Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods

Kenneth Shuster
Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods

Kenneth Shuster

Abstract

America’s punishment system is not working. In the United States, in 1991 alone, a murder was committed every twenty-one minutes, a woman was raped every five minutes, a person was robbed every forty-six seconds, and a burglary occurred every ten seconds.

KEYWORDS: penal, American, Halachic
I. INTRODUCTION

It is with the unfortunate, above all, that humane conduct is necessary.¹

¹ John Bartlett, Familiar Quotations 618 (13th ed. 1955) (quoting Fyodor Dostoyevsky (discussing prison life in Siberia)).
America's punishment system is not working. In the United States, in 1991 alone, a murder was committed every twenty-one minutes, a woman was raped every five minutes, a person was robbed every forty-six seconds, and a burglary occurred every ten seconds. This translates into increases in rates of murder 4.3%, rape 2.7%, and robbery 6.1%. During that same year, federal prisons housed 56,696 inmates, and state correctional institutions held 732,565 prisoners. The state of New York imprisoned 57,862 individuals, close to 10% of the national total of state prisoners. As these numbers make clear, this crime increase cannot be attributed to a less than zealous use of the prisons. Indeed, during 1991, because of increases in both crime and incarcerations, American prisons operated at 16-31% above capacity. While a regime of aggressive imprisonment does not, therefore, serve as a general deterrent, rampant incarceration does not promote special deterrence. A recent study of recidivism in eleven states concluded that, during the past ten years, over 60% of released prisoners were rearrested; almost half of all prisoners released during that same period were reincarcerated. This prevalence of recidivism suggests that many criminals are more dangerous when they leave prison than when they enter. Moreover, incarceration is expensive. For example, New York

2. It is quite possible that the following crime rates would be worse were it not for present crime-reduction devices such as incarceration. By "not working," it is suggested that contemporary American society, through its law enforcement mechanisms, is not deterring crime nearly as effectively as it could be.


5. Id. at 949.

6. Id.

7. Id.


9. Special deterrence is a theory of punishment which seeks to prevent convicts from repeating their crimes. Id.


11. Id. at 641-42. Prisoners may be more violent when they leave prison due to the violence that is routinely inflicted on a significant number of inmates by fellow prisoners. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 314-15 (1993) (describing prison violence); RONALD GOLDFARB, JAILS: THE ULTIMATE GHETTO 96-97 (1975) (describing prison gang rape); CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS ix (1974) (remark of then Philadelphia District Attorney, Arlen Specter, that prison violence makes prisoners "worse" when they leave prison than when they enter).
City spends $58,000 to jail an inmate for one year. Since prison is obviously not solving America's crime problems, why do we continue to incarcerate so many people?

One reason is that imprisonment is perceived as satisfying an important goal of punishment. If criminals are prevented from harming society, the argument goes, the purpose of punishment is fulfilled. To be sure, a criminal who is locked up cannot harm the majority of society.

Another reason for the increase in incarceration rates is the determinate, minimum sentencing guidelines adopted by both the federal system and approximately one-third of the states. Under these guidelines, criminals who would not have been incarcerated are being imprisoned. Exactly how many offenders are being jailed due to the guidelines is hard to tell. What is clear is that, partly due to the guidelines, it has been estimated that by the end of 1994, United States prisons will hold about 1,000,000 Americans.

There are at least four problems with indiscriminately using incarceration as punishment. First, incarceration is only effective as long as it lasts. Therefore, at least regarding all but the most hardened prisoners who are serving life sentences, it is more appropriate to employ punishments that will have a positive impact on a criminal even after the criminal is released. Second, while imprisonment has value when applied to dangerous criminals, it has no merit when applied to individuals who pose no direct danger to society. Because American law allows for the incarceration of both

13. See FRIEDMAN, supra note 11, at 457.
14. Id. ("If the crooks are behind bars, they cannot rape and loot and pillage."). Of course, violent criminals are able to terrorize fellow inmates behind bars. See infra notes 18, 21.
15. See Rothman, supra note 12, at 36. "Fixed sentences were introduced . . . both in the federal system and in roughly one third of the states. . . . They have promoted prison overcrowding. . . . The impact of these guidelines has been to increase the prison population. . . ." Id. at 36-37.
16. Id.
17. See Rothman, supra note 12, at 34.
18. One reason prison is inappropriate for nonviolent offenders is, given prison conditions, nonviolent inmates may experience violence that is not warranted by their offenses. See FRIEDMAN, supra note 11, at 314-15 (describing problems of rape, gang violence, and general despotism in American prisons); David M. Siegal, Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter, 44 STAN. L. REV. 1541, 1550-51 (1992). Also, as a result of such violence, criminals who are not dangerous when they enter prison may become violent through experiencing prison life.
violent and non-violent individuals, a punishment agenda that is just as applied to all criminals is preferable. Third, as the prevalence of recidivism illustrates, imprisonment has value only when it separates dangerous persons from mainstream society. Incarceration does not rehabilitate offenders, provide restitution to victims, nor deter most criminals. It would be better to replace imprisonment with punishment programs based on rehabilitative, restitutive, and deterrent perspectives. Fourth, given the prevalence of rape and other violence in American prisons, incarceration arguably does more both to teach inmates more efficient means of committing crime and to transform inmates into more hardened criminals than it does to deter offenders from illegal conduct. Indeed, a repeated theme of this article is that because of the dangers an inmate may face in prison, a sentence of imprisonment is a potential death sentence, and

19. The result is that two-thirds of the national male prison population are non-violent offenders. See Leven, supra note 10, at 646. The number of non-violent female inmates has also been increasing. See Clifford Krauss, Women Doing Crime, Women Doing Time, N.Y. Times, July 3, 1994, § 4, at 3; see also Mireya Navarro, Mothers in Prison, Children in Limbo, N.Y. Times, July 18, 1994, at B1 (number of female inmates has risen 55% nationally since 1984).

20. See supra note 10 and accompanying text.

21. Again, although incapacitation may protect mainstream society, prison communities remain exposed to overcrowding and serious violence. See Edgardo Rotman, Beyond Punishment: A New View on the Rehabilitation of Criminal Offenders 82-83 (1990). ("This . . . could lead to the . . . conclusion that some positive aspects . . . can compensate for . . . horrendous overcrowding, racial discrimination, and . . . serious prison violence.").

22. See Leven, supra note 10, at 641.

23. See Charles F. Abel & Frank H. Marsh, Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal 4 (1984) ("Victims . . . bear an unrelied burden. The perpetrator may be punished . . . but the victim is left with his or her losses intact.").

24. See Leven, supra note 10, at 642.

25. An extended discussion of rehabilitation, deterrence, retribution (including incapacitation), restitution, and their interrelationship is beyond the scope of this article. For such discussion, see Kadish & Schulhofer, supra note 8, at 136-65.

26. Weiss & Friar, supra note 11, at 69-72 (describing incidents of prison violence and gang rape). Prison rape and violence are so prevalent that the Supreme Court recently ruled that officials must protect prisoners from other inmates even in the absence of a specific request for protection from the potentially victimized inmates. Linda Greenhouse, Supreme Court Roundup; Prison Officials Can be Found Liable for Inmate-Against-Inmate Violence, Court Rules, N.Y. Times, June 7, 1994, at A18.

https://nsuworks.nova.edu/nlr/vol19/iss3/5
constitutes cruel and unusual punishment\textsuperscript{27} when imposed on all but the most dangerous and hardened of offenders.

Consideration of alternative punishment sanctions based on religious foundations is long overdue.\textsuperscript{28} This article attempts to rectify this neglect by reviewing how talmudic\textsuperscript{29} Judaism, through the halacha,\textsuperscript{30} applied theories of deterrence, rehabilitation, restitution, and retribution to its punishment practices\textsuperscript{31} without an aggressive use of imprisonment.\textsuperscript{32}

---

\textsuperscript{27} The cruel and unusual punishment standard is not static but "may acquire meaning as public opinion becomes enlightened by a humane justice." Gregg v. Georgia, 428 U.S. 153, 171 (1976). For another judicial expression of the flexible nature of cruel and unusual punishment mentioned in Gregg, see infra note 164 and accompanying text. See also J. Mark Lane, "Is There Life Without Parole?: A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 LOY. L.A. L. REV. 327, 361 (1993).

\textsuperscript{28} The value of looking to religious principles to inform American legal practice is underscored by the fact that the Supreme Court has consulted religious practice to decide American law. See Roe v. Wade, 410 U.S. 113, 160 (1973) (citing religious authority as guidance for the doctrine that life begins at birth versus conception). By suggesting that American legal practice may be informed by talmudic thought, it is not intended that other religions, such as Christianity, Islam, or Far Eastern belief systems, cannot appropriately contribute to the manner in which American penal law is employed. This discussion is confined to talmudic and American law solely because the author's education as a rabbi and as an American trained lawyer inhibits the expression of opinions on non-talmudic religious penal methods. For interesting treatment of how non-talmudic religious systems deal and have dealt with punishment, see 12 THE ENCYCLOPEDIA OF RELIGION 362-68 (Mircea Eliade ed. 1987).

\textsuperscript{29} The Talmud is a rabbinic commentary on the Old Testament (called "Torah" in Hebrew); "talmudic" means pertaining to the Talmud; "Talmudic Judaism" means Judaism as practiced during talmudic times. There are Babylonian and Jerusalem editions of the Talmud because when the Talmud was compiled, Jewish scholarship centered in Pumbeditha, Babylonia and Jerusalem, Israel. See PAUL JOHNSON, A HISTORY OF THE JEWS 153 (1987). Work on the Jerusalem Talmud finished by the end of the fourth century, A.D., and the Babylonian Talmud was finished during the fifth century, A.D. See Kenneth Shuster, An Halachic Overview of Abortion, 26 SUFFOLK U. L. REV. 641 n.2 (1992). This article cites to the Babylonian edition of the Talmud exclusively.

\textsuperscript{30} "Halacha" refers to Jewish law; "halachic" means pertaining to Jewish law. HAYIM H. DONIN, TO BE A JEW 29 (1972). For an informative description of the evolution of the halacha, see Suzanne L. Stone, In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory, 106 HARV. L. REV. 813, 816 n.13 (1993). "Halachic" and "talmudic" are used interchangeably throughout this article.

\textsuperscript{31} See 13 ENCYCLOPAEDIA JUDAICA 1387 (1972) (stating that "[a]ll talionic punishment . . . reflects its underlying purpose, namely the apparent restitution . . . [and] punishment [which] is inflicted . . . for the deterrence of others."); HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE 13 (1952) ("[M]ayhem . . . is a serious offense, and is punishable by . . . the law of retaliation."); MYER S. LEW, THE HUMANITY OF JEWISH LAW 165 (1985) ("[T]he main purpose of punishment was . . . to reform the character of the
This article begins by presenting an overview of halachic punishment, examining how halacha viewed capital and corporal punishment, penal servitude, and excommunication. The article then examines the extent to which American law can employ halachic methods of punishment. It is suggested that communities that enjoy spiritual values, because they will have more success implementing penal systems which actually compromise crime, are prepared to combat crime communally, and they prefer deterrence, restitution, rehabilitation, and retribution theories over incarceration. Communities that emphasize individual and collective responsibilities over individual rights are also more likely to benefit from halachic punishment schemes. American society has caused much of its present penal problems by focusing too much on imprisonment as a punishment, by promoting individual rights over individual and societal responsibilities, and by de-emphasizing spiritual values in everyday life. Finally, the article concludes that, although constitutional considerations of slavery and cruel and unusual punishment may preclude American law from adopting halachic penal methods, halacha can inspire reforms, such as victim-oriented community offender.

32. Although from the talmudic period on Judaism incarcerated criminals for serious crimes, like homicide and treason, most talmudic imprisonment tended to be detentive or coercive in nature. See 8 ENCYCLOPAEDIA JUDAICA 1301-02 (1972). “Detention... pending completion of the judicial proceedings... continued to be the most common form of imprisonment in this [the talmudic] period. The sages interpreted the passage... as authority... to imprison a person refusing to comply with its instructions.” Id. at 1300; see also LEW, supra note 31, at 62. “[I]n the Torah we find but few references to sentences of imprisonment.” Id.

33. This discussion is limited to these halachic punishment methods because they provide a comprehensive survey of how Jewish law dealt with crime and because they refer to Judaism’s use of rehabilitation, deterrence, retribution, and restitution theories. For example, halachic capital punishment presents crime as an offense against both society and offender; it also provides for a deterrence and rehabilitation-oriented regime of halachic punishment. Halachic indentured servitude teaches there are offenses, such as theft, which require restitution be made to crime victims; it, therefore, shows the restitutive aspect of halachic punishment. Halachic corporal punishment further illustrates Judaism’s conception of deterrence and demonstrates that such punishment can be implemented in a humane manner. Halachic excommunication presents the thesis that because crime impacts on society, its commission warrants societal ostracism; it also is predominately based on a deterrence notion.

34. It is not suggested that individual rights are not as important as individual responsibilities, but that individual rights should not be emphasized over the duties that persons have to each other and society in general. When rights are honored more than responsibilities, people often have no incentive to behave properly—they can behave with impunity and then hide behind their rights.
service\textsuperscript{35} and shaming sanctions,\textsuperscript{36} which apply more humane solutions to the realities of contemporary American life. However, it must first be ascertained whether halachic penal methods are more humane and why American society should adopt halachic punishment systems. Accordingly, halachic punishment schemes, beginning with halachic capital punishment are examined.

II. HALACHIC PUNISHMENT

A. Capital Punishment

Ancient Judaism employed four methods of execution: stoning, burning, decapitation, and strangulation.\textsuperscript{37} Stoning was the most severe form of capital punishment\textsuperscript{38} and was reserved for such crimes as blasphemy,\textsuperscript{39} idol-worship,\textsuperscript{40} witchcraft,\textsuperscript{41} and sabbath-desecration.\textsuperscript{42} Stoning

\textsuperscript{35} Such community service programs would be “victim-oriented” inasmuch as offenders would be required to repay their victims out of the offenders’ earnings.

\textsuperscript{36} See infra text accompanying notes 218-20.

\textsuperscript{37} See 3 THE BABYLONIAN TALMUD, SEDER NEZIKIN, TRACTATE SANHEDRIN 49b, at 330 (I. Epstein ed. & H. Freedman trans., 1935). “Four deaths have been entrusted . . . stoning, burning, slaying [by the sword] and strangulation.” \textit{Id.;} GOLDIN, supra note 31, at 141; see also 5 ENCYCLOPAEDIA JUDAICA, supra note 31, at 142 (defining four methods of talmudic judicial execution as stoning, burning, slaying, and strangling).

\textsuperscript{38} See 3 THE BABYLONIAN TALMUD, supra note 37, 53a, at 359; GOLDIN, supra note 31, at 28 (“Of the thirty-six capital crimes, eighteen are punishable by stoning, . . . [which was] regarded as the severest of the four methods of capital punishment.”).

\textsuperscript{39} See 3 THE BABYLONIAN TALMUD, supra note 37, 49b, at 332. Leviticus 24:14 states: “Take the blasphemer outside the camp . . . and let the whole community stone the criminal.” This article modifies traditional translations of biblical and talmudic passages to render them gender-neutral. For example, in the above passage, the Hebrew literally translates, “let the whole community stone \textit{him}.” However, “criminal” for “him,” is substituted since biblical capital punishments applied to men and women equally. \textit{See} Deuteronomy 17:5 (stating that “[y]ou shall take \textit{the man or woman} who did that wicked thing . . . and you shall stone them.”) (emphasis added).

\textsuperscript{40} See 3 THE BABYLONIAN TALMUD, supra note 37, 49b, at 332. This was based on Deuteronomy 17:2-5 (“If there is found among you . . . a man or woman who has affronted the Lord . . . turning to the worship of other gods . . . you shall stone them.”).

\textsuperscript{41} See Exodus 22:8. The Talmud punishes witchcraft with stoning. \textit{See also} BABYLONIAN TALMUD, supra note 37, 67a.

\textsuperscript{42} 3 THE BABYLONIAN TALMUD, supra note 37, 66a, at 448; 3 THE CODE OF MOSES MAIMONIDES (MISHNEH TORAH), BOOK 14, THE BOOK OF JUDGES, Laws Concerning the Sanhedrin and the Penalties within their Jurisdiction 15:10, at 44 (Julian Obermann et al. eds. & Abraham M. Hershman trans., 1949) [hereinafter 3 MOSES MAIMONIDES].
was accomplished by throwing stones at the criminal from a specified height;\(^43\) often witnesses to the capital offense, as representatives of the Jewish community, did the stoning.\(^44\)

Burning was the second most severe form of capital punishment\(^45\) and was reserved primarily for the sexual offenses of incest and adultery.\(^46\) Burning was accomplished through a three-step process. First, the criminal was placed in dirt up to his or her armpits to prevent the convict from moving or falling.\(^47\) Then a scarf was placed around the offender's neck, after which each witness seized an end of the scarf\(^48\) and pulled until the

---

The hierarchy of halachic punishment underscores Judaism's theocratic perception of crime. For example, stoning, the most severe form of halachic punishment, was employed mainly to stem conduct that expressed either disbelief in God or the observance of precepts, such as the Sabbath, that symbolize divine creation. \(^{See~DONIN,~supra~note~30,~at~65-67.}\)

\(^43.~BABYLONIAN~MISHNEH~SANHEDRIN~45a~(I.~Epstein~ed.~&~Jacob~Shachter~trans.,~1936);~5~ENCYCLOPAEDIA~JUDAICA~142~(1972)~(noting~that~"a~'stoning~place'~was~designed~from~which~he~[the~criminal]~was~to~be~pushed~down~to~death."~);~Haim~H.~Cohn,~The~Penology~of~the~Talmud,~5~ISRAEL~L.~REV.~53,~56~(1970)~(Talmud~established~"stoning-house"~two~floors~high~from~which~the~convict~was~thrown).~

\(^44.~GOLDIN,~supra~note~31,~at~31;~see~also~Cohn,~supra~note~43,~at~57.~The~Talmud~required~the~witnesses~to~a~capital~offense~be~the~criminal's~executioners~to~test~the~veracity~of~the~witnesses's~testimony~and~to~provide~executions~with~a~modicum~of~humaneness~not~attainable~via~other~forms~of~public~capital~punishment.~GOLDIN,~supra~note~31,~at~136-37~n.17;~Cohn,~supra~note~43,~at~56.~

\(^45.~See~GOLDIN,~supra~note~31,~at~34.~

\(^46.~Id.;~see~also~5~ENCYCLOPAEDIA~JUDAICA,~supra~note~37,~at~143.~Incest,~in~Jewish~law,~refers~to~sexual~intercourse~between~ancestors~and~descendants,~siblings~of~the~whole~or~half~blood,~aunts~and~nephews,~in-laws,~and~stepparents~and~stepchildren.~See~8~ENCYCLOPAEDIA~JUDAICA~1316~(1972).~Halacha~defines~adultery~as~"[v]oluntary~sexual~intercourse~between~a~married~woman~.~...~and~a~man~other~than~her~husband."~See~2~ENCYCLOPAEDIA~JUDAICA~313~(1972).~Even~married~men~cannot~commit~adultery~by~sleeping~with~a~single~woman,~per~se,~according~to~halacha,~since~Jewish~men,~unlike~women,~are~biblically~allowed~to~be~married~to~more~than~one~woman~at~the~same~time.~See~4~ENCYCLOPAEDIA~JUDAICA~986~(1972)~(noting~that~biblically~permitted~polygamy~was~practiced~throughout~the~talmudic~period);~12~ENCYCLOPAEDIA~JUDAICA~258~(1972).~

\(^47.~See~3~THE~BABYLONIAN~TALMUD,~supra~note~37,~52a,~at~349;~GOLDIN,~supra~note~31,~at~142.~

\(^48.~Talmudic~law~required~the~testimony~of~at~least~two~witnesses~who~both~witnessed~the~offense~at~the~same~time,~to~convict~a~defendant,~based~on~Deuteronomy~17:6~(stating~that~"[a]t~the~mouth~of~two~witnesses~.~.~.~shall~an~offender~worthy~of~death~be~put~to~death."~).~See~2~J.~DAVID~BLEICH,~CONTEMPORARY~HALAKHIC~PROBLEMS~347~(1983).~
offender opened his or her mouth. At that point, molten lead was poured down the criminal's throat, internally burning him or her to death.

The third most severe form of capital punishment was decapitation. It was reserved for homicide and communal apostasy. Israeli kings also used decapitation to execute rebellious subjects. Strangulation, the least severe method of execution was the only form of capital punishment not founded on the Old Testament. The procedure for strangling was the same as that for burning, except molten lead was not poured down the criminal's throat.

Regardless of the method of execution employed, the criminal had to be killed on the day he or she was sentenced. This requirement was intended, in part, to reduce any anxiety the criminal might experience while awaiting death. Immediately before execution, judges urged the condemned to recite a formula of contrition. This practice was designed to induce the convict to repent and to underscore the rehabilitative function of

49. 3 THE BABYLONIAN TALMUD, supra note 37, 52a, at 349; 5 ENCYCLOPAEDIA JUDAICA, supra note 37, at 143 ("[T]wo kerchiefs were then to be . . . drawn . . . until [the offender] opened his [or her] mouth.").

50. 3 THE BABYLONIAN TALMUD, supra note 37, 52a, at 349-50; GOLDIN, supra note 31, at 143. The "[executioner] kindled the string and threw it into his [the offender's] mouth, and it went down into his stomach and burned his entrails." Id.

51. GOLDIN, supra note 31, at 36.

52. See id. at 36, 180; 3 THE BABYLONIAN TALMUD, supra note 37, 52b, at 355; 5 ENCYCLOPAEDIA JUDAICA, supra note 37, at 143 (stating that "[s]laying by the sword was the mode of executing murderers and the inhabitants of the subverted town").

53. Halacha permitted Jewish kings to execute on their own authority, without prior judicial approval; such execution was accomplished by decapitation. See 5 ENCYCLOPAEDIA JUDAICA, supra note 37, at 144.

54. See GOLDIN, supra note 31, at 37.

55. Id. Because strangulation was not founded on the Old Testament, it may be considered a rabbinic punishment.

56. See supra notes 47-49 and accompanying text.

57. See 3 MOSES MAIMONIDES, supra note 42, 12:4, at 36.

58. See 1 J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 332 (1977) (mentioning immediate execution of accused to avoid agonizing suspense). For an appreciation of this sentiment in a secular context, see EDWIN H. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 524 (1934) (describing that "principal distress is due to the anticipation of death rather than to the actual execution").

59. 3 THE BABYLONIAN TALMUD, supra note 37, 43b, at 283. "When [the condemned] is about ten cubits away from the place of stoning, they say to him, 'confess.'" Only if the accused did not know how to repent was he or she instructed to recite "may my death be an expiation for all my sins." Id. at 283-84; 3 MOSES MAIMONIDES, supra note 42, at 37.
halachic capital punishment. After the execution, the criminal’s corpse was hung from a tree to heighten deterrence.

While halachic capital punishment was geared to underscore the severity, and to deter the commission of capital crimes, it was almost never used. Procedural safeguards, such as the requirement that potential offenders be warned within a certain time before the commission of a capital offense of the penalty for the crime, made convicting a defendant of a

60. It is difficult to appreciate how capital punishment facilitates rehabilitation, except sarcastically. See, e.g., Stephen C. Hicks, The Only Argument for Capital Punishment in Principle—A Frank Appraisal, 18 AM. J. CRIM. L. 333 (1991) (discussing that movie character played by W.C. Fields, about to be hanged, says “it’ll sure be a lesson to me”); see also Samuel J.M. Donnelly, Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices’s Positions, 24 ST. MARY’S L. J. 1, 12 (1992) (noting “rehabilitation is not a goal of capital punishment”). However, rehabilitation applied to halachic capital punishment is comprehensible when it is realized that Judaism treats crime as an affront to God; a fundamental goal of all Judaic punishment is thus the expiation of sin. Cohn, supra note 43, at 55 (“Like all theocratic law, the laws prescribing punishments . . . their primary purpose is expiation.”). Expiation may be understood, therefore, as metaphysical rehabilitation because it provides atonement thus allowing for a peaceful afterlife. See 3 MOSES MAIMONIDES, supra note 42, at 37 (stating confession bestows portion in World To Come). This article entertains the expiatory element in halachic punishment as manifested in halachic capital punishment, corporal punishment, and excommunication, but generally refrains from discussing the expiatory characteristic of halachic punishment. This is because any examination of halachic punishment is intended primarily to provide insights on that system’s practical applications, if any, to the present American punishment regime; application of theocratic notions of punishment to a predominately secular society is inappropriate. For discussion of the theocratic and rehabilitative elements in halachic punishment, see 13 ENCYCLOPAEDIA JUDAICA, supra note 31, at 1386; 2 MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED 534, 534-36 (Shlomo Pines trans., 1963) (“For the Law is a divine thing . . . . [and] abolition of punishments . . . would be cruelty itself.”).

61. See Deuteronomy 21:22-23 (stating “if a person [has] committed a sin worth death, and that person is put to death, and you must hang the defendant from a tree.”); see also GOLDIN, supra note 31, at 33 and 137 n.18; 3 THE BABYLONIAN TALMUD, supra note 37, 45b, at 299 (“All who are stoned are [afterwards] hanged.”).

62. Three famous instances of capital punishment mentioned in the BABYLONIAN TALMUD TRACTATE SANHEDRIN are: 1) the execution of a man for riding a horse on the Sabbath (SANHEDRIN 46A); 2) the execution of Bat Tavi, the daughter of a cohain (priest), for having illicit sex (SANHEDRIN 52B); and 3) the hanging of eighty witches on a single day (SANHEDRIN 45B). See BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME 153-54 (1984). However, even these executions were not imposed pursuant to strict halachic standards but were implemented as “temporary” deterrent measures. Id.

capital offense nearly impossible. These safeguards were so extensive that the talmudic sages referred to a Jewish court which dispensed a capital sentence only once in seventy years as "murderous."

Various reasons have been advanced as to why Judaism provided for such elaborate capital punishment schemes and then minimized their use. First, it has been suggested that halachic capital punishment served not as a practical means of executing criminals, but to illustrate Judaism's hatred of capital offenses. Moreover, Judaism accomplished this illustration by establishing a hierarchy of punishment schedules, with those of capital punishment being the most severe.

Another explanation is that, whereas the Torah prescribed a program of capital punishment, the rabbis made implementation of that program nearly impossible because they recognized human beings can never be absolutely certain of factual guilt and innocence, and thus innocent people may occasionally be executed. They premised this position on the belief

64. See Arnold N. Enker, Aspects of Interaction between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law, 12 CARDOZO L. REV. 1137, 1139 (1991) (discussing impracticality of halachic capital punishment making conviction and execution extremely unlikely); see also Schreiber, supra note 63, at 546 (discussing how technical rules made it nearly impossible to execute under Jewish criminal law).

65. See 5 ENCYCLOPAEDIA JUDAICA, supra note 37, at 145. "A Sanhedrin that puts a man to death ... is called a murderous one. R[abbi] Eleazar ben Azariah says 'Or even once in 70 years.'"

66. See HERBERT L.A. HART, LAW, LIBERTY, AND MORALITY 65 (1963) (providing secular expression of this sentiment) ("The punishment for grave crimes should adequately reflect the revulsion felt by the majority of citizens for them."); see also Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct.").

67. See Enker, supra note 64, at 1145.

68. See Gerald J. Blidstein, Capital Punishment—The Classic Jewish Discussion, 14 JUDAISM 159, 163 (1985). This position is based on a famous argument among Rabbis Akiva, Tarfon, and Shimon ben Gamliel. Akiva and Tarfon testified that if they sat on the Sanhedrin, the Jewish Supreme Court, criminals would not be executed. Shimon ben Gamliel countered that without capital punishment there would be more murders among the Jewish People. See 4 THE BABYLONIAN TALMUD 7a, at 35 (L. Epstein ed. & H.M. Lazarus trans., 1935); Cohn, supra note 43, at 64. The positions of Akiva and Tarfon were based on the fear of executing an innocent individual. See HERRING, supra note 62, at 157 (Tarfon and Akiva were motivated by possibility of mistaken verdict). This fear of mistake is often cited in contemporary discussions of capital punishment. See, e.g., CHARLES L. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 1, 10, 14-22 (1974); HERBERT L.A. HART, PUNISHMENT AND RESPONSIBILITY 89 (1968); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 377 (1981); Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21, 21-22, 75-81 (1987).
it is better that more factually guilty criminals be spared than it is that innocent persons be executed.\textsuperscript{69}

Yet another suggestion is that the Talmud made capital punishment impractical, not out of a fear innocent persons would be executed, but because of a reluctance to terminate even guilty lives.\textsuperscript{70} This view was premised on the sanctity of human life and the belief that all killing destroys the image of God in the world.\textsuperscript{71}

Another reason the talmudic rabbis rendered employment of the death penalty nearly impossible was they understood deterrence to be promoted more by the frugal use of capital punishment than by a regime of extensive execution.\textsuperscript{72} To be sure, the rabbis only refrained from employing capital

\begin{flushright}
\textsuperscript{69} For an expression of this sentiment in a secular context, see Alan H. Goldman, \textit{Beyond the Deterrence Theory: Comments on Van Den Haag’s “Punishment as a Device for Controlling the Crime Rate.”} 33 \textsc{Rutgers L. Rev.} 721 (1981) (explaining why it is worse to punish the innocent than free the guilty).

\textsuperscript{70} See Blidstein, \textit{supra} note 68, at 164.

\textsuperscript{71} Id. at 165.

\textsuperscript{72} See 13 \textsc{Encyclopaedia Judaica}, \textit{supra} note 31, at 1387. “[I]n order to retain the deterrent effect of the death penalty, . . . the judges must do everything in their power to avoid passing death sentences.” Id. At first blush, this appears counterintuitive—certainly, more executions would seem to deter more capital offenses. See Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring) (discussing decreased use of executions diminishing deterrence); \textsc{Herbert L. Packer, The Limits of the Criminal Sanction} 287 (1968) (discussing how fewer uses of capital punishment diminish deterrence). Yet, the talmudic scholars may have appreciated, as other legal thinkers have, that the taking of human life, even with judicial sanction, tends to cheapen the value of life in society. \textit{See, e.g., Ronald Dworkin, Life’s Dominion} 182 (1993) (questioning whether capital punishment creates callousness in society); \textsc{John Laurence, A History of Capital Punishment} xvii (1960) (quoting Clarence Darrow: “[T]he spectacle of the state taking life must tend to cheapen it.”); Donnelly, \textit{supra} note 60, at 24 (explaining Hart’s statement that death penalty might actually reduce respect for life); Hart, \textit{supra} note 68, at 88-89 (stating that use of death penalty by state may actually lower respect for life). Accordingly, the rabbinic stance on deterrence and capital punishment may reflect a talmudic balancing of the ideal of capital punishment as a deterrence with the reality that such punishment often impacts negatively on society. Halacha often balances the appropriateness of observing law in its ideal state against societal realities that preclude such observance. For examples, see 3 J. David Bleich, \textsc{Contemporary Halakhic Problems} 329-43 \textit{passim} (1989) (discussing whether antenuptial agreements may be employed to circumvent problem of agunot (women who cannot remarry because they are not halachically divorced)); 7 \textsc{Encyclopaedia Judaica} 1159 (1972) (noting no restriction may be imposed on a congregation that cannot as a practical matter observe the restriction); Cohn, \textit{supra} note 43, at 56-58 (describing replacement of biblical stoning with rabbinic stoning out of societal need).
punishment after becoming convinced that such punishment no longer served a deterrent function, even when practiced sporadically. Biblical and rabbinic methods of capital punishment remained "on the books," however, as pedagogical expressions of Judaic disgust with capital crime.

While talmudic capital punishment was more of an academic than practical concern during the talmudic period, including the period surrounding the destruction of the Jerusalem Temple, Jews used the death penalty extensively when they were domiciled in the diaspora. This was due to the perception by diasporic rabbis that emergency measures were needed to protect Jewish communities from assimilation and destruction by informers.

73. The institution of talmudic capital punishment was abolished 40 years before the Temple's destruction in 70 A.D. See Stone, supra note 30, at 828 n.78 (dating Jerusalem's destruction at 70 A.D.). The talmudic rabbis formally ended capital punishment 40 years before Jerusalem and its Temple were destroyed, because that is when the Romans exiled the Jewish Supreme Court (Sanhedrin) Judges from Jerusalem; biblical authority to execute criminals existed only when the Sanhedrin could convene within the Temple walls, based on Deuteronomy 17:8-9 ("[Y]ou shall go to the place the Lord your God shall choose... And you shall go to the priests... and the judges who shall be in those days."). See 3 MOSSES MAIMONIDES, supra note 42, 14:12-13, at 41. The Talmud interpreted this passage, with its juxtaposition of priests and judges, as requiring that judges only rule when priests perform (i.e., when there is a temple in Jerusalem). See BLEICH, supra note 48, at 343.

74. See HERRING, supra note 62, at 161.

75. 10 ENCYCLOPAEDIA JUDAICA 1483-84 (1971) (describing the impact of morality on Jewish law through rabbinic use of capital punishment penalties to communicate rabbinic disgust with misbehavior).

76. See supra note 73.

77. See 5 ENCYCLOPAEDIA JUDAICA, supra note 37, at 812 (describing capital punishment dispensed by Jews in Spain and Poland); 13 ENCYCLOPAEDIA JUDAICA, supra note 31, at 1388-89 (discussing Jewish use of death penalty in Muslim and Christian Spain on informers); see also HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW 30 (1984) (noting that Jewish courts were permitted to impose even capital punishment when required by "necessities of the day"); Suzanne L. Stone, Sinaitic and Noahide Law: Legal Pluralism in Jewish Law, 12 CARDOZO L. REV. 1157, 1198 (1991) ("To preserve communal unity... the Jewish community must have the ability to impose... capital punishment.").

78. See HERRING, supra note 62, at 159 (finding that death penalty may be invoked without "conventional considerations" to safeguard Torah interests). Id. at 161 (explaining that the death penalty is necessary for those who inform on Jews to non-Jewish authorities). The informer who disparages Jews to the secular authorities, to receive an award or curry favor, is the most despised figure in Jewish history. To illustrate this point, the siddur, or Jewish prayer book, includes a supplication that God eradicate informers. See 8 ENCYCLOPAEDIA JUDAICA, supra note 32, at 1364 (addition of special blessing to counter increase of informers). For an example of the hatred Jews felt for informers, see Schreiber, supra note 63, at 547-48. For an interesting discussion on the impact of informers on Jewish.
This cursory examination of halachic capital punishment demonstrates it was premised on four beliefs. First, the main purpose of and justification for the death penalty is deterrence; since any taking of human life, especially in public, tends to cheapen such life. Deterrence is promoted more by the frugal use of capital punishment combined with expressions of disgust concerning capital offenses, than it is by a more extensive use of the death penalty. Second, deterrence is promoted by exhibiting the convict's corpse to the public. Third, deterrence and retribution are advanced by allowing society, represented by the witnesses to the respective crime, to carry out executions. Finally, offender rehabilitation is realized through the expiatory function of capital punishment.

Having examined how the Talmud dealt with capital criminals, this article now explores how the Talmud treated thieves who were unable to repay the amount of their theft.

B. Indentured Servitude

Indentured servitude\textsuperscript{79} was the biblical remedy both for those who were unable to support themselves and those who had stolen and were unable to repay for what was stolen.\textsuperscript{80} Because indentured servitude based on an inability to support oneself was not imposed as a punishment, this article deals solely with the latter category.\textsuperscript{81}

\textsuperscript{79} Servitude is purposefully used instead of slavery to describe Judaic penal servitude in order to emphasize that Judaic servitude differed acutely from other forms of slavery in its humane treatment of slaves. Examples of this treatment noted in the article include the provision that ideally limited Judaic penal servitude to a maximum period of six years and the ultra humane manner in which the master had to treat the Hebrew servant. Only if the servant himself requested an extended period of servitude was servitude beyond six years permitted. See 5 THE CODE OF MOSES MAIMONIDES (MISHNEH TORAH), BOOK 12, THE BOOK OF ACQUISITION, Laws Concerning Slaves 2:2, at 249 (Leon Nemoy et al. eds. & Isaac Klein trans., 1951) [hereinafter 5 MOSES MAIMONIDES]; 14 ENCYCLOPAEDIA JUDAICA 1656 (1972). For examples of the humane treatment Judaism afforded indentured servants, see id. at 1656-57, 1659-60; 5 MOSES MAIMONIDES, supra, 1:6, at 247 (forbidden to work servant needlessly); id. 1:7, at 248 (forbidden to assign servant only menial tasks); id. 1:9, at 248-49 (master must treat slave as an equal regarding food, drink, etc.).

\textsuperscript{80} See 5 MOSES MAIMONIDES, supra note 79, 1:1, at 246 ("The Hebrew slave . . . refers to an Israelite whom the court sells into servitude against his will or to one who sells himself voluntarily."); 14 ENCYCLOPAEDIA JUDAICA, supra note 79, at 1655; GOLDIN, supra note 31, at 57.

\textsuperscript{81} Detailed discussion of how indentured servitude was practiced throughout Jewish history is beyond the scope of this article. For more comprehensive treatment, see COHN, supra note 77, at 56-63.
According to Exodus 22:8, a thief was obligated to pay his victim a fine in addition to the amount of his theft. A thief, who was able to repay the theft but unable to pay the fine, could not be sold into servitude; only a thief who was unable to repay the actual theft was sold into servitude. Judaic penal servitude was designed primarily to accommodate restitution on the part of and the rehabilitation of the thief, and to demonstrate that the dignity of the offender-servant need not be actively compromised to achieve those goals. Because the offender-servant was sold into the service of his victim, restitution, which consisted of the servant working for his victim for six years, was accomplished rather easily. This restitution was

82. In all charges of theft, concerning an ox, an ass, a sheep, a garment, or any other loss, both parties must come before God—whoever God declares guilty must pay the winner double [the market value of the stolen item]. “God” in this context refers to the judges who pronounce sentence. See 9 THE CODE OF MOSES MAIMONIDES (MISHNEH TORAH), BOOK 11, THE BOOK OF TORTS, Laws Concerning Theft 1:5, at 60-61 (Julian Obermann ed. & Hyman Klein trans., 1954) [hereinafter 9 MOSES MAIMONIDES].

83. An Israelite woman was not permitted to sell herself into servitude nor could she be sold into service to repay her theft. See 5 MOSES MAIMONIDES, supra note 79, 1:2, at 246.

84. See 5 MOSES MAIMONIDES, supra note 79, 1:1, at 246; GOLDIN, supra note 31, at 58. Our discussion of halachic penal servitude is limited to consideration of Jewish servants. For treatment of the laws regarding non-Jewish or so-called “alien” slaves, see 14 ENCYCLOPAEDIA JUDAICA, supra note 79, at 1658.

85. Of course, the very status of being an indentured servant probably lowered the self-esteem of the thief. This may have been part of the reason why the talmudic sages insisted that the servant be treated humanely.

86. See COHN, supra note 77, at 57 (service of slave to compensate for theft against master).

87. While the Hebrew servant had to work for his employer, the employer had to treat the servant almost as an equal; in an incredible expression of sympathy for the stigma most indentured servants experience, the talmudic scholars ruled that a master had to provide his servant with food, clothing, and shelter equal to that of the master. See 5 MOSES MAIMONIDES, supra note 79, 1:9.

88. Id. 2:2, at 249. Although Jewish law prescribed a six year period of penal servitude, there were three ways in which penal servitude could be terminated within the six years. First, a servant could free himself by paying his master the value of his remaining years of service in proportion to the purchase price the master paid for the servant. For example, if the master paid $6000 for the servant, the servant could free himself at the end of four years by paying his master $2000, or the value of the remaining two years that the servant owes his master. See 4 THE BABYLONIAN TALMUD, SEDER NASHIM, KIDDUSHIN 14b, at 59 (L. Epstein ed. & H. Freedman trans., 1936) [hereinafter 4 BABYLONIAN TALMUD]. Second, a servant could be freed by receipt of a “deed of redemption” delivered by the master to the servant. Id. 16a, at 68. Finally, an indentured servant became free on the death of his master, unless the master left male descendants, in which case, the servant was required to work for his master’s male children for the balance of the six year period. Id. 17b, at 77.
realized through a face-to-face encounter between thief and victim. The thief was made to appreciate that he had wronged a fellow human being, and not merely an “owner” or “possessor.” The victim was able to perceive the thief as a person, not as some impersonal monster. Moreover, because Jewish law insisted the purpose of penal servitude was not merely to achieve pecuniary restitution, such servitude served to rehabilitate the offender-servant by providing him with the opportunity to progress and advance from the low level at which his conduct had placed him.

Unlike their continued practice of capital punishment after the destruction of the Jerusalem Temple, Jews did not practice indentured servitude from the time celebration of the jubilee year ceased. Halachic penal servitude demonstrates four points. First, because Judaism considered theft a crime against the victim as well as society, a thief who was sold into servitude to repay his debt had to work for his victim. Second, a servant usually had to work for his victim for six years. Third, a master was obligated to treat his servant in the most humane manner possible. Finally, a main purpose of halachic servitude was rehabilitation of the offender. These factors further illustrate that Jewish law combined restitutive and rehabilitative principles in its punishment programs. Having examined halachic capital punishment and halachic penal servitude, this article now turns to the most prevalent form of halachic punishment: corporal punishment.

89. For a secular suggestion that the absence of such victim-offender interaction is at the root of the present American prison over-population problem, see Leven, supra note 10, at 650-53.

90. See 14 ENCYCLOPAEDIA JUDAICA, supra note 79, at 1659-60.

91. 4 THE BABYLONIAN TALMUD, SEDER NASHIM, TRACTATE GITNEN 65a, at 306 (I. Epstein ed. & Maurice Simon trans., 1936); 5 MOSES MAIMONIDES, supra note 79, 1:10, at 249. The jubilee year prescribed by Leviticus 25:8-17 was tied to the issue of indentured servitude, inasmuch as even individuals who desired to remain servants past the mandatory six year period had to be freed at the beginning of the jubilee year. Id. The talmudic scholars, therefore, felt it was inappropriate to practice penal servitude once the jubilee was abolished, since at that point, an individual could theoretically remain an indentured servant forever. There is dispute as to when celebration of the jubilee actually ended. Some scholars date cessation of the jubilee at approximately 730 years before the death of Christ, while others believe that the jubilee did not end until the destruction of the Jerusalem Temple in 70 A.D. See COHN, supra note 77, at 61.
C. Corporal Punishment

Halachic corporal punishment,\textsuperscript{92} or flogging, was the standard form of punishment for crimes that did not have biblically prescribed penalties.\textsuperscript{93} There were two forms of flogging, biblical and rabbinic.\textsuperscript{94} Biblical flogging was limited to thirty-nine lashes,\textsuperscript{95} and served as a metaphoric\textsuperscript{96} substitute for the death penalty. Rabbinic whipping served to discipline an offender\textsuperscript{97} who had flouted a rabbinic precept, and was not limited to a specific number of lashes. Theoretically, a candidate for rabbinic whipping could be flogged to death.\textsuperscript{98}

\textsuperscript{92} Discussion of the ways in which corporal punishment is practiced in other religions and countries is beyond the scope of this article. For a summary of how corporal punishment is administered in the countries that practice it, see Tom Kuntz, \textit{Beyond Singapore: Corporal Punishment, A to Z}, N.Y. TIMES, June 26, 1994, § 4, at 5.

\textsuperscript{93} See 6 ENCYCLOPAEDIA JUDAICA 1348 (1972).

\textsuperscript{94} The distinction between biblical and rabbinic corporal punishment reflects the difference between biblical law and rabbinic law generally. Biblical law mainly refers to the commandments and prescriptions found in the canon known as the Old Testament (including the Pentateuch, or Five Books of Moses, Prophets, and Chronicles). Biblical law as used in talmudic parlance also refers to ordinances which the talmudic rabbis and halachic codifiers derived from biblical precedent, and to ordinances which, though deduced from passages in the Old Testament, were believed to have been revealed to Moses at the Revelation at Sinai. See DAVID M. FELDMAN, \textit{MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW} 3-4 (1968). Rabbinic law refers both to the modification of biblical law by the talmudic rabbis and halachic codifiers, and to practices that the halachic authorities enacted to protect biblical principles. \textit{Id; see also} 7 ENCYCLOPAEDIA JUDAICA, \textit{supra} note 72, at 1159.

\textsuperscript{95} See 3 MOSES MAIMONIDES, \textit{supra} note 42, 17:1, at 47-48. Now, \textit{Deuteronomy} 25:2-3, which provides the authority for biblical flogging, authorizes a criminal to be given 40 lashes. The talmudic scholars ruled, however, that only 39 lashes should be inflicted to prevent the possibility of exceeding the biblically authorized number of 40. \textit{Id. LEW, supra} note 31, at 63; 6 ENCYCLOPAEDIA JUDAICA, \textit{supra} note 93, at 1348; Cohn, \textit{supra} note 43, at 71.

\textsuperscript{96} See GOLDIN, \textit{supra} note 31, at 11-12.

\textsuperscript{97} \textit{Id.} at 259 n.4. Rabbinic whipping is referred to in Hebrew as \textit{makkat mardut}, or “whipping of rebellion.” This underscores that such punishment was imposed to discipline. \textit{See id; see also} Shuster, \textit{supra} note 29, at 644 n.18.

\textsuperscript{98} Literally, “until the defendant’s soul departs.” \textit{See} 2 THE BABYLONIAN TALMUD, \textit{SEDER NASHM, TRACTATE KETHUBOTH} 86a-b, at 545 (I. Epstein ed. & Israel W. Slotki trans., 1936); 6 ENCYCLOPAEDIA JUDAICA, \textit{supra} note 93, at 1350. Rabbinic lashings were not limited in number because their purpose was disciplinary; they had to be enforced until the offender resumed observation of the rabbinic precept he had disavowed. \textit{See id}.  

Published by NSUWorks, 1995
Once the Jewish court established that an offender deserved to be flogged, the criminal was publicly whipped by a court attendant, on his or her body, and not through the clothes. One-third of the lashes were administered on the convict’s chest, and two-thirds were administered on the convict’s upper back. The talmudic scholars applied three unique procedures to corporal punishment. First, all whipping candidates received a physical examination immediately before being flogged. Only those deemed physically able to withstand the beating were lashed. Second, halachic corporal punishment was imposed publicly to promote deterrence. Third, the sentencing judges had to attend and monitor the imposition of corporal punishment. Their presence ensured both that the whipper did not whip the criminal excessively, and, if the criminal became ill during punishment, the whipping would cease. These requirements established that halachic corporal punishment was not intended to be, nor was it, a form of torture or cruel and unusual punishment, but rather served to promote both general and specific deterrence. It may be because halachic corporal punishment was considered to be both a humane act and an effective deterrent, rabbinic flogging was extensively employed by many Jewish communities even when Jews did not have complete autonomy. In fact, some Orthodox Jews still practice symbol-
ic flogging on the eve of Yom Kippur (the Day of Atonement), to encourage themselves to repent.\textsuperscript{110}

Having reviewed several physical and liberty-restrictive talmudic punishments, this article now discusses halachic excommunication, the penalty that perhaps best illustrates the halachic tenets that crime is a sin, that crime is an affront to God, and that crime requires societal ostracism to be eradicated effectively.

D. Excommunication

There are two forms of halachic excommunication, \textit{niddui} and \textit{cherem}. \textit{Niddui} refers to the initial imposition of excommunication\textsuperscript{111} and is reserved primarily for individuals who fail to observe rabbinic teaching, to respect court judgments, or to honor their communal obligations.\textsuperscript{112} First, the offender is warned to desist from the respective inappropriate behavior. This reprimand lasts for seven days.\textsuperscript{113} \textit{Niddui} is imposed against an offender who continues the aggravating conduct after expiration of the initial warning period and requires the offender to comport himself or herself in an uncomfortable manner.\textsuperscript{114} The purpose of \textit{niddui} is to render the \textit{menuddah} unattractive to himself or herself and to others,\textsuperscript{115} and thereby induce him or her to reform. \textit{Niddui} lasts for thirty days. It is extended for another thirty days if the offender does not inform the court at the end of

---


\textsuperscript{111} See 8 \textit{Encyclopaedia Judaica}, \textit{supra} note 32, at 350-51. \textit{Niddui} derives from \textit{menuddah}, which means “defiled.” \textit{Id.} at 350 (\textit{Menuddah} also refers to the excommunicant).

\textsuperscript{112} \textit{Id.} at 350-51. These examples are merely illustrative. For a complete list of the offenses that are punishable by \textit{niddui}, see 8 \textit{Encyclopaedia Judaica}, \textit{supra} note 32, at 351-52; Moses Maimonides (\textit{Mishneh Torah}), \textit{Hilchot Talmud Torah} at 268-72 (Eliyahu Touger trans., 1989).


\textsuperscript{114} For example, a \textit{menuddah} was enjoined from washing and grooming himself, from washing clothes, from wearing shoes, from unnecessary social intercourse, and from participating in formal communal prayer. See Moses Maimonides, \textit{supra} note 112, 7:2, at 276-78; 8 \textit{Encyclopaedia Judaica}, \textit{supra} note 32, at 351.

\textsuperscript{115} Support for this proposition may be found in the fact that the \textit{menuddah} was not permitted to wash or groom as if he or she were in a state of mourning. See Moses Maimonides, \textit{supra} note 112, 7:4, at 276.
the initial thirty days that he or she will abstain from the offensive conduct. Finally, the coffin of one who dies *menudah* is symbolically stoned. Cherem, the second and more severe form of excommunication, is placed on offenders who refuse to acknowledge wrongdoing even after the second thirty day period of *niddui*. Cherem differs from *niddui* in that the *muchram* can engage only in limited work and has to study alone, whereas the *menudah* is permitted to conduct his or her regular profession and study the Torah with others.

While these restrictions demonstrate the punitive nature of both forms of halachic excommunication, *niddui* and *cherem* also have a direct impact on the offender’s community. In the case of *niddui*, the rabbis issue an edict that friends and neighbors cannot interact with the *menudah* except to study and to pray. The impact on the community of a *cherem* is greater. Every Jew is obliged to keep a prescribed distance from the *muchram* when not patronizing the *muchram*’s place of business. Halachic excommunication is designed, therefore, to punish and reform the offender and to deter others from the criminal’s conduct. Thus, it utilizes concepts of

116. See id. 7:6, at 278-80; 8 ENCYCLOPAEDIA JUDAICA, supra note 32, at 350-51.
117. See Moses Maimonides, supra note 112, 7:4, at 278; 8 ENCYCLOPAEDIA JUDAICA, supra note 32, at 351. The stoning of a *menudah*’s coffin consisted of placing a single stone on the coffin.
118. See Moses Maimonides, supra note 112, 7:6, at 278-80; 8 ENCYCLOPAEDIA JUDAICA, supra note 32, at 351. *Cherem*, from the Aramaic *charama*, means to “be forbidden.” See id. at 344. *Muchram* refers to the individual in a state of *cherem*. See id. at 351. Eliyahu Touger has translated *niddui*, in the passages from Maimonides, supra note 112, as “ban of ostracism,” and *cherem* as “excommunication.” Rabbi Touger may have done so simply to underscore that *niddui* and *cherem* differ in severity. *Niddui* and *cherem* may both be translated into English as “excommunication” without compromising their Hebrew meaning. See Ben-Yehuda’s Pocket English-Hebrew Hebrew-English Dictionary 29 (Ehud Ben-Yehuda & David Weinstein eds., 1961) (defining cherem as “ban” or “excommunication”); id. at 196 (defining *niddui* as same); see also 8 ENCYCLOPAEDIA JUDAICA, supra note 32, at 350 (describing *cherem* as aggravated *niddui* and not separate punishment).
119. See 8 ENCYCLOPAEDIA JUDAICA, supra note 32, at 351; Moses Maimonides, supra note 112, 7:5, at 278.
120. It is forbidden to be within four cubits [six feet] of the excommunicant. See Moses Maimonides, supra note 112, 7:4, at 276-78. Non-family members are not allowed near excommunicants. See 8 ENCYCLOPAEDIA JUDAICA, supra note 32, at 351.
121. Of course this deterrence was predicated on the assumption the Jewish community would respect rabbinic authority enough to sanction ostracism for the disobedience of rabbinic teachings. Interestingly, this halachic reliance on communal observance permeates Jewish law. Consider the rabbinic edict that forbids a Jew to climb a tree on the Sabbath. See 3 Yisroel Meir Ha-Cohen, Mishneh Berurah, Laws of Shabbos § 336:1 (Aviel
general and specific deterrence and rehabilitation, and involves both the offender and his or her community in eradicating misconduct.

Short of death, excommunication is the most horrible censure an observant Jew can suffer. It is designed to sever the Jew's relationship with the community. Such detachment can be devastating for the religious Jew because, in contrast to other religions, interaction with other members of society is a central religious element of Judaism. Halacha requires the Jew to pray with a minyan (a quorum comprised of ten Jews) to contribute to charity, to study Torah (preferably in public), and to generally take an interest in his or her community. Excommunication prevents such interaction, thus providing a most miserable and deterrence-effective condition for a practicing Jew.

Halachic excommunication was utilized from the initial post-talmudic period through the middle ages, and is still employed in certain orthodox communities. Today, however, in the absence of a central binding

---

Orenstein ed., 1986); 14 THE CODE OF MAIMONIDES (MISHNEH TORAH), BOOK 3, THE BOOK OF SEASONS, The Sabbath, 21:9, at 131 (Leon Nemoy et al. eds. & Solomon Gandz & Hyman Klein trans., 1961). The rabbinic penalty for willfully climbing a tree on the Sabbath is that the offender must remain in the tree until the Sabbath ends. See id. at 131-32. The halachic codifiers apparently did not entertain the thought that the Jew who willfully offended a rabbinic teaching might not adhere to the penalty for that offense.


123. See 5 ENCYCLOPAEDIA JUDAICA, supra note 37, at 808-09; KUSHNER, supra note 122, at 13 (stating that the "essence of religious identity is... membership in a God-seeking community").

124. See 1 SOLOMON GANZFRIED, CODE OF JEWISH LAW (Kitzur Shulhan Aruh) 41 (Hyman E. Goldin trans., Hebrew Publishing Co. revised ed. 1961) (describing appropriateness of praying together with congregation described as minyan, or quorum, of 10 Jews).

125. See id. at 110.

126. See id. at 87.


128. See 8 ENCYCLOPAEDIA JUDAICA, supra note 32, at 353-54 (describing use of cherem in post-talmudic Jewish history); id. at 1368 (discussing excommunication in medieval Eastern and Central Europe); 13 ENCYCLOPAEDIA JUDAICA, supra note 31, at 1389-90 (noting that cherem is the most severe form of post-talmudic punishment); NUN, supra note 109, at 52-53 (emphasizing the effect of excommunication on the offender during the middle ages); see also SHLOMO EIDELBERG, JEWISH LIFE IN AUSTRIA IN THE XVTH CENTURY 67 (1962) (noting use of excommunication in fifteenth century Poland). Excommunication may initially have been an effective deterrent against certain crimes and sins during the middle ages because of the manner in which it was celebrated. While the "lighter" reprimand and niddui were simply publicized by the rabbinical court, cherem was pronounced
halachic authority, excommunication, like other forms of halachic punishment, has lost its general deterrence value. It remains primarily as an expression of ultra-orthodox disapproval of modern, secular conduct.\textsuperscript{129}

Having presented an overview of halachic punishment, the article next compares how the halachic penal methods mentioned above compare with their counterparts in American law. This article also examines the implementation of halachic punishment methods in American law.

III. AMERICAN LAW

A. Capital Punishment

Although contemporary American capital punishment finds its origins in the Old Testament,\textsuperscript{130} modern American capital punishment differs markedly from its biblical ancestor. First, halachic Judaism theorized that executions should be as public as possible to promote deterrence. Conversely, modern American executions are generally conducted in private.\textsuperscript{131} Second, halachic Judaism required that capital punishment occur on the same day as sentencing. In contrast, American executions often occur years after a defendant is sentenced.\textsuperscript{132} Third, Jewish law allowed appeal of a
sentence as of right as often as the defendant wished, provided the appeal was "cogent."133 Others were permitted to present exculpatory evidence on the convict's behalf as often as they wished, without a prior showing of "cogency."134 American law, after Herrera v. Collins,135 only requires appellate courts to entertain new exculpatory evidence after conviction if the evidence is sufficiently competent to overcome a criminal's conviction-acquired presumption of guilt.136 Finally, while halachic Judaism punished a host of crimes and sins with capital punishment,137 American law reserves the death penalty primarily for aggravated homicide.138

American executions are carried out years after an offender is sentenced primarily because of the sheer volume and frequency of executions in America today. Whereas halachic Judaism rarely sentenced a criminal to death,139 there are over 2500 death row inmates throughout the United States.140 This volume of capital convicts, most of whom receive numer-

that the average time between sentence and execution is six and one-half to eight years); Stephen P. Garvey, Death-Innocence and the Law of Habeas Corpus, 56 ALB. L. REV. 225, 225 (1992) (estimating a lapse of six or seven years between sentence and execution); Lewis F. Powell, Jr., Capital Punishment, 102 HARV. L. REV. 1035, 1038 (1989).

133. See 3 MOSES MAIMONIDES, supra note 42, 13:1, at 36-37.

134. See id.


136. See Herrera, 113 S. Ct. at 860 (noting that upon conviction, criminal loses presumption of innocence and acquires presumption of guilt); id. at 869 (stating that because of need for finality in criminal adjudications, post-conviction claims of actual innocence must pass extraordinarily high threshold).

137. See supra notes 39-52 and accompanying text.

138. See Glenn L. Pierce & Michael L. Radelet, The Role and Consequences of the Death Penalty in American Politics, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 713 (1990-1991). While capital punishment was imposed well into the twentieth century for other crimes such as rape, most states today reserve the death penalty for intentional homicides. See BLACK, supra note 68, at 10 (rape was often grounds for execution); FRIEDMAN, supra note 11, at 318 (Supreme Court allows rape to be capital punishment); at 319 (rape can no longer be capital punishment); Pierce & Radelet, supra, at 713 n.5 (death penalty is no longer appropriate for rape of adult not resulting in victim's death).

139. See supra notes 62-65 and accompanying text.

ous judicial reviews of their convictions, makes delayed executions in America the norm. Unlike that of the halacha, the American penal system does not employ a hierarchy of capital punishments to reflect a difference between crimes. Halachic Judaism treats many sins as crimes and accordingly differentiates sins and crimes that pose significant theological dangers to Judaism’s theocratic structure, from sins and crimes that compromise physical and social well-being. American law appropriately defines and punishes only the latter category of offenses as crimes. Furthermore, because American law only capitalizes on offenses it deems especially heinous, American law does not need an array of capital punishment methods to deter capital crimes. Because the death penalty is only used to combat truly egregious crime ab initio, the American notion of capital penal deterrence is satisfied.

In sum, the nature and reality of contemporary American capital punishment appropriately precludes the practice of same-day executions in contemporary America. The establishment of a hierarchy of execution methods is unnecessary in American jurisprudence, since American law only uses the death penalty to punish especially egregious crimes. Yet, other aspects of American capital punishment that differ from their halachic counterparts are infirm and can benefit from a reformulation modeled after halachic practice, or at least after halachic principles.

An important example of an area where such reformulation is warranted is federal habeas corpus law. Herrera holds that habeas review is not required in a capital case on the basis of even newly found exculpatory evidence, unless that exculpatory evidence is competent enough to overcome the convict’s conviction-acquired presumption of guilt. To the extent Herrera holds even a claim of factual innocence may be incompetent to overcome a criminal’s conviction-acquired presumption of guilt, the Court implies that a naked claim of factual innocence of a convicted

141. See Garvey, supra note 132, at 225 n.1 and accompanying text.
142. See Powell, supra note 132, at 1035.
143. See Donnelly, supra note 60, at 34.
145. See supra notes 135-36 and accompanying text.
146. See Herrera, 113 S. Ct. at 860.
individual, by itself, is insufficient to save the convict from execution.\textsuperscript{147} \textit{Herrera} probably resulted from a judicial desire to secure finality in criminal proceedings, thus relieving judicial docket clogging.\textsuperscript{148}

However, \textit{Herrera}, by expressing a preference for judicial economy and finality over the formulation of a standard to help avoid the execution of factually innocent persons, exemplifies the attitude that it is better to risk executing factually innocent individuals than it is to compromise rules of criminal procedure. This exemplification is disturbing considering that it may not be necessary\textsuperscript{149} and that it contradicts most constitutional and philosophical theories of punishment and government.\textsuperscript{150} Moreover, viable

\textsuperscript{147} Chief Justice Rehnquist, for the majority, Justice O'Connor, concurring, and Justice White, concurring in the judgment, all, one way or another, claimed to support the notion that the Constitution prohibits the execution of an individual who has made a "persuasive" showing of "actual innocence." \textit{See id.} at 869 ("We may assume . . . that in a capital case a truly persuasive demonstration of 'actual innocence' . . . would render the execution of a defendant unconstitutional."). The majority noted "the execution of a legally and factually innocent person would be a constitutionally intolerable event." \textit{Id.} at 870 (O'Connor, J., concurring). Justice White added that "I assume that a persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of petitioner." \textit{Id.} at 875 (White, J., concurring); \textit{see also} Hoffmann, \textit{supra} note 135, at 832-33. These protestations, however, amount to no more than lip service to a constitutional ideal, inasmuch as \textit{Herrera} did not provide for how much persuasiveness is required to find actual innocence. \textit{Herrera} also failed to define what it intended by "actual innocence." \textit{See id.} at 832. That the above Justices may have no articulable notions of what constitutes actual innocence is suggested by their use of quotation marks, no less than nine times, when referring to petitioner's claim of actual innocence.

\textsuperscript{148} \textit{See Herrera}, 113 S. Ct. at 869 (stating claims of actual innocence are disruptive of finality in capital cases and place an enormous burden on states); \textit{see also id.} at 874 (noting that "[a]t some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation") (O'Connor, J., concurring); \textit{id.} at 875 (Justice Scalia expressed concern that "we not appear to make it harder for the lower federal courts, imposing upon them the burden of regularly analyzing newly-discovered-evidence-of-innocence claims . . . which . . . will become routine."). (Scalia, J., concurring).

\textsuperscript{149} It has been suggested, for example, contrary to the Justices' protestations that rigid habeas rules are needed to prevent the glut of capital habeas petitions from worsening, the number of yearly death inmate habeas filings is quite small. \textit{See} Berger, \textit{supra} note 132, at 1669 n.23, 1671 n.40 and accompanying text.

\textsuperscript{150} Explanations as to why a preference for procedural considerations over factual guilt or innocence is philosophically wrong include, \textit{Immanuel Kant, The Metaphysical Elements of Justice} 100 (J. Ladd trans., 1965), \textit{cited in} Donnelly, \textit{supra} note 60, at 43 n.240 and accompanying text; \textit{Hart, supra} note 68, at 4-5 (including a requirement that the offender committed an actual offense among the conditions that constitute "standard" or "central" case for punishment); \textit{id.} at 31-52 \textit{passim} (discussing doctrines of legal responsibility and excuse, and justification for punishment being conditioned on the commission of
alternatives to \textit{Herrera} can be modeled after halachic penal philosophy that would facilitate reduction of the judicial backlog and promote the finality of judgments while limiting the possibility that innocent individuals are judicially murdered.\footnote{151}

One such alternative is to limit use of the death penalty to even more particularly egregious crimes than those that presently warrant capital punishment; such offenses could include homicide committed in an especially heinous manner or treason in wartime. This would help to reduce potential federal habeas backlogs by limiting the number of criminals subject to government-administered death; the fewer death row inmates there are, the fewer habeas petitions will be filed. Such a limiting of capital punishment could be premised on the halachic understanding that deterrence is best promoted when capital punishment is imposed more infrequently since frequent government executions may cheapen life in the eyes of society.\footnote{152}

Another option, also modeled after halachic practice, would be to differentiate between newly found exculpatory, cogent evidence submitted by death row inmates themselves, and evidence presented by others.\footnote{153} This distinction might be realized by setting a strict cap on the number of habeas petitions a convict can bring while granting a more generous allowance to the number of habeas petitions others can present on behalf of convicts. While this alternative would not be free from abuse since family members and friends will certainly continue to bring frivolous petitions to help an accused, and while it would be difficult to precisely limit the number of habeas petitions family members or friends could bring, this

\footnote{151. \textit{See Herrera}, 113 S. Ct. at 884 (Blackmun, J., dissenting) ("The execution of a person who can show that he is innocent comes perilously close to simple murder.").}

\footnote{152. \textit{See supra} note 72 and accompanying text.}

\footnote{153. \textit{See supra} notes 133-34 and accompanying text.}
option would at least reduce such misuse. Such a reduction could be realized by limiting the habeas petitions an accused, who has the most motivation to postpone the execution, could bring absent a demonstration that the newly found evidence is competent.154

Talmudic punishment could also be instructive concerning American law’s notion of capital deterrence. Presently, American law promotes capital deterrence for the most part, by moderately publicizing executions.155 To further and perhaps more effectively promote deterrence, American executions, reminiscent of the ancient Judaic practice of post-execution hangings, could be televised and broadcast over radio.156 The visualization of executions may have more of a deterrent effect on potential capital criminals than does the mere reading or hearing about executions.157

Of course, televised executions may imbue public executions with a measure of levity and callousness like public hangings did throughout American history.158 Since executions could be broadcast via television and radio, individuals could watch or listen to executions without congregating in large crowds and without access to convicts;159 this could be

154. One plausible standard for determining whether newly found exculpatory evidence is sufficient to merit additional capital habeas review was suggested by Justice Blackmun in Herrera, 113 S. Ct. at 882-83 (Blackmun, J., dissenting). Justice Blackmun’s opinion, that to obtain subsequent habeas relief, a capital defendant must demonstrate that he or she is “probably, actually” innocent, is an appropriately fair standard for two reasons. First, Blackmun’s suggestion favors the state insofar as the defendant bears the post-conviction burden of demonstrating his or her innocence beyond a preponderance (which is how this author understands “probably”). Second, it favors the defense inasmuch as a defendant who can make a probable, as opposed to the majority’s “extraordinarily high” showing of actual innocence (which seems to suggest a measure of “beyond a reasonable doubt”), is not estopped from bringing even numerous habeas petitions.

155. See supra note 131 and accompanying text.

156. For general support of this proposition, as well as arguments against televising executions, see Jeff I. Richards & R. Bruce Easter, Televising Executions: The High-Tech Alternative to Public Hangings, 40 UCLA L. REV. 381 passim (1992).

157. See Patrick D. Filbin, Pictures at an Execution, 9 COOLEY L. REV. 137, 149-50 (1992); see also Officials Hail Effort to Offer an Alternative to Jail, N.Y. TIMES, Jan. 2, 1994, §1, at 25.

158. See Louis P. Masur, Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865, at 95-97 (describing sentiments that public executions blunt moral sensibilities and brutalize people). The 1835 New York Committee found that “public executions . . . are of a positively injurious and demoralizing tendency.” Id. at 116.

159. Executions may have been made private to diminish the racist implications of hanging blacks (who were hanged much more often than whites) and to keep lynch mobs
facilitated by having executions on week nights when bar and club crowds are usually not as large as they are on weekends. Televised executions do not need to appreciably promote communal levity or violence to offenders. Furthermore, televised executions could be limited to late-night hours to prevent young children from being exposed to such violence. In any event, executions could be televised on an experimental basis and could be discontinued if studies begin to indicate that such executions are losing their deterrent effect or are promoting an indifferent attitude among the public to the loss of life.

In sum, certain aspects of the ways in which American capital punishment is carried out do not imitate halachic capital penal practice—but should, and would benefit by doing so. After analysis of some of these aspects, such as the protracted delays between sentencing and execution, this discrepancy is understandable. It is desirable that American legal punishment differs from halachic punishment in its scope. While talmudic capital sanctions were levied for theocratic-based infractions, American capital punishment constitutionally may not be applied to matters of religion and belief in a manner that would excessively entangle government with religion. However, other aspects of American capital punishment are infirm and can be cured by halachic example. These include Herrera’s preference for procedural integrity over a preference for establishing a convict’s factual innocence, and the relative privatization of American executions.

Having compared halachic and American capital punishment practices, this article now examines the adaptability of halachic servitude to American penal law.


160. Moreover, recent studies have confirmed that televised executions would not have a detrimental effect on the viewing public. For an example of such findings, see RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 232 (1991) (citing a 1990 study that television execution publicity had no “brutalization nor...deterrent” effect on public).

161. See supra notes 39-42, 52 and accompanying text.

B. **Indentured Servitude**

To determine whether contemporary American society can use a system modeled after halachic indentured servitude, examining whether such servitude is barred by the Thirteenth and Eighth Amendments to the Constitution is necessary. The Thirteenth Amendment prohibits slavery and involuntary servitude, except as punishment for crime, anywhere in United States territory.\(^\text{163}\) The Supreme Court honored the punishment exception to the Thirteenth Amendment in *United States v. Kozminski*.\(^\text{164}\) Specifically, the Court held that while peonage, or the threat of criminal sanction, may not be used to induce forced labor,\(^\text{165}\) involuntary servitude may be imposed to either coerce compliance with a civic duty,\(^\text{166}\) or as a criminal punishment.\(^\text{167}\) Based on *Kozminski*, the Thirteenth Amendment does not bar American legal application of halachic penal servitude, which was solely levied for theft.\(^\text{168}\) Yet, because involuntary servitude may constitute cruel and unusual punishment, halachic indentured servitude must be examined from an Eighth Amendment perspective.\(^\text{169}\)

---

163. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONSt. amend. XIII, § 1.


165. Id.

166. Id. at 943-44.

167. See supra note 163.

168. The Amendment and the Civil Rights Act of 1866 were primarily intended to abolish the inhumane treatment of African slaves at the time of the Civil War. See *Kozminski*, 487 U.S. at 942; Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 Temp. L. Rev. 361, 383 (1993). Halachic penal servitude always required that servants be treated with the utmost humanity, and so does not fall into the class of slavery that the Amendment was intended to eradicate. See supra notes 85, 90 and accompanying text.

169. It may seem inappropriate to entertain the Eighth Amendment's ban on cruel and unusual punishment regarding slavery since the author has found that the Thirteenth Amendment does not block application of halachic servitude to American criminal law. However, unlike the mandates of the Thirteenth Amendment, what qualifies as cruel and unusual punishment varies according to the "evolving standards of decency that mark the progress of a maturing society." *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); 3 THE GUIDE TO AMERICAN LAW 401-02 (1983). Accordingly, this article examines whether halachic penal servitude constitutes cruel and unusual punishment by contemporary American standards of decency; halachic servitude, while permitted by the Thirteenth Amendment, may be outlawed by the Eighth Amendment.
The Eighth Amendment's prohibition against cruel and unusual punishment outlaws primarily penalties that are grossly disproportionate to their underlying offenses or that are unnecessary and wanton in the amount of pain they inflict. Applying these elements to halachic indentured servitude, the unnecessary pain ban on punishment is honored by halacha. If anything, halachic penal servitude erred on the side of humane treatment as reflected in the manner in which the halacha required masters to treat their servants.

Nevertheless, halachic servitude probably does amount to cruel and unusual punishment under the proportionality test of the Eighth Amendment. This is because halachic indentured servitude was often imposed in disproportion to its underlying offense; biblical law fixed penal servitude for a period of six years, irrespective of the amount a thief had stolen. For example, two thieves who stole $1000 and $100,000, respectively, were sentenced to identical periods of servitude if they were unable to repay their debts. While this fixed period of service is understandable insofar as it was designed to rehabilitate the offender as much as to compensate the victim, such disproportionality would probably render halachic penal servitude cruel and unusual under the Eighth Amendment.

Yet, although halachic indentured servitude would probably be cruel and unusual punishment as applied to American penal law, modifications of such servitude, fashioned after the halachic principle of victim compensation, may appropriately be utilized in American society. These modifications may be achieved in numerous ways. It is important, however, to appreciate that the most important aspect of halachic indentured servitude was not the specific manner in which it was implemented, but the fact that the offender was forced to compensate his victim.

First, consider a program of community service in which the respective offender is sentenced to a prescribed number of hours or days of community service. 

---

170. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.


172. Gregg, 428 U.S. at 173. For historical treatment of what has become the Eighth Amendment's unnecessary pain element, see Granucci, supra note 171, at 848-52.

173. See supra note 79 and accompanying text.

174. See supra note 90 and accompanying text.
work instead of prison.¹⁷⁵ Determining the length of service by the severity of the crime would prevent any form of victim compensation from constituting cruel and unusual punishment due to a disproportionality concern. Now, such community service could consist, for example, of counseling youths against drug use or theft; such service would amount to victim compensation in cases in which an offender has “pushed” drugs onto a youth. If necessary, the offender in such a scenario would additionally have to reimburse his or her victim’s family for any treatment costs they had to bear as a result of the offender’s drug pushing. Another example of community service would apply to offenders convicted of vandalism or other forms of property damage; such offenders would be required to restore the property they damaged as a condition of parole. Yet, in instances of private theft or property damage, for example, offenders could be allowed to work off their debts to their victims according to payment schedules determined for the most part by the victims. Should a victim not desire the offender’s company or not want his or her family exposed to the criminal, the convict could compensate the victim indirectly by having a portion of his or her salary paid to the victim. A criminal who refuses to participate in such victim restitution would have a portion of his or her income garnished to the victim. The criminal who refuses to cooperate in victim compensation even at this stage, would be incarcerated as all prisoners should who violate their parole. Finally, criminals who are not bothered by the prospect of being imprisoned or who perceive prison as a “badge of honor”¹⁷⁶ could be employed by prison chain gangs that would work them aimlessly and arduously. Such prison work would probably have to be aimless and non-productive for two reasons.

First, psychologists have determined that most people find a certain degree of satisfaction in doing any type of productive work, or work that “involves the ego.”¹⁷⁷ Inasmuch as this proposed sanction is addressed to

¹⁷⁵. New York’s Midtown Community Court recently began to experiment with community service punishment instead of incarceration for misdemeanors. Such community service is not limited to restitution for victims of theft, but is imposed for a host of low-level crimes. See Jan Hoffman, A Manhattan Court Explores Service-Oriented Sentencing, N.Y. TIMES, Nov. 27, 1993, §1, at 1. Connecticut also began to offer the options of community service and home detention as alternatives to prison. A Connecticut judge, quoted in a recent New York Times article, averred that such sentencing alternatives save Connecticut almost $20,000 a year per criminal. See Officials Hail Effort to Offer an Alternative to Jail, supra note 157, § 1, at 25.

¹⁷⁶. See Mimi Silbert, Wrong Way to Get Tough, N.Y. TIMES, Jan. 29, 1994, §1, at 19 (describing how some people “dream” of being incarcerated).

the criminal who refuses to compensate his or her victim, and who is not afraid of being imprisoned, participation in a work gang must not provide the prisoner with any degree of satisfaction—it should make prison an even more hellish experience.\textsuperscript{178}

Second, throughout American history, labor unions have consistently opposed organized, productive prison work.\textsuperscript{179} Moreover, such opposition has been successful. During the latter part of the nineteenth century when prison work was most popular, California, Illinois, Michigan, Minnesota, New Jersey, New York, and Pennsylvania either banned specific and productive prison labor, or modified existing prison work laws to accommodate the powerful political demands of organized labor unions.\textsuperscript{180}

In any event, these gangs should be monitored by boards to ensure that prisoners are not being worked beyond what they can endure, and that prisoners in such gangs are not being discriminated against on the basis of their race, religion, or national origin. Such boards should be comprised of both whites and members of minorities to prevent such boards from being or becoming partial or racist.

Regardless of what form of victim restitution is used, the essential goal of punishment for crimes like drug-pushing and theft should be that victims and communities are somehow compensated either directly or indirectly by their criminals. Criminals who do not wish to participate in such compensation should be persuaded to do so, or at the very least, serve to inspire other convicts to do so. Therefore, incarceration as a penalty for crimes which are compensable, and which does not help to remunerate victims, is inappropriate and should be replaced by victim compensation, community service oriented solutions.

Other reasons why community service, victim compensation programs are to be preferred over the incarceration of all but the most dangerous of criminals include: 1) the wages of non-incarcerated convicts can be taxed;\textsuperscript{181} 2) non-incarcerated criminals can support themselves;\textsuperscript{182} 3) because individuals can usually earn more outside prison than within, non-

179. See FRIEDMAN, supra note 11, at 158.
180. Id. at 158-59.
181. See Leven, supra note 10, at 654.
182. Id.
incarcerated persons would be able to more expediently compensate their victims; and 4) because of the high incidence of (gang) rape and other violence in prisons, a sentence of imprisonment has the potential to become an experience which none but the most dangerous and hardened of criminals deserve.

C. Corporal Punishment

Before entertaining whether American law can and should adopt halachic corporal punishment, it is emphasized that halachic corporal punishment is a method of punishment in which thirty-nine lashes are given to a criminal. This is done only after the sentencing court determines through a medical exam that the convict is physically capable of enduring a flogging, and in which the flogging is monitored by impartial judges or other officials to ensure that the criminal does not receive more than thirty-nine lashes. The flogging must cease in the event a criminal becomes ill while being lashed. The author also has in mind a punishment in which the offender is punished with a device that does not leave permanent marks or scars on the body. The author does not suggest, for example, that flogging be administered in an overly cruel and disproportionate manner, like the caning practiced in Singapore. Such caning is generally administered in a particularly cruel fashion, across the naked buttocks with a stick that is as much as half an inch thick. Such caning also usually splits the skin and causes permanent scarring. Cruel and unusual punishment under the Eighth Amendment consists of penalties that are inflicted in disproportion to their underlying offenses, and punishments that inflict unnecessary and wanton pain on criminals. Therefore, it is apparent that halachic corporal punishment amounts to cruel and unusual punishment under American law. However, this is probably true only under the proportionality prong of cruel and unusual punishment; halachic corporal punishment is probably not unconstitutional under the unnecessary and wanton cruelty aspect of the standard. This is because, just as halachic indentured servitude was prescribed for a usual period of six years,

183. Id.

184. See supra notes 18, 26 and accompanying text.


186. See id.

187. See supra note 172 and accompanying text.

188. See supra notes 87-88 and accompanying text.
halachic corporal punishment was imposed, at least for biblical offenses, according to a fixed measure of thirty-nine lashes. Of course, this problem could easily be obviated in American practice, by American law imposing corporal punishment according to a schedule of lashings that depend on the nature of the respective underlying crime, for example, the number of lashes a criminal receives could depend on whether his or her crime is a misdemeanor or a felony.

More problematic, of course, is whether corporal punishment constitutes unnecessary and wanton infliction of pain under the Eighth Amendment. The author submits corporal punishment, at least limited to the manner in which it was halachically imposed, does not constitute such infliction because many of the judicially accepted capital and other punishment methods currently employed by American law seem to be much more cruel than thirty-nine lashes.

Consider electrocution which has, except for the period between Furman v. Georgia and Gregg v. Georgia, been judicially recognized as a constitutionally permissible form of execution. Such judicial notice seems to ignore the fact that, as a result of electrocution, the capital convict is usually burnt to death through suffering 2000 to 2200 volts for sixty to ninety seconds. Electric chairs also often malfunction necessitating multiple attempts at execution with inherent pain to criminals. It is inconceivable that halachic whipping, limited as it was to thirty-nine lashes, preceded by a medical exam to determine the physical capacity of an offender to withstand the whipping, constitutes unnecessary and wanton infliction of pain if electrocution does not.

Now, while electrocution

189. See supra note 95 and accompanying text.
190. See supra notes 102-05 and accompanying text.
191. 408 U.S. 238 (1972) (outlawing all capital punishment as it was then being imposed).
192. 428 U.S. 153 (1976) (reactivating capital punishment with certain conditions); see, e.g., supra notes 171-72.
194. Id. at 1055.
195. Id. at 1056.
196. The author does not suggest that electrocution is a constitutionally acceptable execution method, which it may not be, only that compared with electrocution, halachic corporal punishment certainly cannot be considered cruel and unusual. See Philip R. Nugent, Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution, 2 WM. & MARY BILL RTS. J. 185, 186 (1993).
is the second most common method of execution in the United States, the nature of other methods of American capital punishment underscores the fact that halachic corporal punishment cannot cogently be considered cruel and unusual applied to American penal practice.

Consider cyanide gassing. Justices Stevens and Blackmun, dissenting in *Gomez v. United States District Court for the Northern District of California* provided an intricate depiction of the horrible physical pain that is incident to execution by gassing. This pain is caused by hypoxia which is defined as a lack of oxygen in the body. Hypoxia typically causes severe pain in the arms, shoulders, chest, and back, similar to the pain of a massive heart attack. Hypoxia is frequently accompanied by "seizures, incontinence of stool and urine, salivation, vomiting, retching, ballistic writhing . . . [and] grimacing," and usually lasts for eight to ten minutes or longer.

An objection may be made that the constitutionality of painful capital punishment methods, like execution, does not of itself, legitimize corporal punishment unless one allows that corporal punishment should only be imposed as a substitute for the death penalty. This is because, while pain incident to the implementation of a *capital* sentence may be constitutionally tolerable, the infliction of even a lesser degree of pain for a non-capital offense may be "cruel and unusual." Yet, such an objection is without merit for two reasons.

First, the pain incident to whipping would not be as severe as the pain most prisoners experience during electrocution. Second, while this article has discovered the permissibility of corporal punishment, in part, by comparing such punishment with capital punishment, it is not suggested that corporal punishment be a substitute for the death penalty—only that corporal

197. See Hoffman, *supra* note 193, at 1039 (noting that electrocution is second only to lethal injection as a method of choice for death penalty administration). Lethal injection is not mentioned in the present discussion, since lethal injection probably does not amount to cruel and unusual punishment.

198. Other methods of capital punishment practiced in the 36 states that impose the death penalty are gassing, which is used in Arizona, California, Maryland, Mississippi, and North Carolina, and shooting, which is employed in Idaho and Utah. See Paternoster, *supra* note 160, at 22.


200. *Id.* at 1654.

201. *Id.*

202. *Id.*

203. *Id.*

204. See *supra* text accompanying notes 194-95.
punishment be a substitute for most instances of imprisonment. Therefore, the appropriate valuation of corporal punishment is one that balances the consequences of corporal punishment with those of incarceration. Such balancing is convincing that corporal punishment, at least as administered in halachic practice, is not cruel and unusual compared with being locked up under present prison conditions.\textsuperscript{205} Indeed, this author would much rather be whipped even a hundred times for a crime he did not commit than be placed for any appreciable amount of time in prison.\textsuperscript{206}

While halachic corporal punishment should theoretically therefore be constitutional, there is sufficient Supreme Court and lower court authority to the effect that American law would probably consider any amount of whipping, imposed as punishment, to be cruel and unusual by contemporary standards.\textsuperscript{207}

Yet, American penal practice would probably have more success eradicating crime if it displayed a true sensitivity for the sanctity of life and the value of truly proportional punishment. By implicitly holding that death is a just penalty, while a life-affirming though possibly more painful punishment is not, American law teaches that life is not as important as the absence of physical pain.\textsuperscript{208} Moreover, because corporal punishment would most probably be considered cruel and unusual while imprisonment with its present dangers is not, the absurd nature of the contemporary American criminal justice system is emphasized.

In sum, the author suggests that, while there should be nothing unconstitutional with applying corporal punishment fashioned after halachic practice to American society, in all probability, American law, at least as

\textsuperscript{205} See supra note 18.

\textsuperscript{206} See supra notes 18, 26.

\textsuperscript{207} See Rhodes v. Chapman, 452 U.S. 337, 345 n.11 (1981) (citing Ingraham v. Wright, 430 U.S. 651, 669 (1977)) (corporal penalties constitute cruel and unusual punishment when imposed as punishment); Ingraham v. Wright, 430 U.S. 651, 689 n.5 (1977) (White, J., dissenting) (holding that bodily punishment invades constitutionally protected liberty interest); see also FRIEDMAN, supra note 11, at 313 (citing 1965 Arkansas federal district court case which held that corporal punishment, in absence of fair safeguards, is unconstitutional). The above cases deal only with whether excessive corporal punishment is unconstitutional, since the Court has understood the Eighth Amendment to reflect the “evolving standards of decency that mark the progress of a maturing society.” See Gregg, 428 U.S. at 173 (opining that halachic whipping, if not all corporal punishment, probably would be considered cruel and unusual punishment today).

\textsuperscript{208} This sentiment is premised on the notion that where there is life, there is hope, or that life, even with great suffering, is to be preferred over even painless death. Of course, not all agree with this, as the existence of organizations like the Hemlock Society, and the recent efforts of Dr. Jack Kevorkian make clear.
decided by the Court, would not sanction any form of whipping as a form of non-cruel and unusual punishment. Excommunication, however, may be more adaptable to American society, at least in modified form.

D. Excommunication

It would be extremely difficult, if not impossible, to apply halachic excommunicative punishment, as it was practiced, to American penal procedure. This is because, to begin with, halachic societies were and are extremely homogenous. Most halachic communities not only tend to be closed to all non-Jews, but were and are, for the most part, exceedingly religious. Jews in halachic groups also share a commitment to daily Torah study. More important perhaps, all segments of the Jewish community are linked; the same Jews who shop, eat, and commerce together during the week, worship together on the Sabbath. Because of this communal closeness, the Jew always has a meaningful incentive to conform to his or her society’s standards; the Jew knows that if he or she does not follow his or her community’s standards, or if the Jew otherwise fails to obey a commonly-known practice, he or she will be embarrassed. On

209. See 3 BLEICH, supra note 72, at 82 (noting that a halachic community (kahal in Hebrew) is not permitted to accept non-Jews as members).

210. See JOHNSON, supra note 29, at 158-60 (describing aspects of and reasons for religious communal observance).

211. See GANZFRIED, supra note 124, at 87-88 (describing importance of daily Torah study and establishment of societies for public Torah study).

212. See I BLEICH, supra note 58, at 34 (Jewish Sabbath-observance has been honored even through hardship).

213. It seems that all societies that effectively implemented measures akin to those of the halacha to eradicate crime as well as social and theological non-conformity were grounded on comparable notions of communal closeness and religious adhesion and valued the importance of societal ostracism in maintaining that closeness. For examples, consider colonial-American communities that practiced whipping, victim-restitution, defendant-embarrassment, indentured servitude, and capital punishment. See Toni M. Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L. Rev. 1880, 1881-82 (1991) (stating that methods such as whipping, branding, placing in public stocks, and victim-compensation were employed in colonial America). The social intimacy of colonial communities increased fear of disgrace. Id. at 1912. Another example was standing in the pillory with a sign describing the offense. Id. at 1913; Mark D. Cahn, Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts, 33 Am. J. Legal Hist. 107, 119 (1989). Offenses made capital under the Massachusetts Body of Liberties of 1648, such as blasphemy, witchcraft, homicide, and idolatry, closely resembled or were identical to those which were capital under the halachic system. See id. at 119 n.73; FRIEDMAN, supra note 11, at 52 ("Every colony also had a mass of indentured servants."); see also supra notes 37, 39-
the other hand, modern American communities tend to be extremely heterogenous; because of this, most American communities do not worship, interact, or share common values enough as a community to facilitate efficient excommunicative goals.

Another reason why halachic excommunication would probably be an unrealistic punishment under present American jurisprudence is that contemporary American society has come to reflect what Professor Lawrence Friedman calls a "culture of rights," which places a premium on individualism. While any increase in personal freedom is better than the alternative, such freedom comes at a great price; society has become acclimated to the idea that the individual is more important than the community of which he or she is a part. Such an attitude hinders effective excommunication which is premised on societal cohesiveness, or the belief that members of a community have responsibilities to each other as collectives of a shared reality, perhaps even beyond totally self-centered obligations.

The fact that halachic excommunicative procedures most probably cannot be applied to contemporary American communities, however, does not instruct that such societies cannot benefit from applying practices premised on halachic excommunication. To be sure, shame was the essence of halachic excommunication and there is no reason why shaming should not be employed as a punishment in American societies. The shaming of offenders could be achieved by a range of methods, imposed individually or in combinations. For example, convicted criminals could be required to wear, or post on their property and cars, signs, or other devices describing their crimes.

One such device that could be used to both shame criminals and put the community on notice of the propensities of the offender, is the electronic "tether" that is attached to the criminal and transmits radio signals to a receiver located in a police station or court. The tether may be used to shame offenders inasmuch as others who see it will be aware of its wearer’s

---

214. See Massaro, supra note 213, at 1922-23 (referring to cultural complexity and pluralism of American society).

215. Of course, most American communities sustain places of communal worship and the like. Yet, because of the heterogenous nature of American society, these places tend to be insular, and as a result do not facilitate broad societal adhesion.

216. See FRIEDMAN, supra note 11, at 303, 445.

217. Id. at 13.

criminal conduct. The tether could also serve to warn the public of the criminal’s disposition for misconduct.

Examples of the use of cars to effect shaming include a Florida bumper sticker program that required convicted drunk drivers to affix signs to their bumper stickers or license plates identifying themselves as drunk drivers. An Oregon judge forced a repeat child molester to post signs, at least three inches high, on his residence and car, warning children that he is a convicted sex offender. 219

For greater evils, offenders could be forced to pay for newspaper advertisements in which they apologize for their crimes. Examples of such a penalty include an Ohio judge’s ordering of first-time offenders to publish apologies in local newspapers and an Oregon judge’s mandate that certain criminals pay for advertisements in which they apologize for their crimes. 220

For even more egregious crimes, offenders could be required to describe and apologize for their offenses on television. 221 That these media would be effective in shaming offenders and reducing crime, is strongly indicated by the impact these media have on the American public. 222 Nevertheless, Professor Toni Massaro, in a thorough and interesting study of the causes and effects of shame throughout American and foreign cultures, 223 has argued that shaming is an inappropriate aim of American law for basically four reasons.

First, it is impossible to reintegrate shamed offenders into mainstream society. 224 Second, because of the heterogenous nature of American society, and because criminals often belong to social classes that are different from those of their victims, there will probably not be enough of

219. See Massaro, supra note 213, at 1886-88; see also Driver Must Keep ‘DWI’ License Plate, N.Y. TIMES, July 8, 1994, at B4 (New York Appeals Court upholds judge’s sentencing repeat drunken driver offender to post sign “Convicted DWI” on license plate).

220. See Massaro, supra note 213, at 1888.

221. It is suggested that televised shaming should be limited to instances of particularly heinous criminal activity, since television, through its ability to reach a broad audience, has the potential to seriously impair the offender’s social integrity.


223. See Massaro, supra note 213, at 1880.

224. Id. at 1884 (federal and state laws do not provide for reintegrating offenders).
an audience to actualize any shaming.\textsuperscript{225} Closely related to this objection is the proposition that shaming will frequently be ineffective in achieving any measure of deterrence since many offenders come from cultures that view crime or imprisonment as worthy of praise; in certain communities, individuals who have been incarcerated are honored more than persons who have not been.\textsuperscript{226} Third, shaming, if employed excessively, may lose its effectiveness.\textsuperscript{227} Fourth, effective shaming would amount to punishment that is disproportionate,\textsuperscript{228} unequal,\textsuperscript{229} and cruel.\textsuperscript{230}

The criticism that shaming would not allow for offender-reintegration is infirm since, at least in regard to the shaming techniques which have been described above, the criminal need not be outside society to be embarrassed by his or her conduct. Rather, the criminal may, like a contrite child, be considered part of his or her social "family" while expressing remorse for his or her crime.\textsuperscript{231} Of course, for a criminal to not be considered an "outsider," society must be prepared to accept the convict's contrition and not regard criminals as "different from us" or as persons with whom "we" cannot genuinely relate.

The arguments that shaming is an impractical sanction, since either the only meaningful audience to the shaming, like an offender's family, will not approve of the technique, or because the criminal or her peers may consider criminal activity and punishment to be praiseworthy, fail to consider that there are other benefits to ostracizing a convict than simply embarrassing him or her. One obvious benefit is through shaming the criminal, society

\textsuperscript{225}. See id. at 1917, 1922 (sub-cultural variations with different definitions of shame may confound effect of shaming).

\textsuperscript{226}. See id. at 1923 nn. 216-17 and accompanying text (prison sentence may promote status in certain cultures).

\textsuperscript{227}. Id. at 1930.

\textsuperscript{228}. See Massaro, supranote 213, at 1937-38 (shaming may offend proportionality since shaming may not be experienced equally by equally culpable offenders and effective shaming may be disproportionate to crime since it may cause irreversible stigma).

\textsuperscript{229}. See id. at 1941 (shaming is not the result of reflective, individualized sentencing).

\textsuperscript{230}. See id. at 1942-43 (speculating that authorizing public officials to shame offenders may create an Orwellian society).

\textsuperscript{231}. In American society it is not always apparent which group constitutes an offender's "family." Frequently a criminal will live in one culture, work in another, and socialize in a third. However, sign, newspaper, and television sanctions would all ensure that a malefactor is shamed in any or all of those cultures. Consider that signs listing or apologizing for criminal conduct could be large enough to cause the criminal to suffer embarrassment in his or her immediate vicinity; use of the newspaper to shame would further expose the offender to a larger audience; finally, televised apologies would ensure that a convict was shamed before \textit{all} of his or her associates—where he or she lives, works, and plays.
is made aware of the criminal's propensities, and is thus in a better position
to either avoid his or her company or to judge for itself whether he or she
poses a danger to the community. This societal advantage resulting
from public shaming is appropriate regardless of a particular offender's
personal or class attitudes toward crime and punishment.

The goal of danger avoidance also explains why even excessive
shaming procedures are valuable to contemporary American society. This
is because the more that criminals are exposed to the public, the more the
public can protect itself from either those criminals or from such conduct in
the future. It should be noted that this theory should only be used to
protect society from violent criminals or from individuals who have been
convicted of crimes for which there is a high prevalence of recidivism.
Professor Massaro's final contention—that effective shaming would amount
to disproportionate, unequal, or cruel punishment—is initially more
promising, since, as Massaro notes, it has considerable constitutional
implications. Yet the shaming techniques advocated here need not
be disproportionate, unequal, or cruel; at least no more so than other, more
conventional punishment mechanisms. In fact, in contrast to much
acceptable punishment, shaming is arguably more crime-proportionate, more
equal and more dignified. Shaming may be said to be more dignified, for
example, than imprisonment, given present violent prison conditions.
Shaming has the potential to be a most equal penalty, since various shaming
techniques can be connected to respective crimes. Such a connection can
ensure that all offenders of a particular class or nature are subject to the
same shaming devices.

Finally, shaming may be a proportionate sanction. For example,
televised shaming, with its ability to reach large audiences, could be

---

232. Professor Massaro cites law enforcement officials to the effect that it is this goal
of societal danger-avoidance that prompts many shaming sanctions. See id. at 1888 n.52
(publication of offenses warn of offender dangerousness).

233. The overwhelming majority of American criminal convictions are arrived at and
dealt with in relatively private conditions. See Massaro, supra note 213, at 1921 nn.209-10
and accompanying text. Given the high rate of recidivism, the public should have the
privilege of protecting itself from future offender-specific activity. See supra notes 10-11
and accompanying text.

234. See Massaro, supra note 213, at 1936 n.262 (whether shaming violates eighth
amendment ban on cruel and unusual punishment depends on whether shaming is
disproportionate, unequal, and cruel).

235. See supra notes 218-20 and accompanying text.

236. See supra note 18.
reserved for the most egregious non-violent crimes. Newspaper shaming could be used to punish less offensive conduct. Shaming through signs, posters, and license plates could be applied to the least offensive criminal activity. Such a shaming methodology would help to ensure that a more morally culpable actor is embarrassed to a wider extent than a less offending criminal.

Other arguments that may be made against using shame as a penal device include first, unlike more conventional and private punishment methods, the public shaming of an offender may impact adversely on the offender's immediate family as well as on the criminal. Second, in the event a convict is found to be innocent, he or she will not have the opportunity to clear his or her publicly tarnished name effectively. Yet, these complaints fail to acknowledge that penology is far from an exact or ideal science, and, in any event, any adverse impact that public shaming would impose on innocent family members and friends, will often be less than the pain, suffering, loss of income, etc., the offender has caused to innocent family members and friends of the victim. Also, it is only advocated that shaming sanctions serve as suitable substitutes for the incarceration of non-violent offenders; it should be obvious that even mistaken shaming will not adversely impact on innocent family members and friends to the same degree that an inmate's exposure to prison violence and H.I.V. will.

The possibility that publicly shamed persons who are later found to be innocent will have no adequate means of clearing their names is more disturbing. Yet, the proper valuation of penalties is one that allows for the unfortunate reality that any penalty may sometimes unfortunately be levied against a factually innocent person in our less than perfect world. Therefore, even the argument that shaming is inappropriate because it may be administered against innocent persons, fails since many people, certainly those who are aware of the realities of prison life, would rather be wrongly accused and embarrassed than unjustly incarcerated and embarrassed.

The argument of innocent shaming also loses potency when it is appreciated that measures can be taken to at least minimize such danger;

---

237. See supra note 215 and accompanying text.
238. In fact, the danger that innocent family members and friends may be harmed by even false criminal allegations may add an appropriate measure of deterrence in the fight against crime. Potential criminals may be more hesitant to commit crimes if they realize that such conduct may result in their families and friends being embarrassed.
239. See supra notes 18, 26.
television time or newspaper space can conceivably be provided to unjustly accused individuals.

IV. OTHER ARGUMENTS AGAINST PENAL SERVITUDE AND SHAMING

Various arguments have been examined against proposed sanctions and modifications involving capital punishment, indentured servitude, corporal punishment, and excommunication (shaming). Other objections may be made regarding prison servitude and the practice of forcing offenders to wear or post signs or other advertisements as part of a shaming sanction. Because of their importance, these arguments are briefly examined separately.

A. Prison Servitude

It may seem inappropriate to advocate a program of prison servitude, notwithstanding any such program's constitutionality, when it is recalled that such servitude was consistently used to grossly discriminate against African-Americans, in the American South, until well after abolition. Even more disturbing are the facts that such discrimination was done legally, pursuant to the punishment exception to the Thirteenth Amendment, and such discrimination not only caused African-Americans to be treated the same as or worse than animals, but inured to the benefit of such discrimination's white perpetrators. When it is further remembered that

240. See supra notes 144-47, 158-62 and accompanying text.
241. See supra notes 163-72 and accompanying text.
242. See supra notes 187-90 and accompanying text.
243. See supra notes 223-30, 234, and infra notes 249-53 and accompanying text.
244. See DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 263 (1989) ("[F]actionalized racist attitudes would continue after the Thirteenth Amendment (1865) abolished slavery and, if allowed ... would justify imposing a de facto ... slavery status."). For expressions of northern and southern racism, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 96-100 (1988).
245. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.
247. See FRIEDMAN, supra note 11, at 95 (describing the Black Code's consequence of free black labor benefiting white employers).
African-Americans constitute the majority of the present prison population in this country,\textsuperscript{248} it is apparent that most of the victims of any regime of prison servitude are going to be African-Americans, and such servitude may all too easily become a sanctioned outlet for harsh racial discrimination.

Nevertheless, there are two elements to the call for prison servitude that distinguishes such punishment from that imposed on African-American convicts in the South. First, the prison labor program advocated in this article is only intended as an eleventh hour sanction to be used when all else has failed. Unless and until a time when the American criminal justice system is prepared to write-off an entire segment of our criminal society, we must be prepared to take extraordinary steps to either deter offenders from future misconduct or, at the very least, to use non-reachable convicts to deter other criminals from harmful activity. Arduous prison labor should be used only on those prisoners who refuse to voluntarily compensate their victims and who are not deterred by the prospect of doing time. Yet, the intent behind such punishment may be adequate only in theory to prevent such punishment from becoming a racist nightmare. Accordingly, measures would have to be taken to prevent such prison labor from becoming a pretext to discriminate against African-Americans or other minority members in the real world.

One such measure could be to establish prison boards, comprised of both whites and members of minorities, to supervise the treatment of prison laborers. These boards would also be required to monitor the physical and mental fitness of all participant prisoners to guarantee that such prisoners are not being worked beyond what they can emotionally and physically endure. Another condition of such labor programs would be, instead of having to work for fixed periods of time, prisoners sentenced to hard labor for refusing to participate in victim-compensation programs would be freed from such programs as soon as they agree to compensate their victims. As such, prison labor would amount to a criminal contempt sanction.

There is still another important problem that needs to be addressed regarding prison labor, however. This article has presumed that even those prisoners who desire to leave the prison chain gang and compensate their victims will be able to do so. It is more probable that, because of the diminished status ex-convicts enjoy, such prisoners will not have a plausible shot at doing so. One solution to this dilemma would be for Congress to make it illegal for employers to discriminate against ex-convicts who have been sentenced for non-violent crimes in the same way in which it is illegal

\textsuperscript{248} \textit{Id.} at 378.
to discriminate against prospective or incumbent employees on the basis of their race, sex, national origin; whatever punishment is imposed on and endured by an offender must be the extent of that offender's debt to society—to punish an individual beyond that is excessive and unjust. Employers will no doubt resist such innovation; many such employers will be motivated by the legitimate desire to keep bad influences and potentially disruptive persons from their businesses. Congress may be the most appropriate entity to address such concern. One possible solution could be to legally differentiate between past criminal activities; employers would only be legally allowed to discriminate against those ex-cons who have done time for violent or otherwise dangerous crimes.

Another solution to the problem of ex-convicts not being able to realistically enter the work force would involve society creating jobs for these individuals in the public sector. Examples of such employment would include cleaning and otherwise rehabilitating the aesthetic appearances of highways, parks, and municipal streets. Other forms of such service might include ex-drug offenders counseling youths against drug use, ex-drunk drivers lecturing against drunk driving, and ex-thieves teaching people how to protect themselves from criminal attack. The exact form of such community service is not as important as the need for society to provide ex-convicts with paid work; employment that somehow allows ex-criminals to use their criminal experience to benefit society (as in the above examples) would be an extra bonus to the addition of many ex-offenders to the productive work force.

In summary, the implementation of prison work forces designed to employ criminals in such a manner as to make incarceration a true deterrent, must be understood as a proposed eleventh hour solution to an otherwise intolerable problem. Aimless and arduous prison labor may be, in the absence of a judicial recognition of corporal punishment, the only way to "reach" a certain segment of violent prisoners. For non-violent prisoners it should be used only on those convicts who refuse to cooperate in victim or community compensation programs. Something must be done to remedy the warehousing of both violent and non-violent human beings together in dangerous, rape-conducive, and disease infested environments. Yet prison labor programs must be conducted with boards comprised of members of minorities who can ensure that such programs do not become pretenses for racial discrimination. Such programs also should be viewed as contempt

sanctions that prisoners can abandon upon demonstration of a willingness to comply with victim-restitution. Finally, society must provide means by which ex-convicts can enter the work force; such rehabilitative efforts should allow ex-convicts to use their criminal backgrounds to benefit society through counseling against various criminal activities.

B. Sign and Advertisement Shaming Sanctions

The author has advocated shaming of non-violent criminals through having such individuals post signs on their persons, properties, and cars, advertising their offenses to the public.\(^{250}\) The intended benefits of such a sanction are that it would embarrass offenders to a degree sufficient to deter crime, and would serve to warn the public of the inherent criminal tendencies of such offenders. Numerous cogent objections may be made against the use of sign sanctions beyond those already entertained in this article.

To begin, there is significant precedent for the reality that signs, worn or posted, can easily become tools for gross discrimination. Examples of this phenomenon in its extreme form include the yellow triangle that Jews were forced to wear,\(^{251}\) and the pink triangle that homosexuals were forced to wear\(^{252}\) by the Nazis.\(^{253}\) What could ensure that comparable discrimination does not result from such shaming activity today?

A crucial distinction between the yellow and pink patches and the shaming sanctions advocated, is that the advertising of criminal behavior to the public would be an activity reserved for convicted criminals. As such this punishment would not be focused on a particular class like whites and African-Americans or on specific types of criminals like child molesters. Instead, shaming sanctions would be imposed on offenders for whom incarceration is not necessary. This would include nonviolent criminals and offenders who stand a strong chance of being rehabilitated and deterred from future misconduct through non-incapacitating means. Second, the

\(^{250}\) See supra notes 219-21 and accompanying text.

\(^{251}\) See JOHNSON, supra note 29, at 489 (Jews had to wear a star of David that was black with a yellow background and that had the word Jude in the middle).


\(^{253}\) Signs have been used throughout history to discriminate against individuals for their crimes or status. See FRIEDMAN, supra note 11, at 75. A famous literary casualty of such treatment is Hester Prynne who is forced, in Hawthorne’s The Scarlet Letter, to wear an “A” to advertise her adultery. Id. at 40; see also Rosalind K. Kelley, Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional? 93 DICK. L. REV. 759, 774 (1989).
shaming sanctions entertained in this article would last for legislatively fixed periods and would, therefore, help reduce the likelihood of non-offense specific discrimination since such discrimination usually occurs indefinitely.

It may still be objected that even shaming sanctions that are initially imposed on criminals may come to be inflicted on innocent minority members. My proposals, however, are made with the assumption they will only be used in an environment that is respectful of human rights and that is opposed to invidious discrimination.

V. CONCLUSION

This article has presented an overview of halachic and American punishment methods and suggested how American law can benefit from halachic precedent in its losing battle against crime. It has been posited that halachic punishment was geared to rehabilitating offenders, compensating crime victims, and deterring crime. To be sure, halachic sanctions were based on the notion that all crime entails sin which must be expiated through punishment, and halacha viewed incapacitation as an ineffective way to control crime. Penalties designed to shame and impose responsibility on offenders were preferred over imprisonment.

Another reason why halachic societies probably did not have the crime problems that modern American communities have, is halachic societies were more community oriented, with neighbors enjoying shared beliefs and values. That reality also helps explain why certain halachic punishments, like excommunication, may be unsuitable for American society; unlike the homogenous halachic culture, most of contemporary American society is composed of diverse, heterogenous communities. Other halachic penal methods, like servitude and lashing, are not realistic alternatives for American penal practice because such practices would probably be judicially considered "cruel and unusual." However, while exact copying of halachic punishment methods by the American legislature and judiciary would be inappropriate, American society can benefit from talmudic penology by adapting sanctions modeled after the principles of halachic punishment.

American law could emulate halachic deterrence in its capital punishment methodology by publicizing executions and by limiting the death penalty to especially egregious capital offenses. American law could copy halachic notions of fairness and humaneness in its habeas law by allowing even questionable claims of factual innocence to be presented on behalf of a capital defendant, even after the defendant is convicted. American law could imitate halachic excommunication by shaming offenders—on a very local level through requiring nonviolent criminals to
wear and post signs describing their offenses and to a broader degree by forcing criminals to apologize to their victims and communities through the mass media. Halachic servitude could inform American penology, through the implementation of community-service programs whereby criminals could compensate their victims and communities for the adverse consequences of their crimes. Prisoners who refused to participate in such programs could be, through prison work programs, for example, encouraged to do so.

Numerous opportunities have been taken here to present the reality that prisons are violent, rape-conducive, and disease-infested environments that are grossly inappropriate for all but the most hardened and “unreachable” of criminals. Prisons do not rehabilitate offenders nor deter crime. To the contrary, prisons arguably promote criminal activity by perpetuating atmospheres where non-violent individuals are made violent and embittered and where hopelessness dominates. The author’s thesis that American society can compromise its crime problems through the application of halachic principals, however, may be no more than a naive optimism. This is because crime is, ultimately, probably something that the police, judges, and prosecutors cannot eradicate by themselves. Effective crime reduction must come from a voluntary and automatic compliance with law\textsuperscript{254} that is promoted through the view that societal responsibilities are as, if not more important, than individual rights, and that crime is a communal problem; from which all segments of society suffer. Successful crime reduction also requires that our criminal justice professionals have the courage to dismantle outmoded and ineffective punishment methods, like incarceration, for all but the most violent or repeat offenders, and replace them with more practical, humane measures. Otherwise, our crime problems are destined to remain with us.

\footnotesize{\textsuperscript{254} See Charles E. Silberman, \textit{Truth and Justice: Why the Best Hope In a 'War' on Crime May Be a Stalemate}, N.Y. TIMES, Jan. 30, 1994, § 4, at 1.}