corporal punishments abound. In practice, at least from a biblical perspective, punishment was sometimes virtually impossible to carry out because of stringent procedural requirements. The classic example is the case of Rabbi Simon ben Shetach, who described his observing a chase ending with the pursuer and victim running into a closed room. Moments later he entered to see the pursuer and victim and a knife dripping in blood. Because two witnesses did not deliver the mandated *hatra'ah*, a warning against the crime and its punishment, and did not actually observe the murder, the biblically ordained death penalty could not be imposed.²⁵

There is another telling Talmudic account. The period immediately preceding the destruction of the Second Temple (70 C.E.) was socially chaotic, with a pervasive breakdown of law and order. Speaking of this period, the Talmud relates that, at least in part, as a consequence of the multiplicity of murders, the Sanhedrin withdrew from the Temple precincts, depriving courts of the ability to try capital cases.²⁶

²⁴ *The Code of Maimonides, Law of Kings and Wars* 3:10, translated in THE CODE OF MAIMONIDES: THE BOOK OF JUDGES 214 (Julian Oberman et al. eds., Abraham M. Herschman trans., New Haven and London: Yale University Press 1977).

²⁵ *Tractate Sanhedrin*, *supra* note 16, at 37b; Maimonides, *Law of Sanhedrin*, *supra* note 6, at 20:1.

²⁶ The Babylonian Talmud, *Tractate Abodah Zarah* 8b (Rabbi I. Epstein ed., A. Mishcon trans., Hebrew-English ed., The Soncino Press 1988).

From a modern secular view, the escalating murder rate should have been cause for increased judicial activity, not judicial withdrawal. That the opposite occurred suggests something about the Talmudic perspective on punishment. Punishments were apparently theoretically designed for a society in which they were to go largely unutilized. Their function was heuristic, the gradations of punishment indicating the ascending moral severity of a host of civil and religious crimes. But there was little blood lost because the punishments would be expected to be rarely carried out.

The modern equivalent of this philosophy is H.L.A. Hart's theory of internalization: for most of us the law tells us what we are expected to do and we do it without threat of punishment.²⁷ Hart adopted a theory that rules are followed because a majority of people adopt an "internal point of view" with respect to the law, meaning people accept a rule and use it to both guide their own conduct and evaluate the conduct of others.²⁸ Once a critical mass of people has internalized the rule, it becomes a social norm.²⁹ This contrasts with the sanction-centered theory of law, where the primary motivation for obedience lies in the desire to avoid punishment.³⁰

A person internalizes a command when he or she feels obliged to follow the rule. This feeling of obligation may arise for a

²⁷ See H.L.A. HART, *THE CONCEPT OF LAW* 40 (2d ed. 1994).

²⁸ See Scott J. Shapiro, *What is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1157 (2006) ("The internal point of view is the practical attitude of rule acceptance—it does not imply that people who accept the rules accept their moral legitimacy, only that they are disposed to guide and evaluate conduct in accordance with the rules.").

²⁹ See Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 *FORDHAM L. REV.* 1171, 1179 (2006) (citing HART, *supra* note 27, at 86).

³⁰ See Shapiro, *supra* note 28, at 1158-59.

myriad reasons. People may obligate themselves to conform their conduct for reasons ranging from a belief in the rules' moral superiority to simple self interest or to a desire to conform to the rest of society.³¹ Once a rule has become a social norm, and thus internalized by most members of society, it retains its validity even where enforcement is lax, so long as it remains a guide for society.³²

Not surprisingly, there are few instances in the vast ocean of Talmudic law and lore in which death sentences are described as actually having occurred. In one noted instance, Rabbi Judah ben Tabbai ordered the execution of a witness who perjured himself in a capital case. The judge was said to have suffered life-long torment for having failed to observe the strict requirements for conviction.³³

This theory-practice dichotomy comes across as well in the Talmudic interpretation of the oft-cited biblical injunction of "an eye for an eye."³⁴ In fact, monetary compensation, not an eye, is awarded for loss of a human orb.³⁵ One tradition is uniform across the spectrum of rabbinic authority—there is to be no disfiguration. The biblical formulation of "an eye for an eye" thus conveys only a

³¹ See Perry, *supra* note 29, at 1180-81; HART, *supra* note 27, at 203.

³² See Perry, *supra* note 29, at 1174-75, 1182-83 ("There is, for example, a valid law against jaywalking in New York City, and this is true despite the fact that virtually everyone jaywalks there.").

³³ The Babylonian Talmud, *Tractate Shebu'oth* 5b (Rabbi I. Epstein ed., A.E. Silverstone trans., Hebrew-English ed., The Soncino Press 1987) ("Judah b. Tabbai used to go and prostrate himself on the grave of that [slain] witness, and his voice would be heard and people thought that it was the voice of the slain man . . .").

³⁴ *Exodus* 21:24; *Leviticus* 24:20.

³⁵ The Babylonian Talmud, *Tractate Baba Kamma* 83b-84a (Rabbi I. Epstein ed., Rabbi E. W. Kirzner trans., Hebrew-English ed., The Soncino Press 1990). The *Baba Kamma* is the first of a series of three Talmudic tractates in the order of *Nezikin* ("damages") that deal with civil matters such as damages and torts. *Baba Kamma* discusses damages and the various forms of compensation owed for them.

heuristic notion. While loss of a body part cannot be adequately compensated through money damages, tort compensation is a pragmatic way for mortals to meet the juridical problem of today and yesterday. This was an enormous shift from pre-Biblical tribal retribution to individual responsibility.

There are a number of theoretical grounds for criminal punishment: retribution, a sense of just desserts; general deterrence targeted against criminal conduct in society at large; specific deterrence directed at recidivism of the defendant; incapacitation; and rehabilitation. All are embodied in our law.³⁶ The calibration of society's moral repugnancy of specific criminal conduct so people will know what is expected of them also supplies support for criminal punishment. The phrase, "and you will eliminate the evil from your midst," (or its equivalent) which sounds in retribution, appears nine times in Deuteronomy.³⁷ The phrase "and the people will see and fear" (or its equivalent), which sounds in general deterrence, appears in Deuteronomy four times.³⁸

Two biblical paradigms conceivably could be construed as directed toward rehabilitative ends, in the sense of accepting the criminal as entitled to a free person's dignity.³⁹ The first is the

³⁶ 18 U.S.C.A. § 3553(a) (West 2000) (setting forth the "[f]actors to be considered in imposing a sentence").

³⁷ *Deuteronomy* 13:5; 17:7; 17:12; 19:19; 21:21; 22:21; 22:22; 22:24; 24:7.

³⁸ *Id.* at 13:11; 17:13; 19:20; 21:21.

³⁹ *See Punishment*, *supra* note 5, at 738 stating:

The obligation to respect the dignity of every individual applies even when the individual in question is an offender who is serving a sentence, and this obligation applies even during the process of the sentence itself. The rabbis ordered that even the execution of a person sentenced to death must be carried out in such a fashion that minimizes suffering and does not include humiliation.

enslavement of the thief who cannot make restitution.⁴⁰ While this is a practice harsh to modern sensibilities, the rabbinic gloss attenuated it almost to the point of extinction. In view of the overly solicitous regulation of the master-slave relationship for the welfare for the slave, it is remarked, “Whoever buys a Hebrew slave is like buying a master for himself.”⁴¹ The second, perhaps, is the exile of a murderer guilty of negligent homicide to the six cities of refuge (plus the forty-two levitical cities),⁴² but it must be evaluated in the light of the Talmudic dictate that the exile of the student compels the exile of his teacher as an accompaniment.⁴³

Current secular and codified Jewish jurisprudence of punishment exist on different planes. For example, I conclude that there is no room for capital sentencing in a modern criminal justice system—that whatever retributive value it offers is far outweighed by both its coarsening influence on the public and its failure to deter—and, of course, the almost total absence of any rehabilitative consequence. But, it is difficult to draw support for a proposition against capital punishment by analogs to the use or non-use of capital punishment in classical Jewish tradition, whose core is charged with a near utopian perspective on criminal conduct and its infrequency.

As a practical matter, we cannot premise our modern secular

⁴⁰ *Exodus* 22:2-4.

⁴¹ The Babylonian Talmud, *Tractate Kiddushin* 20a (Rabbi I. Epstein ed., Rabbi H. Freedman trans., New ed., The Soncino Press 1990).

⁴² *Numbers* 35:6-34; see also *The Code of Maimonides, Laws of Murderers and the Protection of Life* 8:9, translated in MISHNEH TORAH, THE BOOK OF DAMAGES 564 (Rabbi Eliyahu Touger, trans., 1997) [hereinafter Maimonides, *Laws of Murder*].

⁴³ See The Babylonian Talmud, *Tractate Makkoth* 10a (Rabbi I. Epstein ed., Rabbi Dayan H. M. Lazarus trans., Hebrew-English ed., The Soncino Press 1987) [hereinafter *Tractate Makkoth*].

criminal code on the Talmudic, somewhat millenarian notion: that is to say, because mere authoritative disavowal should be sufficient to order the socially acceptable conduct of nearly all persons, there is no need to apply the harshness of any particular mode of punishment.

An idealistic system of moral suasion where lions and lambs lie down together does not appear to work in our diverse modern society with the stresses that lead to widespread criminality. If ever a Judaic code of law and order functioned in practice, can we not assume that there had to be more bite than the mere growl achieved by circumvention of harsh punishment in fact that my Jewish law clerk suggests?

Alongside the biblically ordained and rabbinically interpreted scheme of crime and punishment, there appears to have existed a regime of rabbinically crafted and judicially administered punishment that was both more severe and more fluid.⁴⁴

Abbe Dienstag, my trusted clerk of a quarter of a century ago, hazards a guess that 95 percent of the attention of Talmudic study is focused on biblical rather than rabbinic punishments. During a rabbinic regime, punishment had to be seriously practical—and sometimes harsh—when required for social control.

Here are some highlights of the rabbinic regime of punishment:

- Some of the procedural stringencies were relaxed to allow conviction and the imposition of an alternative death penalty in murder cases, although the eye

⁴⁴ See *Tractate Sanhedrin*, *supra* note 16, at 46a (calling for flogging “not because he

witness testimony of two observers was still required, so that conviction could not be based solely on circumstantial evidence.⁴⁵

- Courts had at their disposal an extra-biblical punishment of lashes.⁴⁶ Maimonides cites some 125 instances of its use.⁴⁷ The procedural safeguards applicable to the biblical punishment of lashes—which made their imposition unlikely—do not appear to have been strictly applied to this rabbinically enforced punishment.⁴⁸
- More generally, some tribunals exercised the power to impose extra-biblical punishments of all sorts, such as death, lashes, and excommunications, as, for example, in the case of Spinoza.⁴⁹ For Uriel da Costa in Amsterdam, there was decreed thirty-nine lashes plus the requirement that each member of the congregation tread on him when he sought re-admittance after excommunication. Da Costa then committed suicide.⁵⁰ Incarceration seems to have been discretionary and without the strict procedural

merited it, but because the times required it”).

⁴⁵ *Id.* at 81b; see also Maimonides, *Laws of Murder*, *supra* note 42, at 4:8.

⁴⁶ *Deuteronomy* 25:2-3; see also Haim Hermann Cohn, *Flogging*, in 7 *ENCYCLOPAEDIA JUDAICA* 79-80 (Fred Skolnik & Michael Berenbaum eds., 2d ed. 2007) [hereinafter *Flogging*].

⁴⁷ See Maimonides, *Law of Sanhedrin*, *supra* note 6, at 16:2.

⁴⁸ See *Tractate Makkoth*, *supra* note 43, at 22a-22b; see also *Flogging*, *supra* note 46, at 79-80.

⁴⁹ See *Punishment*, *supra* note 5, at 736; see also REBECCA GOLDSTEIN, *BETRAYING SPINOZA* 140 (2006).

requirements necessary for biblically imposed punishments. These powers are codified by Maimonides in the twenty-fourth chapter of the Law of Sanhedrin (based on Tractate Sanhedrin 46a et al.), concluding that “[w]ith regard to all these disciplinary measures, discretionary power is vested in the judge. He is to decide whether the offender deserves these punishments and whether the emergency of the hour demands their application.”⁵¹

Other examples of rabbinic punishment include the execution of eighty witches in Askelon,⁵² the force feeding of a prisoner in his cell until he dies of a burst stomach⁵³ and the rule imposing capital punishment on the rebellious son because he may become a murderer,⁵⁴ although such a rule seems more like a threat that is not intended to be carried out.

American law in practice presents the mutually exclusive demands of uniform justice and individualized mercy. The duality is between the regimentation of codified and explicitly scheduled procedures and punishments (assuring that crimes of equal tenor are treated and punished equivalently) and the flexibility of judicial discretion (allowing for the individuality of circumstance, since no

⁵⁰ GOLDSTEIN, *supra* note 49, at 140.

⁵¹ See Maimonides, *Law of Sanhedrin*, *supra* note 6, at 24:10.

⁵² *Tractate Sanhedrin*, *supra* note 16, at 45b.

⁵³ *Id.* at 81b; see also Maimonides, *Laws of Murder*, *supra* note 42, at 4:8.

⁵⁴ *Deuteronomy* 21:18-21.

two crimes or criminals are ever exactly the same).⁵⁵

Implementors of Jewish law, like those of other laws, confront the conflicting pulls of justice and mercy. As Rashi, one of the great medieval commentators (1040-1105), observed respecting the first passage of Genesis, “at first God intended to create it (the world) to be placed under the attribute (rule) of strict justice, but He realised that the world could not thus endure and therefore gave precedence to Divine Mercy allying it with Divine Justice.”⁵⁶

Four possible forms of divine justice have been postulated. The first is Direct Divine Justice, where “God does justice by direct intervention, ‘without involving any human agency.’”⁵⁷ The second form is Institutional Divine Justice. This is where “God directly intervenes within human adjudicatory processes, through institutions like the oracle or ordeal.”⁵⁸ The third form is Charismatic Divine Justice.⁵⁹ In this form, “God inspires the human judge to make a decision in accordance with divine justice.”⁶⁰ The fourth form is Delegated Divine Justice, where “God enacts laws and authorises human judges to apply them in accordance with human

⁵⁵ See JACK B. WEINSTEIN, *THE ROLE OF JUDGES IN A GOVERNMENT OF, FOR, AND BY THE PEOPLE* (forthcoming 2007) (chapter on sentencing).

⁵⁶ *Rashi, Commentary to Genesis 1:5-10, translated in CHUMASH, WITH TARGUM ONKELOS, HAPHTAROTH AND RASHI'S COMMENTARY 3* (Rabbi A. M. Silberman trans., 1934); see also Rabbi Richard A. Block, *Capital Punishment*, in *CRIME AND PUNISHMENT IN JEWISH LAW: ESSAYS AND RESPONSA 71* (Walter Jacob & Moshe Zemer eds., 1999) (“What is God’s prayer? ‘May My attribute of mercy overcome My attribute of anger.’ Even God’s prayer may not always be answered, but its guiding direction is clear.” (quoting *Tractate Berechos 7a*)).

⁵⁷ Bernard S. Jackson, *Human Law and Divine Justice in the Methodological Maze of the Mishpatim*, *JEWISH LAW ASSOCIATION STUDIES XVI: THE BOSTON 2004 CONFERENCE VOLUME 101-22* (Elliot Dorff ed., 2007).

⁵⁸ *Id.* at 105.

⁵⁹ *Id.*

⁶⁰ *Id.*

understanding.”⁶¹ It is the fourth form—Delegated Divine Justice—that is particularly relevant to our discussion because this is where rabbis enforce God made law; those enforcing Biblical law are in the same relative position as current judges enforcing secular law established primarily by legislatures.

At the time the American colonies were first settled, English law regarded almost any crime, even petty theft, as a felony.⁶² Since felonies were punishable by hanging, long terms in prison were almost unknown.⁶³ By the middle of the eighteenth century, however, juries and judges were refusing to convict in many cases because hanging was too extreme a punishment.⁶⁴ While morality no doubt played a part, the burgeoning economy may also have had an influence on the softening of sentences, with nullification resulting partly from the scarcity manpower.⁶⁵ Whatever the cause or causes, capital punishment was eventually limited to only the most heinous offenses.⁶⁶

In the beginning of the nineteenth century, based upon religious concepts of redemption by the Quakers in Pennsylvania and

⁶¹ *Id.*

⁶² Called the “Bloody Code” during the colonial period, English law imposed capital punishment for over two hundred crimes. Steven A. Hatfield, *Criminal Punishment in America: From the Colonial to the Modern Era*, 1 USAFA J. LEG. STUD. 139, 140 (1990).

⁶³ See Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 269 (1967).

⁶⁴ See Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1256 (1995) (“In the seventeenth and eighteenth century . . . where some 230 crimes carried the penalty of death, juries frequently refused to convict . . .”).

⁶⁵ See generally DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 91-102 (1990).

⁶⁶ See LOUIS P. MASUR, *rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865* 4-5 (1989). The trend in most states after 1780 was to limit capital punishment to only first-degree murder. *Id.*

other Protestant groups in New York and elsewhere, a new prison system, which provided for silence, isolation, and reflection, was developed.⁶⁷ Charles Dickens, whose works demonstrate a deep concern for the plight of prisoners, thought the practice was terrible.⁶⁸

By the twentieth century, predicated partly on practices of social welfare, in which many Jews and people of other religions participated, new forms for treating criminals were introduced. Emphasized was help to the poor and education to avoid crime; training and treatment in prison; and probation services to retrain and restrain people outside of prison.⁶⁹ The model was essentially a medical one.⁷⁰

In the 1970s and later, there was a sharp turn away from rehabilitation, partly due to a perceived crime wave and the “war on drugs.”⁷¹ Punishments were substantially increased with long mandatory sentences, elimination of parole and limits on probation. The result was a multiplying of prisoners and a huge expansion of prisons.⁷²

⁶⁷ ORLANDO F. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845* 14-15, 41 (1967) (“The prison was to be so designed that . . . *each* prisoner be in solitary confinement during his incarceration”).

⁶⁸ William J. Dean, *Dickens as Prison Reformer*, 237 N.Y. L.J. 2 (2007); *see also* CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* 43-48 (1867), available at <http://books.google.com/books?id=22S9sQN1BQcC&pg=PA53&dq=philadelphia+and+its+solitary+prison#PPA53,M1> (“The system here is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong.”).

⁶⁹ *See* Gray Cavender & Michael C. Musheno, *The Adoption and Implementation of Determinate-Based Sanctioning Policies: A Criminal Perspective*, 17 GA. L. REV. 425, 439 n.52 (1983).

⁷⁰ *Id.* at 437 (stating the medical approach focused more on the criminal’s individual characteristics than the legal aspects of the crime).

⁷¹ *United States v. Michelena-Orovio*, 719 F.2d 738, 754 (5th Cir. 1983) (explaining that Congress revised the nation’s narcotic laws during the 1970s to deal with “the growing menace of drug abuse in the United States.”).

⁷² *See* Susan B. Tucker & Eric Cadora, *Justice Reinvestment*, 3 IDEAS FOR AN OPEN

My sense is that this increased harshness was partly due to fear and partly to the efforts of religious fundamentalists who seemed, for the moment, to have run out of compassion. I cannot, however, say how much the harsher view of capital and other punishments in the Bible Belt and elsewhere can be attributed to sectarian views of Holy Book doctrine.

In part, this was a racial and class driven change. So cruel had some of the proponents of the “just deserts” concept become that the federal government was prompted to deny funds for prisoners to obtain an advanced education.⁷³

An economist would have predicted that the result would be a disaster. We have an imprisonment rate, per capita, greater than that of any other country,⁷⁴ and a cost to taxpayers that in some cases requires fewer schools to pay for more prisons.⁷⁵ Sociologically and politically, in states like New York, a whole rural industry of prisons has displaced a significant portion of urban male Latinos and African-Americans.⁷⁶ It denies them the right to vote and shifts

SOCIETY 2-3 (2003) (citations omitted), available at http://www.soros.org/resources/articles_publications/publications/ideas_20040106/ideas_reinvestment.pdf. The United States Government’s abandonment of rehabilitation in favor of incarceration has led to an increase in over 1,800,000 prisoners since 1972. *Id.*

⁷³ This “just desert” idea is a softened form of the retributory theory central to our modern sentencing scheme. See Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1306 (2006).

⁷⁴ *Id.* at 1307. The United States had “738 inmates per 100,000 residents” in 2005, “representing the highest per capita rate of incarceration in the world.” *Id.*

⁷⁵ New York State spent \$761.3 million on prison expenses from 1988 to 1998, while cutting funding to state and city colleges by \$615 million during the same period. See Press Release, Center on Juvenile and Criminal Justice, *New York State of Mind?: Higher Education vs. Prison Funding in the Empire State, 1988-1998* (Dec. 1998), available at <http://www.cjcj.org/pubs/ny/nysomper.html>. On average, it costs New York taxpayers \$30,000 to keep a single prisoner in the system each year. The same \$30,000 would be enough to pay for the tuitions of nine students in New York City run colleges. *Id.*

⁷⁶ *Id.* Alarming, in 1997 more African-American and Latino males in New York State

people, for representation purposes, from central cities.⁷⁷

A very sensible and pragmatic solution for this justice-mercy dilemma was recently worked out by Supreme Court Justice Stephen G. Breyer, a former professor at Harvard Law School. The Supreme Court compromise was that the Federal Sentencing Guidelines were “advisory” rather than “mandatory.”⁷⁸

Now, at the beginning of the twenty-first century, we are beginning to see a shift back to the medical—but not messianic—model of redemption.⁷⁹ Even though a sharp decrease in crime has not yet appreciably slowed the increase in incarceration rates, people are beginning to understand the huge, largely unjustified, cost of the expanding prison systems. For example, New York Governor Eliot Spitzer has proposed closing some of New York’s upstate prisons.⁸⁰ Use of private enterprise to run our prisons for profit, a present “cost-

were imprisoned for drug offenses than graduated from State University of New York. *Id.*

⁷⁷ Convicted felons in New York lose their voting rights when they are incarcerated or on parole. N.Y. ELEC. LAW § 5-106(2) (McKinney 2007). In 2004, African-Americans and Latinos, collectively, made up 87 percent of the New York residents who were denied the right to vote. Sara Giboney, *Challenge to Felon Voting Ban Fails, But Fight Goes On*, CommonDreams.org June 28, 2004, <http://www.commondreams.org/headlines04/0628-10.htm>.

⁷⁸ *United States v. Booker*, 543 U.S. 220, 222 (2005) (modifying the Sentencing Reform Act of 1984, so that a sentencing court may consider guideline ranges, but may also conform the sentence to include other statutory concerns, thereby rendering the Sentencing Reform Act of 1984 merely advisory). The Supreme Court is currently considering this highly contested issue, having heard oral arguments on *Gall v. United States* on October 2, 2007. See also Transcript of Oral Argument at 1-56, *Gall v. United States*, 127 S. Ct. 2933 (2007) (No. 06-7949).

⁷⁹ See MODEL PENAL CODE: SENTENCING § 1.02(3) (Tentative Draft No. 1 2007) (“The goal of proportionality is ubiquitous . . .”). One idea on this shift towards the medical model of redemption is that it is occurring not because of the unpopularity of the previous model, but as a result of economic pressures. See Chase Riveland, *Prison Management Trends, 1975-2025*, 26 CRIME & JUST. 163, 196 (1999).

⁸⁰ Governor Eliot Spitzer formed a commission to study the prison program in early 2007 to curtail some of New York State’s \$2.7 billion-a-year prison program budget. See Nicholas Confessore, *Spitzer Seeks Way to Find State Prisons He Can Close*, N.Y. TIMES, Feb. 5, 2007, at B1.

cutting program,” is likely to lead to less rehabilitation with, ultimately, more cost to society.

Failure to come to grips with the need for retraining ex-prisoners so that they can take a lawful place in society is a mistake that is being recognized. Chief Judge Judith Kaye of the New York Court of Appeals has been a leader in providing family and drug courts that will treat, outside of prisons, the social and psychiatric problems that lead to crimes.⁸¹ The goal is to save rather than punish where that is possible.

There are signs that concern for our fellow Americans with blemishes is increasing. Yet, in matters such as sex and drug crimes we continue to find that neither punishment, incarceration, nor attempts-to-cure are satisfactory solutions. The problems with ordering society through punishment remain as vexing as in ancient times. A fundamental problem with using religious norms in imposing sentences in a multi-ethnic and multi-religious secular society like ours is that a judge cannot impose his or her religion on the conduct of someone who may not embrace the same religion, or any religion at all.⁸² Nevertheless, we continue to see a questionable

⁸¹ Chief Judge Kaye has helped implement New York’s first generation of problem-solving courts such as an integrated domestic violence court, where a single judge presides over one family’s civil, criminal and matrimonial matters, as well as novel drug court approaches to addicted repeat offenders, which combine drug treatment, judicial monitoring, graduated sanctions and rewards. Maura D. Corrigan & Daniel Becker, *Problem-Solving Courts: Moving Problem-Solving Courts into the Mainstream: A Report Card from CJ-COSCA Problem-Solving Committee*, COURT REVIEW 6 (2002), available at <http://aja.ncsc.dni.us/courtrv/cr39-1/CR39-1BeckerCorrigan.pdf>.

⁸² See *United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (vacating a sentence “when a judge impermissibly takes his own religious characteristics into account in sentencing.”).

reliance on religion in judicial decisions.⁸³ Even the Supreme Court does not resist this urge—though usually for cosmetic purposes.⁸⁴

To summarize: religion may be used to assist us in understanding why we should try to help people in need more and to punish them less, but its sectarian rules may not be imposed literally.

⁸³ See Sanja Zgonjanin, *Quoting the Bible: The Use of Religious References in Judicial Decision-Making*, 9 N.Y. CITY L. REV. 31 (2005).

⁸⁴ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 458 n.27 (1966) (citing the Misneh Torah, the Laws of Sanhedrin, and the Halakhan). See also Zgonjanin, *supra* note 83, at 63-66 (comprehensively documenting citation to religious texts by federal and state courts).